FORWARD TOGETHER

WELCOME
Morning Recess

Principals’ 101
Special Education and Human Rights
Gillian Tuck Kutarna
Last Month

• Identification and Placement Review Committee
• Special Education Appeal Committee
• Special Education Tribunal
• Individual Education Plan

Education Act

8(3) The Minister shall ensure that all exceptional children in Ontario have available to them, in accordance with this Act and the regulations, appropriate special education programs and special education services without payment of fees…
Regulation 181/98

“exceptional pupil” means a pupil whose behavioural, communicational, intellectual, physical or multiple exceptionalities are such that he or she is considered to need placement in a special education program.

Education Act

S.1 “special education program” means, in respect of an exceptional pupil, an educational program that is based on and modified by the results of continuous assessment and evaluation and that includes a plan containing specific objectives and an outline of educational services that meets the needs of the exceptional pupil;

S.1 “special education services” means facilities and resources, including support personnel and equipment, necessary for developing and implementing a special education program;
Human Rights Code

S.1 Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.
“disability” means,

(a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,

(b) a condition of mental impairment or a developmental disability,

(c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,

(d) a mental disorder, or

(e) an injury or disability for which benefits were claimed or received under the insurance plan established under the Workplace Safety and Insurance Act, 1997;
Duty to Accommodate

**Disability**

17. (1) A right of a person under this Act is not infringed for the reason only that the person is **incapable** of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.

**Accommodation**

(2) No tribunal or court shall find a person **incapable** unless it is satisfied that the needs of the person cannot be accommodated **without undue hardship** on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

- Jeffery Moore diagnosed with severe dyslexia, and designated a “Severe Learning Disabilities” student (Gr. 2).

- Board psychologist recommended self-contained class at Board’s Diagnostic Centre, for intense L.D. remediation.

- Board then closed the Centre due to financial constraints.

- Jeffrey received 1:1 assistance for 5.5 hours/week in Gr. 3.

- Board psychologist recommended local private school, specializing in LD programs, starting Gr. 4.
Moore (cont.)

Board did not:

- Assess how many students affected;
- The effects of the closure on students;
- Conduct a needs-based analysis;
- Determine how the needs of severe LD students could otherwise be met;
- Have anything in place for Sept.
Moore (cont.)

Board did:

• Continue to fund other “discretionary” programs, eg. Outdoor Education.

• Receive a report from the Superintendent setting out the Board’s plan, two months after the decision to close.

• Offer severe LD students from the Diagnostic Centre access to existing in-class supports.

• Base its decision on strictly financial criteria.
Moore (cont.)

SSC Held:

• The service to which Jeffrey was entitled was education, and not special education. Special education was necessary for him to access the education curriculum.

• Boards must accommodate disabilities so that all students can access the core curriculum, before other discretionary items are funded.

• Budget cannot be sole determinant of special education

• “In order to decide it had no other choice, it had to at least consider what those other choices were”.

• “Special Education is not a dispensable luxury”.
Court awarded Moore family reimbursement for private school expenses from grade 4 – 12, half the transportation costs, $10,000. in general damages, and legal costs associated with:

- BCHRT 2005
- BCSC 2005
- BCCA 2008
- SCC 2012

(arising from decision in 1993)
Ontario v. B.C.

Reg. 181/98: IPRC process: meetings, consultation with parents, evidence-based, with right of appeal. (no parallel process in Moore)

Jimmo v. Ontario (Minister of Education) S.C. 2002

Parents appealed OCDSB Supervisor’s decision to cut $3.7 to Special Education in late August, after IPRC process.

SERT and EA positions were eliminated, affecting implementation of IPRC decisions. No parent notice or consultation.

Court held this was contrary to Education Act as it circumvented the Act and the Reg.181/98 process.
R.B. v. Keewatin-Patricia District School Board, 2013 HRTO 1436

- R.B. a grade 3 student with multiple diagnosis: Mild Intellectual Disability, ADHD, Pervasive Developmental Delay, manifested with expressive and receptive language delay and gross and fine motor delays
- excluded from school due to behavior issues (swearing, spitting, yelling, cutting a child’s sweater, throwing materials around the classroom, and stomping on another child’s leg).
- Initially a bag of books sent home, but by time of hearing, receiving 3 hours per week of home instruction.
- Board imposed trespass notice and communication ban on mother (sole custody) as a result of her ongoing conflict with school and administrative staff.
R.B. Decision

HRTO held that R.B. was denied access to education services when:

• his EA support was cut in half;

• V.P. advised mother that reduction in EA support was because of cut-backs in Ministry funding: * No objective analysis or evidence that reduction in service was warranted.

• School was confident he would do well as a result of his “growth in independence and maturity”, but not measured

• Mother no longer included in discussions re: needs

• Excluded without appropriate education services in place
HRTO Order

• $35,000 in monetary compensation for injury to dignity, feelings and self-respect;
• Full time shared EA and SPL 30 minutes per week, to be removed only on objective evidence;
• behavioural management plan to be developed in consultation with mother;
• communication ban and trespass notice lifted;
• mother to be consulted on IEP and IPRC
• third party facilitator to help repair the relationship between parent and school staff.
R.B. (cont.)

