



Special Education Complaint and Appeal Processes in Ontario
in a Social Justice Context

**Identifying inefficiencies, costs and effective resolution
in the students' best interest**

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1. Abstract

This report is a follow up study to 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*.

Since results of that report indicated a high level of frustration among parents in dealing with the resolution of their concerns, a further study was initiated to examine current processes in order to understand underlying reasons for dissatisfaction, and propose more effective resolution mechanisms for Special Education matters.

The findings of this report are based on the following data:

- (i) survey data about the experiences of parents in addressing Special Education concerns from the 2016 report
- (ii) client experience statements from Horizon Educational Consulting records
- (iii) a review of internal and external complaint resolution processes for Special Education
- (iv) a review of the case law related to Special Education in legal forums
- (v) taxpayer resources spent by school boards on appeal and litigation actions with parents related to Special Education matters,

and a literature review on Special Education law.

Internal review processes included the school level Identification Placement Review Committee (IPRC) process, the school board level IPRC process (system IPRC), the school board Special Education Appeal Board (SEAB) process and the role of trustees.

The review of external complaint processes included the Ontario College of Teachers, the Ontario Ministry of Education, Ombudsman Ontario, the Ontario Special Education Tribunal (OSET), the Human Rights Tribunal of Ontario (HRTO) and the court system.

The results of the study indicated that processes currently in place do not support timely resolution of Special Education concerns in the students' best interest in terms of efficiency (communication and delay), credibility (impartiality), oversight and enforcement. School boards are education service providers but many do not apply a high standard of responsiveness, transparency and accountability as a public service.

New resolution mechanisms are recommended in this report to reflect the priorities of the Ministry of Education for high standards and exemplary practices in public education and increased collaboration with parents, to replace adversarial, ineffective and costly current processes regarding Special Education service delivery in Ontario's public schools.

2. Background

Further exploration of the findings from the 2016 report led to a continuation of the project to assess the efficiency, relevancy, credibility and appropriateness of the existing complaints resolution processes. Secondary factors assessed were time delays incurred by such processes and oversight and enforcement of each process, including internal school board processes and external public processes.

Appendix 1 highlights the limitations of the various internal and external processes.

3. Internal School Board Processes for Special Education

School IPRC meetings

These meetings are scheduled at the school attended by the student and must include three staff members, one of whom must be a principal or vice-principal, in addition to a parent or both parents, who may also bring a support person with them to the meeting. A meeting must be held within 15 days of a parent request as per regulation in the *Education Act*.

Often parents are dissuaded from this process and told support is available without the IPRC process (client experience statements from Horizon records). However, it is the only means to formally recognize the needs of the student in a legal process set out by the *Education Act*.

School Board IPRC meetings

These meetings are often requested by parents to obtain access to a specialized program class or because of dissatisfaction with a school level IPRC process, lack of knowledge or expertise or due diligence by school personnel, a dispute related to the implementation of the accommodations of the Individual Education Plan (IEP) and errors or omissions in an initial IPRC process (client experience statements from Horizon records).

School Board Special Education Appeal Process

If a parent of a child who requires Special Education through the school system is unsatisfied with the results of both the school IPRC as well as the School Board IPRC, they are able to file a school board Special Education Appeal. This is the only mechanism that is internally available for dissatisfied parents before external mechanisms are explored.

However, the intent of this internal appeal process is to address primarily disagreement with the identification and placement of a student. It is not intended as a recourse for complaints from parents about the implementation of the accommodations of the IEP, the quality or frequency of Special Educations services, or the personnel assisting the student.

While an appeal process is available internally to parents who disapprove of a decision that has been made regarding their child, it is not necessarily beneficial as there are some appropriateness and credibility issues with such a remedy.

A third party does not always conduct the Special Education Appeal. Therefore, there exists the possibility of bias in favour of the school board as the education service provider, if persons conducting the appeal are employed by the school board and are being asked by parents to overturn a decision that has been implemented by their colleagues.

This situation creates bias and, ultimately, conflict of interest with loss of credibility in a process that should adjudicate impartially. Furthermore, if parents of a student are also employees of the school board there is fear of reprisal from the employer. The non-education sector employed parent must take the lead in the resolution process, which is often an added burden and not an option to the single parent school board employee.

The internal appeal process also has a very limited mandate under the *Education Act* and is not currently able to address the majority of issues regarding the dissatisfaction a parent encounters in the implementation of Special Education services at their child's school.

Additionally, there are delays in the internal IPRC appeal process. Ultimately, the students suffer from this prolonged delay if they are being denied Special Education services or are being provided with inappropriate interventions or insufficient support to which they are entitled.

The internal school board appeal process ultimately negates the best interests of the student and gives rise to potential conflicts of interest for personnel and potential reprisal situations for parents involved. There is no oversight or enforcement of internal school board appeal processes, leaving the parents vulnerable to school board discretion as to the level of engagement in this process.

The Role of Elected School Board Trustees

Although parents are often directed to contact their area elected school board trustee with any concerns, a review of the legislated role of the school board trustee indicates that it is not in their mandate to resolve individual constituent complaints and their role is limited to facilitating communication and interaction with school board personnel.

Responding to the concerns of parents and other community members

A trustee is often the first point of contact for parents and community members who have questions and/or concerns about their local school. While individual trustees do not have the authority to direct board staff to undertake any particular action they can help in answering questions, finding solutions or facilitating interaction with the school and board administration.

