



WELCOME

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



Accommodating Complex Needs CASSA 2019

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Competing Rights

- Students have the right to attend school
- Students have a right to learn in a safe environment
- Students have the right to accommodation of disability-related learning needs
- Parents have the right to be consulted regarding special education accommodations
- Staff have the right to a workplace free of violence
- Students have a right to privacy



Agenda

- Education Law
 - right to attend
 - right to special education
 - duty to consult parent/guardian
 - exclusion
- Occupational Health and Safety Law
 - right to a safe workplace
 - work refusal
- Human Rights Law
 - duty to accommodate disability
- Containment & Restraint
 - Risks
 - Best Practices



Education Acts

**Right to Attend, Special Education &
Exclusion**



Right/Duty to Attend

- Students must attend school until the age of 16 or 18, depending on the provincial legislation
- Education is provided without fees
- Students have a right of attendance between 6 and graduation from secondary school
 - In some provinces the right to attend extends to the age of 21 years (S.33(1))



Right to Special Education

- Students have a right to receive special education programs and services individualized to meet their needs
- Equity and inclusion is not necessarily full-time participation in regular classroom setting
- Ontario, Alberta and B.C. all provide rights of appeal to parents/guardians (adult students) regarding special education
- Ontario, Alberta and B.C. provide parents/guardians/students rights to consultation and rights to consent to programs and/or services to differing degrees



Exclusion

Ontario Education Act

265 (1) *It is the duty of a principal of a school, in addition to the principal's duties as a teacher,*

(m) subject to an appeal to the board, 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;



Exclusion

B.C. School Act

91 (5) If a teacher, principal, vice principal or director of instruction suspects a student is suffering from a communicable disease or other physical, mental or emotional condition that would endanger the health or welfare of the other students, the teacher, the principal, the vice principal or the director of instruction

(a) must report the matter to the school medical officer, to the school principal and to the superintendent of schools for the district, and

(b) may exclude the student from school until a certificate is obtained for the student from the school medical officer, a private medical practitioner or a private nurse practitioner permitting the student to return to the school.

(6) If a student is removed or excluded from school under subsection (3) or (5), the board must continue to make available to the student

(a) if the student is enrolled in more than one educational program, the educational program for which the board is responsible, or

(b) in any other case, an educational program.



Exclusion

- Not on the progressive discipline continuum.
- Exclusion is not to be used as a disciplinary measure (PPM 145)
- Exclusion is a measure of last resort.
- Solely an inquiry into whether the other pupils can be kept safe while the student in question is in attendance.
- A judgement
- As soon as the risk can be sufficiently mitigated, the student has the right to return.
- School Board has an ongoing obligation to provide education to an excluded student. (R.B.: instruction from an itinerant teacher three hours per week in the public library is insufficient)



Occupational Health & Safety

Teachers Refusing Work



Workplace Violence

Occupational Health and Safety Act (Ontario)

- the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker;
- an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker;
- a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

Occupational Health and Safety Act (Alberta)

- whether at a work site or work-related, means the threatened, attempted or actual conduct of a person that causes or is likely to cause physical or psychological injury or harm, and includes domestic or sexual violence;



Prevention

- School boards have duties to prevent workplace injury
 - Assessment of risk
 - Nature of work
 - Incident history
 - Environmental factors
 - Program factors
 - Processes for developing protective factors/risk reduction
 - Programs to reduce risk
 - Program supports and services for assessment
 - Safety Plans
 - Training
 - Protective equipment
 - **Restraint and Containment/Seclusion rooms?**
 - Re-assessment



Work Refusal

- Ontario, Alberta and B.C. occupational safety legislation that provides a right to refuse work that is unsafe
- Circumstances and procedures for refusing work are identified in legislation
- Tools available in Ontario, Alberta and BC to assist with creating safe environment
 - Ontario *Workplace Violence in School Boards*
 - Alberta *Occupational Health and Safety School Kit*
 - B.C. *Occupational Health and Safety Principles for Principals*



