

**Responding to Special Education Student Needs in Ontario**

**The Impact of *Moore vs British Columbia (Education)* in Ontario**

**Special Education Case Law Arising from Litigation**

**with School Boards**

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## **1. Abstract**

This report is a follow up to the June 2017 report *Special Education Complaint and Appeal Processes in Ontario in a Social Justice Context; Identifying inefficiencies, costs and effective resolution in the students' best interest* which further explored issues raised from the June 2016 report *Access to Special Education in Ontario in a Social Justice Context – Identifying barriers and obstacles for students, parents and teacher-parents in accessing Special Education in Ontario*.

Both reports are accessible in the Published Reports section of the website [www.horizoned.ca](http://www.horizoned.ca).

The goal of this report is to address outstanding components of the 2017 report which time constraints did not permit. The findings of the current report are based on the following:

- i. A review of the case law related to Special Education in Ontario Superior Court, Ontario Divisional Court, Ontario Court of Appeal and any similar cases before the Supreme Court of Canada since 2012,
- ii. data from survey inquiries with 72 school board special education personnel about their knowledge of the precedent setting 2012 Supreme Court of Canada decision *Moore vs. British Columbia (Education)* on the provision of special education programs and services, and its impact on school board operations (policy, procedure, practice) and
- iii. an analysis of the impact of existing legislation, policy and process as obstacles to special education service delivery.

From this review, there have been no cases found involving special education before the Superior Court, the Court of Appeal or the Supreme Court of Canada since the 2012 *Moore* decision. Many school boards had court cases where the term “special education” was referred to in the decision, however, many of the cases were not primarily about a “special education” issue regarding a student. Rather, the term “special education” was only stated in passing, often in the context of bargaining collective agreements and determining educational assistants’ rights.

Only one case was found concerning a student’s “special education” rights where the school board had previously reported in 2017 that it had “No Files Relating to Special Education” but which was found in CanLII and Quicklaw LexisNexis: the Simcoe Muskoka Catholic District School Board had a matter before the Human Rights Tribunal of Ontario.

Very little survey data was obtained from interviews and queries with special education personnel and /or school board superintendents regarding the *Moore* decision, as lack of response from school board personnel hampered data collection. Only a handful of staff were aware of the decision and responses received categorically stated that school board was already offering a range of programs and services that was meeting the needs of students with exceptionalities.

There have been no amendments to Ontario’s *Education Act* since the 2012 *Moore v British Columbia (Education)* case, with respect to special education. Ten bills were presented in the Ontario legislature regarding education, but only one passed into law, relating to a student’s death.

## **2. Government Response to the 2017 Report**

Acknowledgement of the 2017 report was received from the Premier's office with indication that the issues would be forwarded to the attention of the Minister of Education. No response or acknowledgment was ever received from the Minister of Education for the 2016 or 2017 reports.

The Office of the Ontario Ombudsman declined to engage a systemic investigation for issues identified in the 2017 report. The Office's response indicated complaints must be individually filed by parents on a case by case basis as there is no trigger or criteria for launching systemic investigation. However, the number of complaints from parents of special needs children continues to grow annually as reported in the Ombudsman's yearly report.

The Privacy Commissioner of Ontario also declined a systemic investigation of school board non-compliance with Freedom of Information (FOI) requests. As was outlined in the 2017 report, despite 62% of school boards not responding or complying with the requests, the Privacy Commission of Ontario stated in their response that there was no mechanism to initiate such an investigation. The Commissioner's office indicated complaints must be filed on a case by case basis against each school board.

The Auditor General of Ontario's Office did not respond to the request to investigate the lack of transparency and accountability of school board disclosure of litigation costs with parents of special needs children, despite taxpayers' money being used to do so without any tracking at source from Ministry of Education funding.

The Ministry of Finance commissioned the Gandalf Group to engage in a public survey undertaken by EKOS Research with field dates in February 2018, part of the pre-budget Omnibus Bill. As part of the phone survey, one question to survey participants related to Special Education. The caller asked whether the participant supported a 30-day timeframe for school boards to complete assessments of special needs students. Currently, long wait lists exist for such assessments in school boards and students often wait one to two years before they can be assessed.

Meanwhile, Special Education issues have consistently been increasing and feeding the education litigation domain over the same time period, due to the lack of a mechanism to deal with monitoring school board compliance to policies and implementation of Individual Education Plans (IEPs) for special needs students.

Over the last 12 years new laws have predominantly been introduced in the wake of a student's death at school, occurring at school or at a school related activity. In 2017 it was Rowan's Law (concussion safety), in 2015 it was Ryan's Law (access to asthma puffers) in 2006 it was Sabrina's Law (anaphylaxis protocols to nut allergy). Sadly, and too often, the death of a student is the threshold for change in Education law and policy in Ontario.

### 3. Review of Case Law pertaining to Special Education in Ontario Courts

The 2016 and 2017 reports examined case law from the Ontario Special Education Tribunal (ONSET) and Human Rights Tribunal of Ontario (HRTO).

In this report, the difference in mandate of the HRTO and the Ontario Human Rights Commission (OHRC) is also explored to improve the understanding of how the Commission could address special education related challenges and act to improve special education service delivery issues by school boards.

In accordance with Ontario's *Human Rights Code*, the OHRC exists to help "provide for equal rights and opportunities without discrimination." [1]. While the HRTO is perhaps more conspicuous to the average Ontarian, the OHRC nevertheless plays a very important role in providing visibility and advocacy for human rights issues broadly.

Instead of adjudicating human rights claims as the HRTO does, the OHRC, in its own words, is mandated to "promote, protect and advance respect for human rights, and to identify and promote the elimination of discriminatory practices. The OHRC works in many different ways to fulfill this mandate, including through education, policy development, public inquiries and litigation." [2] In fact, the OHRC was involved in the *Moore* decision as an intervener at the Supreme Court of Canada. In its factum, it argued that:

*'The special education scheme established by Ontario "statutorily entrenches the right to accommodation" and allows students with disabilities to access education on an equal basis. The HRTO has noted that this is consistent with the goals of section 15 of the Charter and the Code, that is, the removal of barriers to the equal participation of children with disabilities in education.'* [3]

As it is based on the same legislation as the HRTO, the two organizations share a similar outlook and vision. More specifically, as it relates to this report, the OHRC has identified education as a "strategic focus area" in which it aims to promote a "human rights culture...with a special focus on educating children and youth and addressing systemic discrimination in our education system." [4]

#### **Case law from the Ontario Superior Court of Justice, the Ontario Divisional Court (Judicial Review) and the Ontario Court of Appeal**

##### **Cross referencing with school boards stating 'no cases' in the 2017 Report**

Based on the 2017 report *Special Education Complaints and Appeal Processes in Ontario in a Social Justice Context*, twelve school boards stated that they had "No Files Relating to Special

Education” (**Appendix 1**). These school boards claimed that they had no special education issue concerning a student that was discussed before a tribunal or a court.

To ensure that their responses were accurate, each school board and the term “special education” (for French language school boards, “enfance en difficulté,” “éleves ayant des besoins particuliers,” “EED” and “éducation spéciale”) was searched in three prominent legal databases-- Westlaw Canada, Quicklaw LexisNexis, and CanLII (**Appendix 2**).

Additionally, both ‘Superior Court’ and ‘Court of Appeal’ were selected in each search to ensure no cases had come before the Ontario Superior Court or the Ontario Court of Appeal.

**It should be noted that databases such as Westlaw Canada, Quicklaw LexisNexis and CanLII do not report each and every case before tribunals or courts. Therefore, there may be cases that have been heard before courts and tribunals, but there is no documentation available about the results of these potential cases. Also, these databases do not list which cases begun and were settled, or if any cases were re-routed to an alternative dispute resolution process (i.e. negotiation, mediation, arbitration).**

From this search, no cases involving special education were found before the Ontario Superior Court, the Ontario Court of Appeal, or the Supreme Court of Canada since the 2012 *Moore* decision.

It is noted that many school boards had court cases where the term “special education” was referred to in the decision, however, many of the cases (as documented in the chart in Appendix 4) were not primarily about a “special education” issue regarding a student. Rather, the term “special education” was only stated in passing, often in the context of bargaining collective agreements and determining educational assistants’ rights.

**One case was found concerning a student’s “special education” rights where the school board had previously stated that they had “No Files Relating to Special Education”.**

The Simcoe Muskoka Catholic District School Board did have a matter before the Human Rights Tribunal of Ontario (HRTO) *K.M. v. Simcoe Muskoka Catholic District School Board, 2010 HRTO 1665* (CanLII and Quicklaw LexisNexis). The applicant, as litigation guardian for G.M. in this matter, claimed that the school board (the respondent) did not accommodate her disability “in their provision to her of an instructional program and services”.

The specific issue before the HRTO was whether the applicant could seek administrative information from the school board regarding its implementation of special education programs. The HRTO determined that the applicant was not entitled to many documents requested because they were not relevant to her complaint. However, based on the applicant’s complaint, the HRTO ordered that the respondent school board must provide:

- a) All policies and protocols relating to any complaints process and communication protocols with the applicant's parents between May 2005 and the date of the complaint;*
- b) All correspondence between the applicant's father and the respondents relating to the alleged incident of trespassing between May 2005 and the date of the complaint;*
- c) All speech and language assessments relating to the applicant, performed between May 2004 and the date of the complaint and all decisions relating to the delivery of speech and language services to the applicant made or implemented between May 2005 and the date of the complaint, including all evidence supporting such decisions;*
- d) All written communications and correspondence relating to the requests for, and provision of, (i) special equipment for use at school and at home and (ii) individual accommodations for the applicant between May 2005 and the date of the complaint;*
- e) All written communications, correspondence and other documents relating to all proposed and all actual educational and/or psychological assessments for the applicant, including but not limited to communications and correspondence relating to, and to or from, Dr. Duck, between May 2004 and the date of the complaint;*
- f) All written communications, correspondence and other documents of the special education "team", including but not limited to meeting minutes, between May 2004 and the date of the complaint.*

**The importance of this Order on the respondent school board is significant, as it speaks to accountability and transparency, and supports the data in the 2016 report highlighting the obstacles and barriers that parents raised with regard to communication with school and school board personnel:**

**(page 21) '55.1% of parents noted that communication between them and the school was strained or difficult'**

**(page 23) '34% of parents noted that Special education policies and processes were not adequately explained by school staff'**

**Evidence in a tribunal setting of the challenges faced by parents further validates the survey results of the 2016 report, and the need for school boards to improve communication and disclosure of policies and process in a public service context.**

#### **4. The Impact of the *Moore* decision in Ontario**

The Supreme Court of Canada case, *Moore v British Columbia (Education)*, 2012 SCC 61 involved a complaint under the British Columbia *Human Rights Code* which alleged that the BC government and the school district had discriminated against Jeffrey Moore by failing to provide him with the services he needed to succeed as a student with a learning disability.