Board argued that mother’s conduct should be taken into account in determining whether Board met duty to accommodate. Board cited:

1. R.B.’s Mother failed to advise school R.B. had gone off medication.
   
   **Held**: this did not interfere with Board’s ability to accommodate.

2. Mother alleged that R.B. was being bullied.
   
   **Held**: Verified by evidence.

3. Mother alleged he was segregated.
   
   **Held**: Verified by evidence of tape on floor, desk in hallway, tent in Special Education room.
R.B. (cont.)

4. Mother sent R.B. to school with recording device.

**Held:** only after school failed to consult on IEP, issued trespass or and communication ban, and refused to meet.

Trespass should have been for 24 hours, and to mother’s spouse.

Communication for special needs is essential.

Recording device incident didn’t prevent Board from accommodating student.
R.B. (cont.)

5. Board attempted communication with father.
   **Held:** Mother was the custodial parent.

6. Mother’s report of EA conduct to police
   **Held:** Principal failed to take her complaint seriously, and had also involved the police.

7. Mother alleged she had been bullied.
   **Held:** “not unfounded”.
Conclusion

“Mother a fierce advocate for her son… The school responded negatively to her advocacy….The more she was shut out, the more she spiralled out of control”. The context of her actions cannot be ignored.

“R.B. was denied meaningful access to the education provided to students in Ontario because of the Respondent’s relationship with his mother and not because the respondent was unable to meet his needs.”

* Mother’s conduct did not prevent the Board from accommodating R.B.
L.B. (by S.B.) v. Toronto District School Board, 2015 HRTO 1622

L.B. a 17 year old with L.D., ADHD, anxiety and depression. Parent alleged disability was a factor in denial of educational services in grade 9, and TDSB failed to provide appropriate accommodations.

Argued that she had no choice but to enroll him in a boarding school in April of Gr. 9, with small classes and a focus on elite sports, and sought reimbursement from TDSB, citing Moore.

Evidence by the Applicant indicated the Applicant’s placement in the boarding school has benefitted him and allowed him to do well.
L.B. Decision

Held: Board did not have to pay for private residential school.

Province operates residential schools (eg. Trillium), but boards do not, and not accessed through Board IPRC.

Residential school not a “service” under the Education Act. “Service” under Reg. 298 – education 5 hours a day, between 8 and 5.

Transportation and home instruction are accommodations are not “services” under the Act.
L.B. (cont.)

Also held: Board failed to accommodate disability:

• No transition plan from Gr. 8. V.P. testified that she took a “wait and see” approach.

• Staff had not read assessments referenced in IEP, or contacted psychologist who did Gr. 4 and 8 assessments.

• IEP stated 300 minutes of withdrawal support.

• Did not see an EA, social worker, attendance counsellor or psychologist throughout grade 9.

• Did not consult with parent about referral to social work services until 2 months after referral sent.
Failure to Accommodate (cont.)

• Did not consider referrals to alternate placements, eg. S.23 or Provincial Demonstration Schools, or alternate high school

• L.B. stopped attending. No formal home instruction offered.

• SERT testified that SS IEP’s are different that elementary, and don’t include social/emotional support. HRTO disagreed.

• First “In School Support Team” meeting was in March. Contemplated possible referral in April to School Support Team.

• Guidance Counsellor completed a “recommendation form” in support of L.B.’s application for a private school, at parent’s request.
L.B. (cont.)

L.B. did not return after March Break.

TDSB explained:

• New VP, P and Guidance Counsellor
• Social worker away for part of the year
• Absences due to illness
• Work to rule by teachers
• Parent did not ask for particular programs/services (eg. S.23)
• Good things were planned for April, had he attended.
HRTO Order

• HRTO held that these institutional challenges did not justify lack of accommodation.
• Delay of almost a full school year
• Cited *R.B. v. Keewatin-Patricia DSB*: parental conduct does not modify board’s duty to student
• Awarded $35,000. for injury to dignity, feelings and self-respect, taking into account his vulnerabilities, for Sept. to April of Grade 9.
Analysis

Boards of Education have a duty to accommodate students with disabilities to the point of undue hardship.

Procedural and Substantive Accommodation:
• **Substantive**: explore all legitimate options.
• **Procedural**: reasonable investigation into needs (IPRC, IEP)

*Moore*: Applicant must show he/she has a protected characteristic, and have suffered an adverse impact in service delivery as a result. *(prima facie case)*
Analysis (cont.)

Respondent Board may defend by:

(a) denying the existence of a protected characteristic, or that an adverse impact occurred; or

(b) student cannot be accommodated without undue hardship, taking into consideration cost, outside sources of funding, and health and safety requirements.

Accommodation is not about the search for the ideal, or to necessarily implement what the parent or student wants, if accommodations Board has provided are appropriate.

Key: do the accommodations provided meet the child’s special needs, ie. facilitate access to the curriculum? (L.C. v. TDSB 2011 HRTO)

An evidence based inquiry.
Analysis (cont.)

• Conduct of the parent will not justify the failure to accommodate.
• But: Parent conduct can be relevant if parent fails to cooperate in the accommodation process eg. won’t consent to an assessment.
• HRTO: Board has a very high burden to prove it cannot educate a student because of conduct of parent.
• “Wait and see” approach can support a finding of a breach of the Code
• Deficit in funding of a particular program may not on its own justify removal of a service