Teachers Refusing Work

- O. Reg. 857 s.3 *Part V of the Act* [work refusal] *does not apply to a teacher where the circumstances are such that the life, health or safety of a pupil is in imminent jeopardy*
- *Alberta Occupational Health and Safety School Kit states:*
All workers must refuse unsafe work, if they have reasonable grounds to believe that the work involves imminent danger to themselves or others. . . If a teacher is required to work with a high-risk student, who has the potential to become extremely violent, that could be imminent danger. However, if the teacher has the training to deal with potentially violent students and the supports are there, he or she is not in imminent danger.



Right to Refuse to Teach

- *OECTA Elementary v Toronto Catholic District School Board*, 2017 CanLII 37597 (ON LRB)
- Teacher and EA were repeatedly hurt by kindergarten student
- During student outburst, teacher initiated a work refusal, but student was removed.
 - OLRB found this was not a valid work refusal because of Reg. 857
- Next day, student was back in class, with no changes made, so teacher initiated another work refusal.
 - TDSB argued there was no imminent hazard, only a chance
 - OLRB found teacher should not have to put herself in harm's way, and then be prevented by Reg. 857 from distancing herself from the harm.
 - *“The statute is clear that the worker must have “reason to believe” that workplace violence is “likely to endanger himself or herself” – at some point either at the time of refusal or in the imminent future.”*



Injury to Worker

- In the case of workplace injury, an employee can make a claim under Workplace insurance legislation (eg. Ontario *Workplace Safety Insurance Act, 1997*)
- A student injured at school may also make a civil claim against the board for negligence. (see *Myers v. Peel County Board of Education*, [1981] 2 SCR 21, 1981 CanLII 27 (SCC))



Human Rights

Duty to Accommodate & Containment



Ontario *Human Rights Code*

*S.1. Every person has a right to equal treatment with respect to **services** . . or **disability**.*

*S.17. (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.*



B.C. *Human Rights Code*

8 (1) A person must not, without a *bona fide and reasonable justification*,

(a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or

(b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public

because of ... physical or mental disability ...



Human Rights Tribunals

- 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?
- An evidence based inquiry.
 - *L.C. v. Toronto District School Board*
 - *U.M. & M.M. v York Region District School*
 - *K.F. v Waterloo Catholic District School Board*
 - *J.S. v Dufferin-Peel Catholic District School Board*



Moore v. B.C.

Moore v. British Columbia (Education) 2012 SCC 61 B.C.

B.C. Human Rights Code S.8

- The *service* “customarily available to the public”, to which Jeffrey Moore was entitled, was education, and not special education. Special education was the **means** necessary for him to meaningfully access the education curriculum.
- Boards must accommodate disabilities so that all students can access the core curriculum, before other discretionary items are funded.
- “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”.



Moore – SCC Analysis

Prima Facie Case of Discrimination

Applicant must show he/she

- (a) has a protected characteristic;
- (b) has suffered an adverse impact in service delivery; and
- (c) the protected characteristic was a factor in the adverse impact.



Defence

Respondent Board may defend by demonstrating justification of the practice:

(a) Procedural Accommodation

- reasonable investigation into needs (IPRC, IEP)

(b) Substantive Accommodation

- explore all legitimate options.

to the point of undue hardship, taking into consideration cost, outside sources of funding, and health and safety requirements.