Jeffrey suffered from severe dyslexia for which he had received special education services at his public school. In Grade 2, a psychologist employed by the school district recommended that since he could not get the remedial help he needed at his school, he should attend the local Diagnostic Center to receive the necessary intensive remediation. When the Diagnostic Center was closed by the school district, Jeffrey transferred to a private school to get the education he needed. It was following this transfer that Jeffrey's parents filed a complaint under s. 8 of the British Columbia *Human Rights Code*.

After a review of the evidence, the Court concluded that there was *prima facie* discrimination since, due to Jeffrey's disability, he did not have meaningful access to the general education to which students in BC are entitled. The Court then found that the school board had not made reasonable efforts to accommodate Jeffrey: despite recognizing that Jeffrey require intensive remediation in order to have meaningful access to education, the school board had not considered how closing the Diagnostic Centre would affect students like Jeffrey and there was no indication that the school district had looked into possible alternatives for accommodation. The Court also found that the program cuts made by the school board in order to respond to budgetary shortages were disproportionately made to special education programs in relation to other programs.

Thus, even when financial resources are limited, school boards are required to make reasonable efforts to accommodate students with disabilities in order to ensure that all students have meaningful access to the general education to which they are entitled.

##### **a) Changes to the Ontario Education Act since *Moore vs BC (Education)***

A search for amendments to the *Education Act* was conducted on the LegisInfo Ontario website. Despite the fact that there have been twelve bills brought forward to try and initiate change, no amendments have been made to the *Education Act* since the 2012 *Moore* case, with respect to special education (**Appendix 3**).

It is interesting to note that the only bill that was given Royal Assent was Rowan's Law concerning concussion safety. Rowan Stringer was a high school student who died after suffering two concussions in one week from playing rugby with her high school team. Rowan's death alerted the government that there were insufficient youth sport concussion protocols in Canada. It seems that in order for the legislature to resolutely pursue a bill in the education sector, a very severe harm must occur.



## **b) Changes to Ontario Ministry of Education Policy and Guidelines for Special Education**

Despite the fact that there are no changes to the *Education Act* as a result of the *Moore* decision, the Ministry of Education has recently published a new draft document titled *Special Education in Ontario: Kindergarten to Grade 12, Policy and Resource Guide 2017*, which supersedes the previous Special Education document created in 2001.

The release of this document in 2017 may suggest that work began on it after the *Moore* decision in 2012, but this is unconfirmed. There are no thematic links between the *Moore* decision and this new policy document addressing legislation, policy and funding.

The only publicly accessible reference to changes to special education funding found, which may correlate with the timing of the *Moore* decision, is in the *Education Funding -Technical Paper – Ministry of Education 2017-2018*:

(Page 15) [http://www.edu.gov.on.ca/eng/funding/1718/2017\\_18\\_technical\\_paper\\_en.pdf](http://www.edu.gov.on.ca/eng/funding/1718/2017_18_technical_paper_en.pdf)

*'Differentiated Special Education Needs Amount (DSENA)*

*Allocation Changes to reflect the final year of a four-year phase in of a new funding model for the Differentiated Special Education Needs Amount Allocation, and other adjustments.'*

The initial year of a four- year phase in of a new funding model would have been 2014-2015, which may reflect attention given to special education funding as a result of the *Moore* decision in 2012.

It would appear that the new special education document and a vague reference to a new four-year funding model are the only traceable events unfolding since the *Moore* decision.

Multiple attempts to contact various Ministry of Education officials to obtain information on the impact of the *Moore* decision on Ministry initiatives since 2012 brought no results.

## **c) School Board Employer Policy and Practice Changes as a result of the *Moore* decision**

To explore the awareness and impact of the 2012 Supreme Court of Canada decision in *Moore v BC (Education)*, a survey of 72 Ontario school board superintendents (or other delegates as redirected) was conducted. Of the 15 school board representatives who participated in the survey, only 8 indicated they were aware of the decision. They cited their awareness originating from a variety of sources (see page 11).

Survey respondents indicated that no changes to policy or operational practice had occurred as a result of the decision. Some indicated that their board's policies and practices were already

sufficient to deal with all students and equity concerns, while others indicated that changes may have been taking place at another level.

### Survey Methodology

Initial requests to participate in the survey were extended to 72 Ontario school boards by telephone beginning in October 2017. Attempts were made to speak to superintendents in charge of special education, however in some cases, queries were redirected to supervisors, directors, and coordinators.

Many school boards requested that inquiries be made in writing so requests were then sent via email in November-December 2017. The deadline for responses was February 15, 2018, however some interviews were completed after that date to accommodate staff schedules.

For school boards from which no initial response was received, multiple attempts (usually in the range of 2-4 attempts, but in one case as many as 7) were made to reach the contact person either by phone or email to schedule the interview or allow survey questions to be answered via email. Additionally, for large school boards (for example, the Toronto District School Board), attempts were made to contact more than one Superintendent.

The survey consisted of four questions related to the *Moore* decision and was designed to explore the individual's awareness of the decision, and their perception of its impact on changing policy and/or practice at the school board.

#### Survey questions:

1. Are you new to the position of Superintendent of Special Education?
2. Have you been briefed on the 2012 Supreme Court decision of *Moore* related to the provision of special education program and services by school boards? How?
3. Have you participated in discussions at your school board on how policy and practice have changed/are changing/will change, as a result of this decision on special education programs? If so, what changes are in progress?
4. Are there any other comments you would like to add with regards to the impact of the decision on practice in your school board?

### **Survey Results**

By the deadline of February 28, 2018, the following results were obtained:

- 15 out of 72 school board representatives participated in the survey
- 11 school boards responded but declined to participate in the survey
- 46 school boards failed to respond (the total number of non-responders was 89 since, for some school boards, attempts were made to contact multiple superintendents)

Of the 15 board representatives who participated, 9 indicated that they were aware of the *Moore* decision, however their degree of recollection of the decision and how they were informed of it was varied and vague. For example, one respondent indicated that they were “not sure” if they were briefed on the decision, while another had “some recollection” of it.

The respondents attributed their knowledge of the decision to a variety of sources, including:

- Ministry legal briefings/newsletters
- a law firm
- internal memos
- links to the decision or story being circulated internally via email
- conferences
- webinars
- other professional development activities.

Aside from two respondents who indicated that there had been general changes to policy, it appears that the *Moore* decision has not had an impact on policy at the operational school board level.

In fact, many respondents addressed the question about policy and practice changes by affirming that current practices were serving students effectively with general statements such as “*We serve all students well*”.

The full results of the survey are found summarized in **Appendix 4** and indicates participating school boards with the names of persons contacted.

Lack of response to the survey invitation, regardless of the number of follow up attempts, produced largely incomplete data. These results clearly illustrate serious problems with school board communication and information disclosure in a public service context.

## **5. Analysis of the Impact of existing legislation, procedures and policy as obstacles to servicing special education needs**

To guide the analysis, the following research question was developed:

How is current legislation, policy or procedure inhibiting special education service delivery?

One example each of legislation, policy and procedure was analyzed:

- 5.1 the exclusion clause of the Education Act and the Charter of Rights infringement (legislation)
- 5.2 the one-year limitation to filing a complaint at the HRTO (policy)
- 5.3 obtaining assessments at school boards prior to services being offered (procedure)

## **5.1 The ‘Exclusion Clause’ of the Education Act and Charter of Rights Infringement**

The duties of a school principal are outlined in section 265(1-m) of Ontario’s *Education Act*. One such duty, generally referred to as the ‘exclusion clause’, allows a principal to refuse to admit to the school a person whose presence in the school would be detrimental to the physical or mental well-being of pupils.

### *Duties of principal*

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

*[...]*

*access to school or class*

*(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;*

*[...]*

In order for this provision to be enforceable, the *Trespass to Property Act* must be used in conjunction with it. Under the *Trespass to Property Act*, a person who enters premises without the express permission of the occupier or who refuses to leave premises at the direction of the occupier, is liable to conviction of a provincial offence and may be fined up to \$10 000. An “occupier” includes a school board with respect to the premises of a school. [5]

This provision allows the principal to exclude any person, including staff, students, parents and visitors, and may even be used to exclude a parent volunteer if concerns were raised regarding conduct.

Although the Ontario Court of Appeal held that special needs students could not be exempt from exclusion simply because of their exceptional status, it has since been found through parent feedback that the exclusion clause is being invoked disproportionately to exclude students with special needs, sometimes indefinitely. This raises some important concerns:

- a) when can the exclusion clause be invoked,
- b) what recourse do parents have if their child is excluded and,
- c) is its use against students with special needs an infringement of equality rights.

Unlike suspensions and expulsions, which are designed to remove students from the school for disciplinary purposes, the exclusion clause purports to be applicable for safety concerns and not intended to be used as a form of discipline.

Some school boards use this provision sparingly and only in instances when all other alternatives to ensure student physical and mental well-being have been exhausted. In other school boards it is used frequently, but this report did not seek data to explore this practice. To obtain this data, exclusion letters sent to parents would need to be documented and released by school boards.

All three removal mechanisms used with students (suspensions, expulsions, and exclusions) have corresponding appeal procedures which must be communicated to parents (**Appendix 5**).

However, it should be noted that only exclusions require the appellant to identify the reason the appeal is being sought. Data on the number of exclusion appeals currently on record with school boards was not investigated for this report.

To make a claim that one's *Charter* rights under section 15 have been infringed as a result of discriminatory application of the 'exclusion clause', the claimant must show that they experienced differential treatment on the basis of their particular characteristic, and that the treatment denied them equal human dignity and is discriminatory.

Although a claim alleging that a special needs student has been discriminated against in the application of the exclusion clause has not yet been made, this tactic is used against parents of special needs children when they advocate for their children's rights as seen in *K.M. v. Simcoe Muskoka Catholic District School Board, 2010 HRTO 1665*.

**The use of the exclusion clause of the Education Act and Trespass to Property Act against parents who advocate for their child is not only unfair and inappropriate, but also contravenes the mandate of the school board to provide educational services in the public interest.**

That which warrants further investigation, is the apparent lack of educational assistant support (human resources) which leads to triggering the use of the exclusion clause by a school principal. Often, parents indicate that lack of educational assistant availability to intervene and support a student is the reason used to explain to parents why the exclusion clause was used by a school principal. This lack of human resources to support students due to funding is an example of how this situation is related to the *Moore* decision in daily school board operational practice.

Human resources are a key component of public education services and special education service delivery in particular. If funding educational assistants is lacking, the Ministry of Education should be ensuring that there is adequate funding to properly support the needs of special needs students in schools. As it relates to the *Moore* decision, further study is required to establish a direct link between the use of exclusions and lack of funding for educational assistants. School boards must monitor exclusion data as it relates to special education service delivery.

A legal analysis of the exclusion clause and *Charter* rights is provided in **Appendix 6**.

## **5.2 The one-year limitation to filing a complaint at the HRTO (policy)**

One example of problematic policy is related to the Human Rights Tribunal of Ontario (HRTO).

In order to bring a complaint to the HRTO, it must be filed within one year of the last instance of (alleged) discrimination. Unfortunately for many parents struggling with the emotional and financial hardship of navigating the often onerous and complicated services their children need, imposing this timeline to create a comprehensive and persuasive application to the HRTO can be unachievable.

While the HRTO can accept a submission that is “late,” the applicant must show a “sincere application with a valid reason for delay.”[6] The standard which must be met to override the one-year acceptance period is rather onerous and does not take into account general hardships.[7]

However, even if an application is successfully submitted and the HRTO decides to hear the case, wait times for a final decision can be lengthy. The HRTO, according to its own targets, tries to ensure a hearing within 180 days of them being ready to hear a case and render a decision within 90 or 180 days (the longer timeline is for cases that take 4 days or longer to hear).[8]

Unfortunately, the HRTO only met its initial hearing goal 59% of the time and met its decision timeline goal 76% of the time for shorter hearings and only 36% of the time for longer hearings (with an average wait time of 300 days).[9] Overall, the time between an application being accepted to that same file being closed averaged 326 days.[10]

**In addition to the lengthy timelines faced by parent and guardians, the rate at which claims are dismissed as opposed to being adjudicated on the merit of the arguments seem high.**

For the two current reports available for 2017 from the HRTO, out of 549 final decisions rendered, 312 were dismissed on jurisdictional and procedural grounds (of which only 17 were on jurisdictional grounds). [11]

### **Procedural challenges with a complaint made to the Human Rights Tribunal of Ontario**

The Social Justice Tribunals of Ontario (SJTO) 2015-2016 Annual Report “Caseload Statistics” identify the number of applications/appeals received and the number of applications/appeals resolved before the seven boards/tribunals of the SJTO.

In 2015-2016, 3,357 applications/appeals were brought and 3,234 were resolved before the Human Rights Tribunal (HRTO).

This suggests that there is a relatively low abandonment rate of 123 cases at the HRTO. It is unclear whether these “abandoned” cases were settled in mediation or other alternative dispute

resolution processes, or abandoned because the person felt overwhelmed with the quasi-judicial nature of the process once initiated by the complaint.

In 2015-2016, 55% of the applications to the HRTO were concerning disability, which may have included special education complaints (no breakdown available).

### **Access to representation to navigate the HRTO process**

There is a large disparity between applicants and respondents' legal representation before the tribunal. Only 28% of applicants (i.e. the special education student or parents/guardians in a special education issue) were represented by a lawyer/paralegal and 53% were self-represented at hearings before the HRTO.

Comparatively, 86% of respondents (i.e. the school board in a given special education issue) were represented by a lawyer/paralegal and only 9% were self-represented. [10]

In 2015-2016, the Ontario Special Education Tribunals only had one application/appeal received and it was not resolved before the Tribunal. Statistics were not gathered concerning legal representation at the Ontario Special Education Tribunal in the Annual SJTO Report.

Based on the very high self-representation rate before the HRTO for applicants, parents or guardians of special needs children may not want to bring their claims to the HRTO because of

- a) the high cost of hiring a lawyer or paralegal
- b) the school board having legal representation and parents feel intimidated and untrained to self-represent
- c) parents sacrifice the pursuit of the rights of the child to provide for the real life needs of the child (ie therapy) and it becomes a financially motivated decision to abandon the pursuit of the child's rights in order to help the child directly with limited family funds.

Given that there was only one case brought before the Ontario Special Education Tribunal in 2015/2016 indicates that most issues relate to service and access rather than identification and placement of the student (the narrow mandate of the Special Education Tribunal).

However, it seems that if individuals have determined that they want to proceed specifically to the HRTO, they are unlikely to abandon their claim given the very low abandonment rate listed above.

### **Delays incurred in the HRTO process**

Compounding lengthy timelines with a complicated bureaucratic system that strangles most claims in procedural issues is hardly ideal. This may be especially true for a parent or guardian already dealing with the financial and emotional implications of raising a child with special

educational requirements and trying to ensure that their children's needs are being adequately addressed.

Moreover, a child's needs are put on hold throughout this process, even if a claim is successful, lost time and attention are detrimental to a child. Again, this process can hardly be argued as being in tune with the educational needs of children and fulfilling a public service.

On July 8, 2016, the Supreme Court of Canada released **R v Jordan**, 2016 SCC 27 [**Jordan**], a decision that fundamentally changed the framework that determines whether an accused has been tried within a reasonable time under s 11(b) of the Charter. [12]

**Although the Jordan ruling applies to criminal cases, access to justice within a reasonable time should apply to all tribunals and courts in the public interest, in order to foster credibility and trust in these processes.**

Such public processes include complaints before social justice tribunals, administrative boards, and commissions since they apply the Rules of Civil Procedure in a quasi-judicial forum.

Restricting the public's ability to complain during a process lacks transparency and accountability in government responsiveness to the needs of its citizens.

### **5.3 Obtaining assessments at school boards prior to services being offered (procedure)**

It is common knowledge that parents can wait up to two years for psycho-educational assessments for their child in the publicly funded education system. This wait time has been recognized as unacceptable in the public eye and has been identified by government as an area of need. On page 4 of this report there is reference made to this issue being presented in a public survey which indicates that the issue is problematic at a systemic level.

Some school boards will tell parents that accommodations and special education services cannot be initiated without a prior assessment. Even though the Ministry of Education indicates that an Individual Education Plan (IEP) can be put in place for a child while awaiting assessment, this remains a best practice and not an automatic practice in all school boards and schools.

#### Procedural fairness and due process

The concept of procedural fairness and due process are not part of school board mindset or operational practice at the current time. Parents are often told that their child is on waitlist for assessment but no documentation, communication or follow-up in terms of a registry is ever disclosed by the school board as to how the child is prioritized for an assessment and how his or her position changes on the waitlist.



Although procedural fairness is tied to equality rights and access rights, which relate back to Charter rights under section 15, there is no active correlation between them in educational practice.

There is a lack of resources to assess the individual needs of students with exceptionalities, a corresponding lack of support after a specific diagnosis and a lack of support once students age out of the education system.

Regarding the lack of resources for assessing a child's needs, 64% of elementary schools were reported as placing restrictions on these types of assessments. [13] More specifically, an average of 9 students were waiting for an educational assessment in Ontario's elementary schools. [14]

Once a child receives a professional assessment of their educational needs, proper and sufficient support after diagnosis is lacking.

If we are to truly evaluate inclusiveness in Ontario's education system, it is axiomatic that pandering to a majority leaves behind a vulnerable minority of students. Inclusiveness should be about the welfare of *all* students. Viewing the issue from the eyes of special needs children and their parents is a fruitful and necessary exercise.

Regarding support, a lack of training, educational assistants (EAs), a lack of focus and an overall lack of guidance for special needs children is problematic for the generally overwhelmed and stressed parent(s). Obviously, a lack of support in the form of EAs and adequate training for teachers is not a new concern. [15] This continues to be a problem and one which this report without question supports addressing. However, a lack of adequate support for children with special needs is larger and more a widely encompassing issue.

Further study is required to reveal the correlation of restrictions and rules to the abandonment rates of complaints related to special education service delivery and the best interest of the child.

## **6. Alternative process: The Refugee claimant process framework and its applicability to special education service delivery model (delay, expediency, child's' best interest)**

The following is a chart comparing the Refugee Claimant Process to the Special Education Process. A discussion of the issues concerning each process is discussed following the chart.

<b>Refugee Claimant Process</b>	<b>Special Education Claimant Process</b>
<p>There are two types of claim processes for refugees: port of entry claims and in-land claims. Each process will be discussed below.</p> <p><b>Port of Entry</b></p> <ol style="list-style-type: none"> <li>1. A port of entry claim is made to Canada Border Service Agency (CBSA)               <ol style="list-style-type: none"> <li>a. If eligible: then the claim will be heard by the Refugee Protection Division (RPD) of the Immigration and Refugee Protection Board (IRB)</li> <li>b. If not eligible: the claimant can ask the Federal Court within 15 days to agree to review the decision and provide a stay of removal                   <ol style="list-style-type: none"> <li>2. If eligible then the claim is heard by the RPD of the IRB. The claimant must complete a Basis of Claim (BOC) form and submit it to the RPD in 15 days.</li> <li>3. From the date of the eligibility decision, there is a hearing at the RPD within:                       <ol style="list-style-type: none"> <li>a. 45 days for the claimants of a Designated Country of Origin (DCO)</li> <li>b. 60 days from claimants not from a DCO</li> </ol> </li> <li>2. The claimant has 10 days to prepare and file evidence for the hearing before the RPD                       <ol style="list-style-type: none"> <li>a. If the claim is accepted then the claimant can apply for permanent residential status</li> <li>b. If the claim is refused then it moves to a right of appeal                           <ol style="list-style-type: none"> <li>2. If the claim is refused then:                               <ol style="list-style-type: none"> <li>a. the claimant can appeal before the Refugee Appeal Division (RAD) of the IRB</li> </ol> </li> </ol> </li> </ol> </li> </ol> </li> </ol> </li></ol>	<p>If there is a request from the parent(s)/guardian(s) for special education programs for their child and formal recognition of their needs through the Identification Placement and Review Committee (IPRC), then the following process must be followed:</p> <ol style="list-style-type: none"> <li>1. The parent(s)/guardian(s) need to request in writing that the principal coordinate a meeting with the IPRC / or the principal of the school may, with written notice to the parents, refer the student to the IPRC</li> <li>2. A designated representative of the board shall ensure that the pupil is referred to the IPRC established by the Board for a decision on where the pupil should be.</li> <li>3. The superintendent of the board and the designated representative will use their best efforts to ensure the IPRC meets as soon as possible.</li> <li>4. Within 15 days either the principal or the designated representative of the board will provide the parents with:           <ol style="list-style-type: none"> <li>a. A guide under section 13 of the O. Reg. 181/98 entitled “Identification and Placement of Exceptional Pupils”</li> <li>b. A written statement of when the principal expects that the IPRC will meet</li> </ol> </li> </ol>