Accommodation Key Principles

- Individualized accommodation
 - Investigation into the student's particular needs
 - Individualized educational plan

- Respect for Dignity

- Maximization of inclusion and participation

- Maximization of Independence



Duty to Accommodate

Procedural

- UDL
- Special Education Plan
- Identification & Placement
- Transition Planning
- Program Planning
 - Risk Assessment (Reassessment)
 - Consultation
- Communication

Substantive

- UDL
- Cultural Teaching/Learning
- Transition Plan
- Individual Education Plan (IEP)
 - Positive Behaviour Management
 - Applied Behavioural Analysis
- Safety Plan
 - Review & Revision
- Professional and Paraprofessional Services
- Educational programming & extra-curricular activities



Expulsion

LK and UGDSB 2019 CFSRB 2 (CanLII)

- Grade 2 Autistic child – repeated threats and assaults on staff
- Expulsion from the school upheld on appeal.
- CFSRB accepted that student could not control his behavior, did not understand the consequences, and that his behavior was a manifestation of his disability.
- CFSRB nevertheless found that pupil's continued presence in the school created an unacceptable risk to safety of other persons, and that the safety concerns outweighed the other factors.
- Parental conduct undermined school staff's ability to manage student's behaviour



Containment / Seclusion & Restraint

Competing Rights to Safety and
Accommodation



Containment / Seclusion Rooms

Calming room/space

- self-selected.
 - may have sensory and other tools
 - student can leave at will
 - intended to support self-regulation
-
- Containment or Seclusion
 - not self-selected
 - no resources, furniture
 - may be padded
 - may be locked, or no door handle on inside
 - for safety
 - may be used for behavior modification* extraordinary cases



Containment / Seclusion Rooms

Alberta – prohibited by Ministerial Order to take effect
September, 2019

B.C. – Provincial Guidelines Physical Restraint and Seclusion in
School Settings provide direction that can be used as last resort
for self-injurious or injurious conduct

Ontario – does not have Ministry of Education guidance for use
of restraint or seclusion in school settings

Ontario Child, Youth and Family Services Act 2017: a child/youth
can be placed in a locked room for de-escalation if a child's
conduct indicates it is likely in the immediate future they will:

- cause serious property damage; or
- serious bodily harm to another individual; and

there is no less restrictive means of restraining the child/youth.



Physical Restraint

B.C.

- defines as “a method of restricting another person’s freedom of movement or mobility – in order to secure and maintain the safety of the person or the safety of others”
- BC does not include property damage
 - Response to Injurious and Self-Injurious Student Behaviour

Ontario

- does not have guidance in education sector
 - Care and treatment guidelines
 - School boards have moved to training process focused on de-escalation and hold and release technique



Best Practices

- Positive behaviour plan to develop skills and/or shape behaviour
- Last resort
- Identified in Safety Plan developed with parent consultation
- Staff must be trained in de-escalation and school district's procedure with regular practice
- Purpose built space
- Monitored throughout by two individuals
- Minimum time in the room
- Parent informed
- Record created
- Debrief

Record identifying:

- Trigger(s); behaviour observed; de-escalation strategies used
- Who was involved
- Duration in seclusion and behaviour observed
- Injury and/or physical damage
- Compliance or deviation from procedures
- When parents informed
- Debrief with staff, principal, parent
- FBA, behaviour plan review
- Record provided for Superintendent
- Data collection centrally to monitor use



Restraint and Containment

Risks:

1. Negligence claim
 - Duty of care
 - Standard of care – prudent parent under the circumstances
 - Foreseeable harm
 - Breach of duty is the proximate cause of damage
2. Human Rights Complaint
3. Work Refusal
4. LTD and/or Workplace Insurance Claim
4. Charter of Rights and Freedoms – S.7 and S.15



Review of Practices

- Use of these practices and their outcomes
 - Frequency across individual children, groups of children (e.g., placement, age, gender, **factors related to marginalized populations**, disability, communication skills), settings, individual staff
- Fidelity of data collection, behaviour plan review and revision, safety plan review and revision, environmental changes
- How is data being applied to improve practices (behaviour management, safety planning, **staff training**)
- Procedure use and effectiveness
- Are procedures reflecting best practice



Resources

- Ontario Human Rights Commission *Policy Accessible Education for Students with Disabilities*
- US Department of Education, *Restraint and Seclusion Resource Document*



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