<p>within 15 days of getting the decision from the RPD</p> <p>.If successful at RAD then the claimant has a new hearing at the RPD</p> <p>.If unsuccessful, the claimant can ask the Federal Court to review the decision and grant a stay of removal within 15 days</p> <p>1.If successful in the Federal Court, then the claimant has the right to a new decision on their claim</p> <p>2.If unsuccessful at the Federal Court, then the claimant can be removed from Canada</p> <p>b. If there is no right to appeal to the RAD then you can ask the Federal Court for a stay of removal within 15 days</p> <p>c. The claimant may apply for a Pre-Removal Risk Assessment (PRRA) but must wait: 12 months if from a DCO or 26 months if not from a DCO</p> <p><b><i>Inland Claims</i></b></p> <p>1. The claimant can make an inland claim by submitting a Basic of Claim (BOC) form and other required forms, as necessary, from Citizenship and Immigration Canada (CIC)</p> <p>a. If eligible: then the claim will be heard by the Refugee Protection Division (RPD) of the Immigration and Refugee Protection Board (IRB) in 15 days</p> <p>b. If not eligible: the claimant can ask the Federal Court within 15 days to agree to review the decision and grant a stay of removal</p> <p>2. From the date of the eligibility decision, there is a hearing at the RPD within:</p> <p>a. 30 days for the claimants of a Designated Country of Origin (DCO)</p> <p>b. 60 days from claimants not from a DCO</p>	<p>2. At the IPRC meeting, the following will occur:</p> <p>a. The chair will introduce everyone</p> <p>b. The IPRC will review all available information</p> <p>c. The committee will discuss any proposal of special education services for the students</p> <p>d. After all the information is presented the IPRC will make a decision</p> <p>2. The IPRC decision will state:</p> <p>a. Whether the student is exceptional</p> <p>b. The categories and definitions of any exceptionalities identified</p> <p>c. The IPRC description of the student's strengths and needs</p> <p>d. The IPRC's placement decision</p> <p>e. The IPRC's recommendations regarding special education</p> <p>f. And the reasons for the decision when the IPRC has identified that the student should be placed in a special education program</p> <p>2. If the parent(s)/guardian(s) agrees with the IPRC decision then the parent(s)/guardian(s) must sign the decision and the IPRC will notify the principal</p> <p>a. Additionally, parent(s)/guardians(s) can ask for a review of the IPRC decision any time after the child has been in the program suggested by the IPRC for at least 3 months or longer</p> <p>2. If the parent(s)/guardian(s) are not satisfied with the identification or placement</p>
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<p>2. The claimant has 10 days to prepare and file evidence for the hearing before the RPD</p> <p>a. If the claim is accepted then the claimant can apply for permanent residential status</p> <p>b. If the claim is refused then it moves to a right of appeal</p> <p>2. If the claim is refused then:</p> <p>a. the claimant can appeal the decision before the Refugee Appeal Division (RAD) of the IRB within 15 days of getting the decision from the RPD</p> <p>.If successful at the RAD then the claimant can have a new hearing at the RPD</p> <p>.If unsuccessful, the claimant can ask the Federal Court to review the decision and grant a stay of removal within 15 days</p> <p>1. If successful in the Federal Court, then the claimant has the right to a new decision of their claim</p> <p>2. If unsuccessful at the Federal Court, then the claimant can be removed from Canada</p> <p>b. If there is no right to appeal to the RAD then you can ask the Federal Court for a stay of removal within 15 days</p> <p>c. The claimant may apply for a Pre-Removal Risk Assessment (PRRA) but must wait: 12 months if from a DCO or 26 months if not from a DCO</p>	<p>determined by the IPRC, there are three options:</p> <p>a. The parent(s)/guardian(s) can request another meeting with the IPRC within 15 days</p> <p>b. The parent(s)/guardian(s) can appeal the decision in writing to the the Appeal Board set up by the school board within 30 days of the IPRC decision</p> <p>c. If the principal disagrees with the IPRC placement and the student has been in the program for at least 3 months, then the parent(s)/guardian(s) or principal can ask the IPRC to review the placement again. This must be done within 15 days after the 3 month period of the child being in the program.</p> <p>2. If the decision is appealed, the following occurs:</p> <p>a. The board establishes a Special Education Appeal Board (SEAB) to hear the appeal</p> <p>b. The SEAB must be composed of three persons who have no prior knowledge of the student (one of whom is selected by the parent)</p> <p>c. The chair will arrange the meeting no later than 30 days after the chair is selected</p> <p>d. The SEAB must review the IPRC material</p> <p>e. The SEAB will make a recommendation</p> <p>f. The recommendation must be made within 3 days after the SEAB meets and in writing</p> <p>g. The school board, within 30 days of receiving the SEAB written decision will decide what action</p>
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	<p>should occur with respect to the recommendations</p> <p>If the parent(s)/guardian(s) do not agree with this decision then the parent(s)/guardian(s) can appeal it further to the Ontario Special Education Tribunal of the Social Justice Tribunals of Ontario (SJTO) within 15 days</p> <ol style="list-style-type: none"><li>2. If parent(s)/guardian(s) accept the IPRC placement but are concerned with the nature of the special education program, then four steps can be taken:<ol style="list-style-type: none"><li>a. Review the Individual Education Plan to determine if the plan meets the child's needs</li><li>b. Discuss the issue with the student's teacher</li><li>c. Include the school principal in the discussion</li><li>d. If the issue cannot otherwise be resolved, contact the special education coordinator or the superintendent of special education</li></ol></li></ol> <p>**If the child 16 years of age or older then they can be present at any of the IPRC meetings.</p>
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According to a refugee law advisor at Ottawa Community Immigrant Services Community Organization, there are two major issues with the refugee claimant process:

First, there is an issue with the legislated 10-15 day time limitations to prepare and speak at hearings. The advisor stated that the time limitations are inadequate because the claimant often cannot gather substantial evidence and acquire legal services in that short period of time.

Second, there is an issue of delays in the system because of the large number of refugee claimants and the limited number of adjudicators sitting on the Refugee Protection Division. . This issue has been echoed in scholarly articles, such as Constance MacIntosh's *Insecure Refugees: the Narrowing of Asylum Seekers Rights to Freedom of Movement and Claims Determination post 9/11 in Canada*. The delays in the system are also likely attributed to the increased amount of refugee claimants applying for refugee status in Canada.

A key common issue between the two processes is timelines for each subsequent part of the process. Parent(s)/guardian(s) are only given 15 days to appeal the initial IPRC decision back to the IPRC, or 30 days to appeal it to the Appeal Board set up by the respective school board.

Similar to the refugee claimant process, this is likely an inadequate amount of time for a parent to understand the nature of the process, gather evidence of their child's issues, and potentially even seek legal assistance/advice for this matter. There are also taxing administrative delays in the special education process, as anecdotal parent feedback indicates that school boards do not respect the given timelines and parents are left the task of follow-up.

Some small school boards do not have a specific Special Education Superintendent. Therefore, if a parent does have a problem it will likely be addressed to the Director of Education of the board or another Superintendent with multiple responsibilities. As well, current statistics show that special education issues are increasing and that students face delays before getting an IPRC meeting. At any given elementary school there is currently 9 students waiting for an IPRC, and 7 students waiting at any given high school for an IPRC [17].

A comparison of the two processes can highlight similar challenges, however special education issues are predominantly service implementation related, as opposed to achieving status.

## **7. Conclusion**

Current complaint processes do not reflect the magnitude of the challenges faced by parents of special needs children in Ontario. The processes in place are not service oriented and there is currently no mechanism in place in Ontario to address compliance and service issues with special education with education service providers (school boards).

Litigation is not an appropriate course of action to measure service-oriented deficiencies in the public service sector. However, it is the only indicator available to date to capture the dissatisfaction of parents.

Accessibility to representation for litigation remains a real financial barrier to parents of special needs children who must prioritize funds and resources to support the real needs of the child first. Parents should not have to sacrifice advocating for services the child is legally entitled to receive from a public service - an education at the level typical children receive.

Communication and disclosure issues continue to surface for the third year in a row:

- no return email and phone communication to a member of the public, 2018 survey
- non-compliance and disclosure of Freedom of Information requests, 2017
- engaging in 'gate-keeping' communication practices and non-disclosure of information to parents on policies and process in the 2016 report.

Teacher unions advising teachers not to communicate with parents via email is an example of further obstacles for collaboration.

Challenges with communication and disclosure of information at the school board level is mirrored in challenges in communication and disclosure with government agencies.

Policies and processes established to be in the service of the public generally frustrate and discourage citizens from complaining, which would drive needed improvement to publicly funded services and programs. Complaint processes should reflect the government's commitment to responsiveness, transparency and accountability to its citizenry.

Lack of data and invisible data hamper the analysis of the impact of existing legislation, procedures and policy as obstacles to servicing special education needs. Since school boards are not required to collect data on their special education services delivery, there is no data other than that generated by parent and staff surveys and anecdotal comments. As there are no mechanisms currently in place, invisible data is available data, but that is not collected. An example of invisible data is the abandonment rate of complaints from parents on special education services delivery, which is real but that current processes do not capture.

An alternative mechanism for special education service delivery issues would promote practices in the students' best interest and the public interest, both goals of the Ontario Ministry of Education.

**Appendix 7** lists all of the key contacts, government agencies, parent and education relation associations to whom the 2016, 2017 and 2018 reports were sent, or electronically shared. It is hoped that through a newly elected provincial government, commitment to the recommendations listed will be addressed.

## **8.Recommendations to the Minister of Education and the Government of Ontario**

**Recommendations in this report remain the same in scope as those presented in the 2016 and 2017 reports:**

**1. Create and implement a public service policy framework for school board education services to reflect a client services mindset by improving communication protocols, responsiveness, timeliness, disclosure, transparent internal processes and an external public complaint mechanism available to parents to address special education service delivery issues (such as psycho-educational assessments, system program waitlists) and implementation of Individual Education Plans.**

**2. Mandate school board personnel training in the Ontario Human Rights Code and compulsory Accessibility training to support inclusive principles in public education service delivery, particularly to special needs populations. This training to focus on school**

**board personnel’s responsibility in communicating parental and child rights in education services to parents.**

**3. Amend the Education Act to include an oversight mechanism for school boards with a framework for consequences and penalties for non-adherence to policy and procedure so that operational practices are aligned in all schools and school boards in Ontario in the students’ best interest.**

**4. Repeal the legislated internal School Board Special Education Appeal Process and the Ontario Special Education Tribunal as ineffective, inefficient and underused avenues for the resolution of parent concerns with Special Education programs and services.**

**5. Mandate school boards to report complaint, appeal and litigation costs related to Special Education matters in public reports for greater transparency and accountability of taxpayer funds and to align with enveloped funding from the Ministry of Education for Special Education.**

**6. Provide equitable access to parents for legal support and costs from taxpayer funds as school boards currently use, when all complaint mechanisms have been explored and litigation is necessary.**

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*This document does not contain legal advice. Pro Bono Students Canada is a student organization. This document was prepared with the assistance of PBSC University of Ottawa Common Law Section law student volunteers. PBSC students are not lawyers and they are not authorized to provide legal advice. This document contains general discussion of certain legal and related issues only. If you require legal advice, please consult with a lawyer.*



**Appendix 1**

**Table 1: School Boards Complying with Requests (28/72 or 38%)**

<b>School Board</b>	<b>Number of Files</b>	<b>Costs Associated with Each File</b>
Avon Maitland DSB	No files relating to Spec Ed.	nil
Bluewater DSB	No files relating to Spec Ed.	nil
Brandt Haldimand Norfolk Catholic DSB	Two files relating to Spec Ed, both settled.	1. \$1,090.45 2. \$806.82
Bruce-Grey Catholic DSB	No files relating to Spec Ed.	nil
Conseil scolaire Viamonde	No files relating to Spec Ed.	nil
Conseil scolaire Franco-Nord	No files relating to Spec Ed.	nil
Conseil scolaires des aurores-boréales	No files relating to Spec Ed.	nil
Durham DSB	Three cases relating to Spec Ed, one of which was heard at the ONSET and two that were heard at the HRTO. Fees were estimated, as Durham DSB has an in house lawyer and therefore is not billed specific fees for each case. The two HRTO cases dealt with Spec Ed as a sub component of larger issues.	1. \$5,000 - \$10,000 2. \$5,000 - \$10,000 3. \$5,000 - \$10,000
DSB Ontario North East	Three files relating to Spec Ed, two settled and one ongoing	1. \$35,800.64 2. \$5,394.36 3. \$1000.00 – Ongoing
Halton DSB	Records were not provided on a case-by-case basis, but rather for each occasion the board received a bill from a law firm.	1. Total legal fees from November 25, 2008 to January 27, 2017 amounting to \$138,858.27
Hastings & Prince Edward DSB	One file relating to Spec Ed, settled.	1. \$29,816.30 \$722.30 for disbursements incl.

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Huron Perth Catholic DSB	Six files relating to Spec Ed, one of which was an IPRC appeal and the rest were IEP arbitrations.	<ol style="list-style-type: none"> <li>1. \$203.40</li> <li>2. \$101.70</li> <li>3. \$610.20</li> <li>4. \$97.18</li> <li>5. \$9,395.10</li> <li>6. \$13,790.70 – IPRC appeal</li> </ol>
Huron-Superior Catholic DSB	One file relating to Spec Ed, settled.	<ol style="list-style-type: none"> <li>1. \$67,850.85</li> </ol>
Lambton Kent DSB	Three files relating to Spec Ed, two settled and one ongoing.	<ol style="list-style-type: none"> <li>1. \$106,118.47</li> <li>2. \$4,262.11</li> <li>3. \$4,074.78</li> </ol> <p>Case on going.</p>
Limestone DSB	Eight files relating to Spec Ed, all settled.	<ol style="list-style-type: none"> <li>1. \$6,082.29</li> <li>2. \$1,244.64</li> <li>3. \$1,316.45</li> <li>4. \$790.58</li> <li>5. \$833.24</li> <li>6. \$459.00</li> <li>7. \$2,462.72</li> <li>8. \$1,066.66</li> </ol>
Moose Factory Island DSAB	No files relating to Spec Ed.	nil
Moosonee DSAB	No files relating to Spec Ed.	nil
Ottawa-Carleton DSB	<p><u>09/10</u> – 1 appeal, 7 cancelled appeals and 2 appeals carried into 2010/11</p> <p><u>10/11</u> – 5 appeals, 2 pending appeal and 1 appeal carried into 2011/12</p> <p><u>11/12</u> – 6 dropped appeals</p> <p><u>12/13</u> – 3 dropped appeals</p> <p><u>13/14</u> – 3 dropped appeals</p> <p><u>14/15</u> – 2 pending appeals, 4 dropped appeals</p> <p><u>15/16</u> – 1 pending appeal, 2 dropped appeals</p> <p><u>16/17</u> – 2 dropped appeals</p>	<p>09/10 - \$10,527.56</p> <p>10/11 - \$21,992.84</p> <p>11/12 - \$1,469.00</p> <p>12/13 - \$2,334.00</p> <p>13/14 - \$1,017.00</p> <p>14/15 - \$2,825.00</p> <p>15/16 - \$0.00</p> <p>16/17 - \$0.00</p>

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Rainbow DSB	Two files relating to Spec Ed, both settled.	1. \$36,524.39 2. \$8,937.88
Rainy River DSB	One file relating to Spec Ed, ongoing.	1. \$64,676.18
Renfrew County DSB	No files relating to Spec Ed.	nil
Simcoe County DSB	Thirteen files have been opened relating to Spec Ed, eight of which have been closed to date, fees provided on a yearly basis	09/10 - \$3,183.00 10/11 - \$1,362.00 11/12 - \$8,592.00 12/13 - \$18,692.00 13/14 - \$3,764.00 14/15 - \$8,649.00 15/16 - \$20,605.00
Simcoe Muskoka Catholic DSB	No files relating to Spec Ed.	nil
St. Clair Catholic DSB	No files relating to Spec Ed.	nil
Superior-Greenstone DSB	No files relating to Spec Ed.	nil
Toronto DSB	Seven files relating to Spec Ed that were heard at the Human Rights Tribunal of Ontario, two were abandoned/dismissed, two case involved payment of damages, two cases are under judicial review and one is an on-going matter. Toronto DSB also had three files relating to Spec Ed that were heard at the Ontario Special Education Tribunal, one of which had the application withdrawn and the other two reached a non-monetary settlement and agreed to terms only.	<u>HRTO cases:</u> 1. \$6,228.79 2. \$16,261.30 3. \$249,553.82 \$35,000 monetary compensation for injury to applicants' dignity (case under judicial review) 4. \$9,504.57 \$7,500 general damages and confirmation that training on autism provided to school and staff. 5. \$16,537.91 \$1,500 in general damages 6. \$32,515.57 Case under judicial review.

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		7. \$9,605.00 Case on-going <u>ONSET cases:</u> 1. \$9,017.05 2. \$19,404.20 3. \$9,303.93
Trillium Lakelands DSB	Two files relating to Spec Ed, both settled.	1. \$3,528.13 2. \$2,229.00
Upper Canada DSB	Two files relating to Spec Ed, both settled.	1. \$2,160.00 2. \$53,388.00

**Appendix 2**

**Westlaw Canada Database Results**

**Re: School Boards citing “No Files Relating to Special Education” in the 2017 report**

<b>School Board</b>	<b>Case Citation(s)</b>	<b>Brief Description of The Cases</b>
Avon Maitland DSB	No Cases citing “special education” in this database	N/A
Bluewater DSB	1. 2008 CarswellOnt 5146	→ Concerning collective agreements (maximum class size for special education classes)
Bruce-Grey Catholic DSB	1. 2001 CarswellOnt 10144	→ Concerning collective agreements
Conseil Scolaire Viamonde	No Cases citing “enfance en difficulté,” “élèves ayant des besoins particuliers,” “EED” “éducation spéciale” or “special education” in this database	N/A
Conseil Scolaire Franco-Nord	No Cases citing “enfance en difficulté,” “élèves ayant des besoins particuliers,” “EED” “éducation spéciale” or “special education” in this database	N/A
Conseil Scolaires des Aurores-Boréales	No Cases citing “enfance en difficulté,” “élèves ayant des besoins particuliers,” “EED” “éducation spéciale” or “special education” in this database	N/A
Moose Factory Island District Area School Board	1. 1977 CarswellOnt 2718	→ Concerning collective agreements
Moosonee District School Area Board	1. 2012 CarswellOnt 5511 2. 2011 CarswellOnt 7913	→ Concerning collective agreements

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		→ Concerning collective agreements
Renfrew County District School Board	<p>1. 2008 CarswellOnt 10337</p> <p>2. 2010 CarswellOnt 11524</p> <p>3. 2008 CarswellOnt 10552</p> <p>4. 2004 CarswellOnt 10656</p>	<p>→ Concerning collective agreements, the possibility of a Special Education teacher strike</p> <p>→ Concerning altering Educational Assistant work responsibilities</p> <p>→ Grievance about a teacher who also worked for a Council that dealt with special education student needs</p> <p>→ Union grievance to the board for reducing educational assistants working house</p>
Simcoe Muskoka Catholic District School Board	No Cases citing “special education” in this database	N/A
St. Clair Catholic District School Board	<p>1. 2009 CarswellOnt 10381</p> <p>2. 2013 ONSC 4025</p>	<p>→ the Ontario English Catholic Teachers Association wants to include the Principal of Special Education in the bargaining unit</p> <p>→ Negligence case against the Board, only mentioned special education when discussing the qualification of the principal in question</p>
Superior-Greenstone District School Board	1. 2016 CarswellOnt 929	→ Concerning a breach of a collective agreement

**CanLII Database Results**  
**Re: School Boards citing “No Files Relating to Special Education”**

<b>School Board</b>	<b>Case Citation(s)</b>	<b>Brief Description of The Cases</b>
Avon Maitland DSB	No Cases citing “special education” in this database	N/A
Bluewater DSB	No Cases citing “special education” in this database	N/A
Bruce-Grey Catholic DSB	No Cases citing “special education” in this database	N/A
Conseil Scolaire Viamonde	No Cases citing “enfance en difficulté,” “élèves ayant des besoins particuliers,” “EED”“éducation spéciale” or “special education” in this database	N/A
Conseil Scolaire Franco-Nord	No Cases citing “enfance en difficulté,” “élèves ayant des besoins particuliers,” “EED”“éducation spéciale” or “special education” in this database	N/A
Conseil Scolaires des Aurores-Boréales	No Cases citing “enfance en difficulté,” “élèves ayant des besoins particuliers,” “EED”“éducation spéciale” or “special education” in this database	N/A
Moose Factory Island District Area School Board	No Cases citing “special education” in this database	N/A
Moosonee District School Area Board	1. 2006 CanLII 21590	→ Concerning collective agreements

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Renfrew County District School Board	1. 2008 CarswellOnt 10337	→ Concerning collective agreements, the possibility of a Special Education teacher strike
Simcoe Muskoka Catholic District School Board	1. 2010 HRTO 1665	→ Case discussed in the body of the report: the applicant claimed that the school board (the respondent) did not accommodate her disability “in their provision to her of an instructional program and services
St. Clair Catholic District School Board	1. 2013 ONSC 4025	→ Negligence case against the Board, only mentioned special education when discussing the qualification of the principal in question
Superior-Greenstone District School Board	No Cases citing “special education” in this database	N/A

**Quicklaw LexisNexis Database Results**  
**Re: School Boards citing “No Files Relating to Special Education”**

<b>School Board</b>	<b>Case Citation(s)</b>	<b>Brief Description of The Cases</b>
Avon Maitland DSB	No Cases citing “special education” in this database	N/A
Bluewater DSB	1. 2001 OLAA 109	→ Concerning collective agreements, wrongful dismissal of Special Education teacher
Bruce-Grey Catholic DSB	1. 2001 CarswellOnt 10144	→ Concerning collective agreements, Special Education teacher lost hours and wages
Conseil Scolaire Viamonde	No Cases citing “enfance en difficulté,” “élèves ayant des besoins particuliers,”	N/A



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	“EED”“éducation spéciale” or “special education” in this database	
Conseil Scolaire Franco-Nord	No Cases citing “enfance en difficulté,” “élèves ayant des besoins particuliers,” “EED”“éducation spéciale” or “special education” in this database	N/A
Conseil Scolaires des Aurores-Boréales	No Cases citing “enfance en difficulté,” “élèves ayant des besoins particuliers,” “EED”“éducation spéciale” or “special education” in this database	N/A
Moose Factory Island District Area School Board	No Cases citing “special education” in this database	N/A
Moosonee District School Area Board	No Cases citing “special education” in this database	N/A
Renfrew County District School Board	1. 2008 CarswellOnt 10337 2. 2010 CarswellOnt 11524 3. 2008 CarswellOnt 10552	→ Concerning collective agreements, the possibility of a Special Education teacher strike  → Concerning altering Educational Assistant work responsibilities  → Grievance about a teacher who also worked for a Council that dealt with special education student needs
Simcoe Muskoka Catholic District School Board	1. 2010 HRTO 1665	→ Case discussed above: the applicant claimed that the school board (the respondent) did not accommodate her disability “in their provision to her of an instructional program and services

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St. Clair Catholic District School Board	1. 2009 CarswellOnt 10381  2. 2013 ONSC 4025	→ the Ontario English Catholic Teachers Association wants to include the Principal of Special Education in the bargaining unit  → Negligence case against the Board, only mentioned special education when discussing the qualification of the principal in question
Superior- Greenstone District School Board	No Cases citing “special education” in this database	N/A

### **Appendix 3** Search for Amendments to the *Education Act*

#### Methodology

To search for amendments to the *Education Act* broadly, a Hansard's Advanced search was conducted on the LegisInfo Ontario website. The following are the specifics of this Hansard Advanced search:

- Keyword: "Education Act"
- Session: All sessions
- Type of Business: Introduction of Bills
- Date Range:
  - From: 01/January/2012
  - To: 01/January/2018

Thirteen results were generated from this search and are listed in the following chart.

<b>Name of Bill</b>	<b>How did the Bill apply to the <i>Education Act</i></b>	<b>Did the bill become law? (Yes/No)</b>
Bill 39, An Act to amend the Education Act with respect to concussions/ Projet de loi 39, Loi modifiant la Loi sur l'éducation en ce qui a trait aux commotions cérébrales.	This Bill amends the <i>Education Act</i> with respect to "Pupil Health". The Minister made policies and guidelines respecting injuries and concussions.	No. The Bill was carried on First Reading on March 6, 2012.
Bill 80, An Act to designate Bullying Awareness and Prevention Week in Schools and to provide for bullying prevention curricula, policies and administrative accountability in schools / Projet de loi 80, Loi désignant la Semaine de la sensibilisation à l'intimidation et de la prévention dans les écoles et prévoyant des programmes-cadres, des politiques et une responsabilité administrative à l'égard de la	This Bill designates the week beginning on the third Sunday of November as Bullying Prevention Week.	No. The Bill was carried to the First Reading on May 2, 2012.

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prévention de l'intimidation dans les écoles.		
Bill 102, An Act to amend the Education Act to restrict the use of blocker pads / Projet de loi 102, Loi modifiant la Loi sur l'éducation pour restreindre l'utilisation de bloqueurs.	This Bill proposed to ban foam blocker pads in Ontario schools, except for use in sports.	No. The Bill was carried to the Second Reading on August 30, 2012. The Bill is referred to Standing Committee as of August 30, 2012.
Bill 107, An Act to amend the Education Act with respect to hiring practices for teachers / Projet de loi 107, Loi modifiant la Loi sur l'éducation en ce qui concerne les pratiques d'engagement des enseignants.	This Bill revokes the Ontario Regulation 274/12 Hiring Practices.	No. The Bill was carried to the First Reading on September 25, 2013.
Bill 143, An Act to enact the Child Care and Early Years Act, 2013, to repeal the Day Nurseries Act, to amend the Early Childhood Educators Act, 2007 and the Education Act and to make consequential amendments to other Acts / Projet de loi 143, Loi édictant la Loi de 2013 sur la garde d'enfants et la petite enfance, abrogeant la Loi sur les garderies, modifiant la Loi de 2007 sur les éducatrices et les éducateurs de la petite enfance et la Loi sur l'éducation et apportant des modifications corrélatives à d'autres lois.	This Bill is focused on establishing a system of responsive, safe, and high quality accessible child care.	No. The Bill was carried to Second Reading for Debate on April 30, 2014.
Bill 197, An Act to amend the Education Act with respect to the planting of allergenic plants on school premises / Projet de loi 197, Loi modifiant la Loi sur l'éducation en ce qui a trait à la plantation de	This Bill ensures that allergenic plants are not put in Ontario schools.	No. The Bill was carried to the First Reading on May 9, 2016.

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plantes allergènes dans les lieux scolaires		
Bill 214, An Act to amend the Education Act to provide for agreements to create regional Aboriginal school boards / Projet de loi 214, Loi modifiant la Loi sur l'éducation pour prévoir la conclusion d'ententes créant des conseils scolaires autochtones régionaux.	This Bill will create regional Aboriginal school boards.	No. The Bill was carried to the First Reading on June 8, 2016.
Bill 69, An Act to amend the Education Act with respect to a comprehensive financial literacy course / Projet de loi 69, Loi modifiant la Loi sur l'éducation en ce qui concerne un cours complet sur la culture financière.	This Bill will create a financial literacy course in Ontario school.	No. The Bill was carried to the First Reading on November 16, 2016.
Bill 191, An Act to amend the Education Act in relation to Fetal Alcohol Spectrum Disorder (FASD) / Projet de loi 191, Loi modifiant la Loi sur l'éducation en ce qui concerne l'ensemble des troubles causés par l'alcoolisation foetale.	This Bill will promote awareness and understanding of fetal alcohol spectrum disorder, or FASD, including best practices to support pupils who may have FASD.	No. The Bill was carried to the First Reading on December 13, 2017.
Bill 193, An Act to enact Rowan's Law (Concussion Safety), 2017 and to amend the Education Act / Projet de loi 193, Loi édictant la Loi Rowan de 2017 sur la sécurité en matière de commotions cérébrales et modifiant la Loi sur l'éducation.	This Bill will require sports organizations and school boards to engage in concussion review awareness.	Yes. The Bill was given Royal Assent on March 7, 2018.

A second search was also conducted on the LegisInfo Ontario website under the Advanced Hansard's search regarding special education specifically. The following are the specifics of this Hansard's Advanced search:

- Keyword: "special education"
- Session: All sessions

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- Type of Business: Introduction of Bills
- Date Range:
  - From: 01/January/2012
  - To: 01/January/2018

There were no Hansard “Introduction of Bills” results citing “special education” with the above specific date range.

## Appendix 4 (School board survey results form superintendent interviews)

**Table 1: School Boards from which responses were received**

School board	Number of Contact Attempts	Person, title, and date	New to position?	Briefed on or aware of Moore decision	How briefed/ aware of decision	Changes in practice or policy at school board	Other comment or info
Brant DSB	3	Michelle Shypula, Superintendent of Special Education Feb. 23 2018	April 2017	Unaware but equity is very important. Redid IARP and safe and accepting schools policy		New policy was received from the Ministry – came out in Sept 2017. Responsibility moved to Director of education directly.	Faith enables us to create places that are respectfully, dignified, and that celebrate differences
Catholic DSB of Eastern Ontario	4	Dr. Hawes, Superintendent for school effectiveness Feb. 23 2018	15+ years in different positions	Was briefed	Briefed by a law firm	Felt that their policies and services already reflected equity goals	Accessibility is a real focus. Need to look more at equity and inclusion from emotional well-being; we've looked at educational and physical inclusion- we need to provide more emotional support-inclusion. We do include but we also need to work on accepting.

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CECCE	7	Marie France Paquette, Superintendent, Jan. 26, 2018	Yes- less than a year	Not aware			Referred to director of services (pending follow up)
Mon avenir	4	Anik Gagnon	Yes but did similar position in another board for 2 years	Yes	Received a notice	Not particularly as special education is reviewed every year based on student enrollment budget exception- alities needs and staffing; receive enveloped funds	
Aurores boreales	4	Genevieve Fortin Robinson Coordinator of special education services, Jan. 11, 2018	No	Some recollec- tion	Don't know	We serve all students well	This was in BC and we are in ON (implied not being relevant?)
Nouvel Ontario	3	Tracy Rossini, Director of services, Jan. 8, 2018	no	Yes			



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Grand Nord	2	Marc Gauthier, Director of education Jan. 10, 2018	no		No impact	Processes and programs in place to serve the needs of students	
Nord Est	2	Irene Charette	1.5 years	no		Law in Ontario is specific on services and programs; cannot use no funds as a reason	Lack of French speaking professionals to offer services is the only obstacle, not funding
Durham Catholic	3	Janine Bowyer, Superintendent of special education Feb. 23, 2018	6 years, 5th on special education	yes	Ministry legal briefings newsletter etc.	Added weight to positions and plans already implemented	Since 1991, fully support inclusion which is a belief of the board; individual education plans are very important. Court case used to support teachers and students and make people aware of the human rights implications of education and their provision
Durham District	3	Heather Mundy, Superintendent for special education Feb. 7, 2018	Sept 2017	yes	Through Osgoode Hall, 1 law firm, 2 different sessions	Professional development with in-house lawyer, discussion at senior team level, currently working through special	New education plan based on equity started 2 years ago, first year of implementation

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						education review	
Hamilton Wentworth Catholic	3	Toni Kovach, Superintendent of Special Education Feb. 1, 2018	No - been in the position for 2.5 years	Yes - she was briefed on the case at a career development conference	Seemed aware of decision, she stated that she is surprised that the school board did not institute measures earlier	Stated that many legal cases change the implementation of policies, not the policies themselves	Legal cases have been helpful to improve communication that occurs between all parties who want support for their child
James Bay Lowlands	3	Tom Steele, Supervisory Officer and Lieutenant, interview Jan. 18, 2018	No - been on the board for 20 years.	No	No. Stated that he participates in discussion with the special education supervisory committee and updates the special education plan. He expects	No	He is happy that we are getting closer to equitable solutions for all students.

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					that the plan will reflect changes to legislation		
North-west		Shelly Durance, Special Education Coordinator, Nov. 24, 2017	10 years	Not sure	Have participated in Webinar on Spec Ed Law via Osgoode and decision may have been discussed there	Unaware of changes at her level but they may be occurring elsewhere	

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Ottawa Catholic	1	Manon Seguin, Superintendent Special Education and Student Services, Dec. 7, 2017	8 years as superintendent; only specific to special education as of this year	Has not been briefed		Can't comment on this; changes are dictated by the Ministry of Education; Board is aligned with ministry policy, memorandums - any changes are dictated by those; likely that the case/decision has influenced the Ministry	Superintendents are aware of what happens in Ontario, and have a focus on decisions from tribunals; Boards are implementers - they give opinions but ultimately will do what is dictated/determined by the Ministry; Board does anything in their power to allow students with special needs to learn
Simcoe	1 (Questions were provided in advance)	Chris Samis, Superintendent of Special Education Dec. 1, 2017	4 years in position	Yes	Not formally briefed but aware through PD sessions offered through Board and/or law firms which support the Board	Supreme Court decisions are fewer than those from Human Rights tribunals and so they help determine the role of Spec. Ed. in general, but have no real impact on day-to-day decisions	Education lawyers are needed to act as mediators to find solutions by acting as mediators; can't view as win-or-lose situation since students (and families) will be part of the school community for many years; future relationships need to be maintained positively

**Table 2: School Boards that Declined to Participate in the survey**

<b>School Board</b>	<b>Number of Contact Attempts</b>	<b>Contacted Person, title</b>
Avon Maitland	3	Kim Black
Franco Nord	4	Monique Menard
Providence	3	Edith St. Arnaud
Catho Est Ontarien	3	Lyne Racine
Niagara	3	John Dickson, Superintendent for special education
Halton Catholic	n/a	
Halton District	n/a	
Huron Superior	3	Joe Chielli
Kawartha Pine Ridge	3	Georgette Davis
Near North	3	Roslyn Bowness
Peterborough Victoria	2	Anne Marie Duncan, Superintendent of Learning/Special Education

**Table 3: School Boards from Which No Response was ever Received**

<b>School board</b>	<b>Number of Contact Attempts</b>	<b>Contacted Person, title</b>
Algoma	4	Fred Valley

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Algonquin	4	Jodi DiRocco
Bluewater	4	Wendy Kolohon
Bruce-Grey	4	
Catho Grandes Rivieres	2	Colinda Morin Secord
North East	4	Steve Pladzyk, Director of Special Education
Dufferin Peel	4	Tilia Cruz, Superintendent, Special Education
Grand Erie	4	
Greater Essex	n/a	
Hamilton-Wentworth district	3	Janice Tomlinson
Hastings Prince Edward	3	Colleen DeMille
Huron Perth	3	Gary O'Donnell
Keewatin Patricia	3	Joan Kantola
Kenora Catholic	3	Paul White, Superintendent of Instructional Services
Lakehead	3	Colleen Kappel
Lambton	2	Angie Barasse, Superintendent of Education
Limestone	3	Allison McDonald
London Catholic	3	Kelly Holbrough
Moose Factory	3	General superintendent voicemail

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Moosonee District	2	General superintendent voicemail
Niagara Catholic	2	Pat Rocca, Superintendent of Education
Nippissing Parry	2	Paula Mann, Superintendent of Education
Northeastern	2	Jackie Robinson, Superintendent of Education
Ottawa Carleton	2	Olga Grigoriev Superintendent of Learning support Services
Peel	2	Wendy Dowlong, Associate Director of School Support Services
Penetanguishine	2	June Merkley, Supervisory Officer
Rainbow	2	Michelle Smethurst, Admin. assistant to Superintendents
Rainy River	2	Andrew Harris, Superintendent of Education
Renfrew Catholic	2	Linda Arsenault, Admin. assistant to Superintendent
Renfrew District	3	Jacqueline Poirier, Superintendent of Education
Simcoe Muskoka	2	Lonnie Bolton, Superintendent of Education
St. Clair	3	Scott Johnson, Superintendent of Education
Sudbury	4	Rossella Bagnato, Superintendent of School Effectiveness
Superior North	4	Kerry Desjardins, Superintendent of Education
Superior Greenstone	4	Nicole Morden-Comier, Superintendent of Education School Effectiveness & Early Years

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Thames Valley	4	Sheila Builder, Superintendent of Special Ed
Thunder Bay catholic	4	Allison Sargent, Superintendent of Education
Toronto Catholic - Area 1	4	Flora, Cifelli, Superintendent of Education
Toronto Catholic - Area 2	4	Douglan Yack, Superintendent of Education
Toronto Catholic - Area 3	4	Michael Caccamo, Superintendent of Education
Toronto Catholic - Area 4	4	Peter Aguiar, Superintendent of Education
Toronto Catholic - Area 5	4	John Wujek, Superintendent of Education
Toronto Catholic - Area 6	4	John Shanahan-, Superintendent of Education
Toronto Catholic - Area 7	4	Kevin Malcom, Superintendent of Education
Toronto Catholic - Area 8	4	Shawna Campbel, Superintendent of Education
Toronto	3	Andrew Gold, Superintendent
Toronto	3	Andrew Howard, Superintendent
Toronto	3	Angela Nardi-Addesa, Superintendent
Toronto	3	Anne Seymour, Superintendent
Toronto	3	Audley Salmont, Superintendent
Toronto	3	Curtis Ennis, Superintendent
Toronto	3	Elizabeth Addo, Superintendent



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Toronto	3	Ian Allison, Superintendent
Toronto	3	Jacqueline Spence, Superintendent
Toronto	3	Jane Phillips-Long, Superintendent
Toronto	3	John Chasty, Superintendent
Toronto	3	Karen Falconer, Superintendent
Toronto	3	Kathleen Garner, Superintendent
Toronto	3	Kerry-Lynn Stadnyk, Superintendent
Toronto	3	Leila Girdhar-Hill, Superintendent
Trillium Lakelands	4	Katherine MacIver, Superintendent
Upper Canada	4	Valerie Allen, Superintendent of Schools
Upper Canada	4	Jodi Barrett, Superintendent of Schools
Upper Canada	4	David Coombs, Superintendent of Schools
Upper Canada	4	Ron Ferguson, Superintendent of Schools
Upper Canada	4	Tim Mills, Superintendent of Schools
Upper Grand	4	Cheryl Van Ooteghem, Superintendent of Education
Waterloo Catholic	4	Gerry Clifford, Superintendent of Learning
Waterloo Catholic	4	Judy Merkel, Superintendent of Learning
Waterloo Catholic	4	John Klein, Superintendent of Learning

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Waterloo Catholic	4	Richard Olson, Superintendent of Learning
Waterloo Catholic	4	Laura Shoemaker, Superintendent of Learning
Waterloo Region	4	Lila Reid, Coordinating Superintendent
Waterloo Region	4	Scott Lomax, Coordinating Superintendent
Wellington	4	Brian Capovilla, Superintendent of Education
Windsor Essex	4	Emelda Byrne, Executive Superintendent of Education
York Catholic	4	Diane Murgaski, Director of Education
York Region (Central)	4	Becky Green, Superintendent
York Region (Central)	4	Michael Cohen, Superintendent
York Region (Central)	4	Rita Russo, Superintendent
York Region (East)	4	Camile Logan, Superintendent
York Region (East)	4	Daniel Wu, Superintendent
York Region (East)	4	Peter Tse, Superintendent
York Region (North)	4	Dianne Hawkins, Superintendent
York Region (North)	4	Erik Khilji, Superintendent
York Region (North)	4	Shawn Bredin, Superintendent
York Region (West)	4	Paul Valle, Superintendent
York Region (West)	4	Rashmi Swarup, Superintendent

York Region (West)	4	Tod Dugney, Superintendent
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**Appendix 5 – Comparing Appeal Procedures for Suspensions, Expulsions, and Exclusions**

	<b>Suspension</b>	<b>Expulsion</b>	<b>Exclusion</b>
<b>Appeal Procedures</b>	<ul style="list-style-type: none"> <li>• Written notice of request for appeal must be sent to a Supervisory Officer within 10 school days of the start of the suspension</li> <li>• Appeal must be heard within 15 school days of the board receiving the notice of appeal</li> </ul>	<ul style="list-style-type: none"> <li>• Written notice of request for appeal must be sent to the Tribunal within 30 school days after the expulsion notice is received</li> </ul>	<ul style="list-style-type: none"> <li>• Written notice of request for appeal must be sent to the Board within 10 school days of the commencement of the exclusion</li> <li>• Must specify the nature of the disagreement with the decision to exclude</li> <li>• appeal must be heard within 15 school days of receiving the notice of appeal</li> </ul>

**ONTARIO REGULATION 472/07**

Education ACT 265.(1) (m)

Ontario Ministry of Education Policy and Program Memorandum 145 (page 4)

## Appendix 6

### **A Legal Analysis of the Intersection of the Education Act’s “Exclusion Clause” and the Right to Equality under the *Canadian Charter of Rights and Freedoms***

As previously discussed at section 5.1 of this report, the power to exclude students from the school under paragraph 265 (1)(m) of the *Education Act*<sup>1</sup> is constitutionally suspect when used to exclude special needs students, particularly where a lack of educational assistant support is the root cause of the issue. The following analysis provides a more in-depth explanation of the legal basis for this conclusion. First, we explain the applicable legal provisions in the *Education Act* and *Trespass to Property Act*<sup>2</sup> that provide for the power to exclude students and discuss their practical effect on special needs students. Second, we provide an overview of principles of equality law. Third, we apply these principles to the case at hand, and discuss avenues for improvement.

#### **1. The “Exclusion Clause” and its Effects on Special Needs Children**

Section 265 of the *Education Act* lays out the duties of school principals in a variety of matters, from discipline, to textbooks and reporting duties. Paragraph 265 (1)(m) provides for the power to exclude a person from the school premises to protect the physical and mental well-being of students:

Duties of principal

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

[...]

access to school or class

(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;

[...]

This power is subject to an appeal to the board. Unlike suspension powers, this power to exclude has no time limit<sup>3</sup>. A person who refuses to leave the premises when directed to do so by the principal may be subject to a fine of up to \$10 000 pursuant to the *Trespass to Property Act*<sup>4</sup>.

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<sup>1</sup> RSO 1990, c E.2 [*Education Act*].

<sup>2</sup> RSO 1990, T.21 [*Trespass to Property Act*].

<sup>3</sup> A suspension cannot exceed 20 days: see subsection 306(4) of the *Education Act*.

<sup>4</sup> Pursuant to subsection 1(2) of the *Trespass to Property Act*, school boards have all the rights and duties of an “occupier” within the meaning of section 1 of the *Trespass to Property Act*. A person who enters on premises without the express consent of the occupier or who does not leave when directed to do so by the occupier is liable to conviction of an offence and a fine of up to \$10 000: subsection 2(1) of the *Trespass to Property Act*.

The exclusion power can be used in a broad range of contexts to protect children from dangerous individuals. However, concerns have been expressed recently with the emerging use of the exclusion power to exclude special needs students from school, sometimes indefinitely, for outbursts that are associated with their disability<sup>5</sup>.

Some principals justify its use by stating that the exclusion is temporary and intended to give time to put in place adequate support for the child, so that future outbursts can be prevented. However, the fact that there is no time limit putting pressure on the school to act has caused concern to parents. Many consider that the exclusion power is being used inappropriately to avoid dealing with a child with a disability, instead of providing the appropriate educational assistant support in classrooms. While the child is excluded indefinitely from school, they are deprived of sorely needed educational services through no fault of their own.

## **2. The Right to Equality under the *Canadian Charter of Rights and Freedoms*<sup>6</sup>**

Section 15 of the *Canadian Charter of Rights and Freedoms*<sup>7</sup> (the *Charter*) guarantees the right to equality, protecting against discrimination based on a variety of personal characteristics, such as race, gender and disability. It applies to government action, including legislation itself and administrative decisions taken by government actors pursuant to legislation. As such, provisions of the *Education Act* that violate the right to equality can be subject to a challenge under the *Charter*, as well as school board decisions made in the exercise of those statutory powers<sup>8</sup>.

Under the *Charter*, the claimant must show that the law in question creates a distinction between them and others based on their disability, and that this distinction is discriminatory because it perpetuates prejudice and stereotyping<sup>9</sup>. Relevant factors include the historic disadvantage of individuals that share the claimant's characteristics, whether the legislative provisions in question correspond to the real needs and circumstances of the claimant, and whether there is an ameliorative purpose to the legislation<sup>10</sup>. The government may then seek to justify the discriminatory provisions based on a pressing and substantial objective, provided that the

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<sup>5</sup> Michael Robinson, « School exclusions can give special-needs students the boot – indefinitely” (15 Feb 2016) *The Toronto Star*, online: <https://www.thestar.com/yourtoronto/education/2016/02/15/school-exclusions-can-give-special-needs-students-the-boot-indefinitely.html>.

<sup>6</sup> Although this analysis focuses on violations of the constitutional right to equality, it should be noted that similar arguments of discrimination based on disability in the use of exclusion powers could be made in the context of a human rights complaint under the Ontario *Human Rights Code*, RSO 1990, H.19, which also applies to school boards.

<sup>7</sup> *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

<sup>8</sup> *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256; *Chamberlain v Surrey School District No 36*, 2002 SCC 86

<sup>9</sup> *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 30, [2011] 1 SCR 396.

<sup>10</sup> *Law v Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 SCR 497; *Withler*, at para 38.

measures taken a proportional to that objective<sup>11</sup>. Where a decision (as opposed to a law) is at issue, the decision must strike a proportionate balance between the impact on the right to equality and the objectives of the statute<sup>12</sup>.

### **3.Application of Equality Rights to the Exclusion Clause and its use with regard to Special Needs Students**

Given that the exclusion clause applies in a broad range of contexts where its use may, in fact, be appropriate, the following analysis does not focus on a potential challenge to the *Education Act* itself. Rather, it focuses on the potential constitutional issues that arise when the principal decides to use the exclusion clause in relation to a special needs student. For that reason, we apply the framework under the *Charter* applicable to administrative decisions.

Applying the test for a Charter infringement, we see that the use of the exclusion clause on special needs students creates a distinction based on disability. While exclusions in other contexts may be useful to address culpable behavior on a temporary basis, the impact of using the exclusion clause on special needs students is disproportionate and potentially indefinite. Because the root cause of the problem is lack of educational support, not culpable behavior, the student risks being excluded for long periods of time through no fault of their own. During this time, they are deprived of educational services. The ordinary trespasser does not face these impacts, and other students that pose a security risk are subject to a highly regulated suspension process with defined time lines that better protects their interests<sup>13</sup>.

The distinction is likely discriminatory, because it perpetuates typical stereotypes and disadvantage faced by persons with disabilities. There can be no doubt that individuals with learning disabilities and other special needs are a historically disadvantaged group, who have been marginalized and often given inadequate tools to succeed. Using the exclusion power in contexts where the child's behavior is linked to lack of adequate educational support staff does not correspond to their actual needs and circumstances of students, especially in the long term. Rather, it enables the school board to not provide appropriate educational services to them. The lack of a time limit creates risks of abuse and puts little incentive on school boards to act quickly to ensure that special needs students have the support they need upfront.

As for justification, the objectives of ensuring the safety of all students may justify the use of the exclusion clause in the very short term to minimize risks while adequate support is put in place. However, the indefinite or long-term use of the exclusion clause is not proportionate to this objective. Children with special needs have a right to meaningful access to an equivalent

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<sup>11</sup> *R v Oakes*, [1986] 1 SCR 103, 1986 CanLII 46 (SCC); see debate about the proper stage of the analysis at which to consider the government's justification in *Quebec (Attorney General) v A*, [2013] 1 SCR 61, 2013 SCC 5 (CanLII).

<sup>12</sup> *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395.

<sup>13</sup> Section 306 of the *Education Act*.

education<sup>14</sup>, and their right to equality must be limited as little as possible. As such, a principal's decision to exclude a special needs child from school can be constitutionally challenged if it drags on for too long and if the school does not take adequate measures to ensure that proper support is in place in a timely manner.

These issues can be addressed in a variety of ways. School boards can develop policies that limit more clearly the circumstances in which the exclusion power should be used by principals, to ensure that the power is exercised in a manner that is respectful of students' constitutional rights. They can also monitor the frequency of its use and the circumstances in which it is used in their schools, to better inform those policies and intervene. Amendments to the *Education Act* may also be considered to incorporate appropriate time limits and oversight directly in the legislation, that will reduce the risk of infringement of a student's constitutional rights.

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<sup>14</sup> *Moore v British Columbia (Education)*, 2012 SCC 61, [2012] 3 SCR 360.

## **Appendix 7 – Report Distribution List**

### **2016 Report**

Ontario Premier, Kathleen Wynne  
Education Minister Mitzie Hunter  
Ombudsman Andre Marin  
Ontario Secondary School Teachers Federation (OSSTF)  
Elementary Teachers of Ontario (ETFO)  
Associations des enseignantes et des enseignants franco-ontarien (AEFO)  
Ontario English Catholic Teachers Association (OECTA)  
Ontario Institute for Education Leadership  
Associations des directions et directions adjointes des ecoles franco-ontariennes (ADFO)  
Association des gestionnaires de l'éducation franco-ontarienne  
Catholic Principals' Council of Ontario  
Council of Ontario Directors of Education  
Members of Provincial Parliament  
Ontario Catholic Supervisory Officers Association  
Ontario Principals Council  
Ontario Public Supervisory Officials Association  
Association for Bright Children of Ontario  
Association francophone de parents d'enfants dyslexique ou ayant tout autre trouble d'apprentissage  
Autism Ontario  
Learning Disabilities Association of Ontario  
Canadian Association for Community Living  
VOICE for Hearing Impaired Children  
Ontario Association for Families of Children with Communication Disorders  
Parents for Children's Mental Health  
The Canadian Hearing Society  
Spina Bifida and Hydrocephalus Association of Ontario  
Tourette Syndrome Foundation of Canada  
Silent Voice Canada  
Ontario Association for the Deaf  
Ottawa- Carlton Association for Persons with Developmental Disabilities  
Citizen Advocacy  
Reach Canada (Ottawa)  
People for Education  
Canadian Parents for French (Ontario)  
Ontario Association of Parents in Catholic Education  
Ontario Federation of Home and School Associations  
Office of the Provincial Advocate for Children and Youth  
Parents Advocacy in the School



## **2017 Report**

Ombudsman of Ontario  
Privacy Commissioner of Ontario  
Auditor General of Ontario  
Ontario Premier, Kathleen Wynne\  
Education Minister Mitzie Hunter  
Ombudsman Andre Marin  
Ontario Secondary School Teachers Federation (OSSTF)  
Elementary Teachers of Ontario (ETFO)  
Associations des enseignantes et des enseignants franco-ontarien (AEFO)  
Ontario English Catholic Teachers Association (OECTA)  
Ontario Institute for Education Leadership  
Associations des directions et directions adjointes des ecoles franco-ontariennes (ADFO)  
Association des gestionnaires de l'education franco-ontarienne  
Catholic Principals' Council of Ontario  
Council of Ontario Directors of Education  
Members of Provincial Parliament  
Ontario Catholic Supervisory Officers Association  
Ontario Principals Council  
Ontario Public Supervisory Officials Association  
Association for Bright Children of Ontario  
Association francophone de parents d'enfants dyslexique ou ayant tout autre trouble d'apprentissage  
Autism Ontario  
Learning Disabilities Association of Ontario  
Canadian Association for Community Living  
VOICE for Hearing Impaired Children  
Ontario Association for Families of Children with Communication Disorders  
Parents for Children's Mental Health  
The Canadian Hearing Society  
Spina Bifida and Hydrocephalus Association of Ontario  
Tourette Syndrome Foundation of Canada  
Silent Voice Canada  
Ontario Association for the Deaf  
Ottawa- Carlton Association for Persons with Developmental Disabilities  
Citizen Advocacy  
Reach Canada (Ottawa)  
People for Education  
Canadian Parents for French (Ontario)  
Ontario Association of Parents in Catholic Education  
Ontario Federation of Home and School Associations  
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[3] Ontario Human Rights Commission, “Factum of the Intervenors of the Ontario Human Rights Commission, the Saskatchewan Human Rights Commission and the Alberta Human Rights Commission” at paragraph 18.

[4] Ontario Human Rights Commission, “Putting People and their Rights at the Centre: Building Human Rights Accountability (Ontario Human Rights Commission Strategic Plan 2017-2022)” at page 11.

[5] RSO 1990, c T.21 [Trespass to Property Act], s. 2, s 1(2).

[6] Human Rights Legal Support Centre, “Time Limits” online: <http://www.hrlsc.on.ca/en/publications-resources/information-sheets-guides/time-limits>.

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[9] *Ibid*

[10] *Ibid*

[11] Social Justice Tribunal Ontario, “HRTO Activity Report: Decisions Issued”

[12] *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631.

[13] Canadian Centre for Policy Alternative Disability and Inclusion in Education (pages 22-24)

[14] The Toronto Star – “Tens of millions in grants targeted for needy students aren’t reaching them”

[15] People for Education *Special Education 2017*

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[17] [ccdp-chrc.ca/eng/content/left-out-challenges-faced-persons-disabilities-canadas-schools.C32](http://ccdp-chrc.ca/eng/content/left-out-challenges-faced-persons-disabilities-canadas-schools.C32).

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Ottawa Community Immigrant Services Community Organization, Refugee services

Gandalf Group - Alex Swann (Omnibus Bill phone survey commissioned by the Ministry of Finance)