<http://candidates.ontarioschooltrustees.org/en/school-boards-and-trustees.html>

School board trustees are responsible not only for the operational and pedagogical outcomes of Ontario's schools but must also ensure that these expected outcomes are effectively communicated to parents and the community. Further, where academic expectations are not met, school boards must explain to their constituents, or local board supporters, what steps are being taken to improve achievement outcomes. (pp. 39 -40)

http://cge.ontarioschooltrustees.org/files/en_ch_4.pdf

3. External Processes for resolving Special Education matters

One of the goals of the project was to investigate the efficiency, relevancy, credibility and appropriateness of the processes available, as well as the time delays that are incurred by parents and individual students when seeking a resolution to issues that arise with Special Education services. Oversight and enforcement were also assessed regarding these external processes.

Review of external complaint processes included the Ontario College of Teachers, the Ontario Ministry of Education, Ombudsman Ontario, the Ontario Special Education Tribunal (OSET), the Human Rights Tribunal of Ontario (HRTO) and the court system.

Ontario College of Teachers

The College's mandate is to protect the public interest and complaints about Special Education matters may only be addressed if they relate to the words, actions or inactions of a particular teacher or principal in the course of their professional duties. A valid complaint needs to be an example of an infraction in professional ethics or standards. Quality of instruction, appropriate IEP accommodations, adequate support, qualifications, attitude, inter-personal relationships with students or parents are issues redirected to the school board employer.

Ontario Ministry of Education

The ministry sets out operational guidelines to school boards for Special Education processes, policies and programs based upon criteria found in the *Education Act*. **There is no complaint mechanism available to parents either in legislation or in the operational structure of the ministry. Complaints from parents have been redirected to school boards as a human resources matter or to the Ombudsman Ontario office for investigation** (client experience statements from Horizon records). Therefore, oversight of the Ministry of Education by the Ombudsman's office regarding Special Education services is moot.

Ombudsman Ontario

An additional step parents may take if they are not satisfied with the decision of the school with regards to the provision of Special Education is to make a complaint to Ombudsman Ontario. Complaints made to the Ombudsman are external to the school board itself, resulting in the elimination of any inherent bias. The Ombudsman is an independent officer of the legislature who acts as a watchdog by investigating complaints made by the public against public sector bodies.¹ School boards are one such body. Complaints made by parents will typically receive a response within two weeks of the filing of the complaint. Although the Ombudsman has jurisdiction over school boards, it also oversees the provincial government and around 1,000 other public sector bodies.²

This broad scope of jurisdiction may result in investigations that take months to complete and to ultimately provide resolution. Once again this creates the problem of having students who may be in need of Special Education being forced to wait until a resolution is reached. The duration of this resolution process may leave a student without required Special Education services and resources for months, negating the best interest of the student.

A hindrance to using the Ombudsman as a means of complaint resolution is that parents are unaware the avenue exists. Of survey respondents in 2016, over 70% were unaware that they were able to make a complaint to the Ombudsman's office.³

An additional obstacle to using the Ombudsman when parents are not satisfied is that the Ombudsman has no enforcement powers. The Ombudsman can exert pressure on school boards to accept findings and recommendations of large scale investigations, but any intervention from the Ombudsman's office for a complaint from a parent is implemented at the discretion of the school board.

Social Justice Tribunal Processes

The time delay that is incurred through the traditional litigation framework is less than ideal, as it is the students in need of Special Education who suffer the most. Stemming from this finding, the project hoped to recommend effective and timely mechanisms to resolve issues in the public education sector, benefitting individual students and ultimately supporting the public interest.

A further investigation of case law from two tribunals was undertaken, including cases researched from 2016 that had been heard before the Ontario Special Education Tribunal (OSET) as well as additional research into cases heard at the Human Rights Tribunal of Ontario (HRTO) over the last 10 years.

Ontario Special Education Tribunal

The Ontario Special Education Tribunal (OSET) is an appeal mechanism available to parents or guardians of children with Special Education needs who disagree with a school board's decision regarding their child's exceptionalities or placement.⁴

OSET is independent from both school boards and the Ministry of Education. This appeal mechanism is available to parents only when their complaint has been considered by the school board's Identification and Placement Review Committee (IPRC) and a Special Education Appeal Board (SEAB).⁵ The OSET hears cases through both mediations and hearings adjudicated by members with knowledge and experience in Special Education, mediation and adjudication.⁶ **However, no decisions have been rendered by the Tribunal between 2014 and 2017** (at the time of writing of this report).

The OSET can make orders about the Special Education identification and/or placement of a student from the five identifications categories and definitions of exceptionalities as listed in the *Standards for School Boards' Special Education Plans*, and the range of placement options in the school board's Special Education Plan.⁷

OSET decisions may be filed with the Ontario Superior Court of Justice in order to be enforceable by the court.

In reviewing school boards' decisions, the OSET "**will consider** (*our emphasis*) the student's needs and the programs and services available."

The OSET does not have the power to order a board to provide medical or therapeutic services as Intensive Behaviour Intervention (IBI) for a student.⁸ **The scope of the OSET is narrow, focusing on identification and placement, and not service delivery, quality or frequency to meet the IEP accommodations or professional recommendations.**

The relevant excerpt from the 2016 report reads (pages 6-7):

Reviewing the last ten years of jurisprudence from the Ontario Special Education Tribunal (ONSET), as well as the last five years of jurisprudence from the Human Rights Tribunal of Ontario (HRTO) allowed us to identify key recurring access issues:

- *The inability of parents to build open, responsive, and reciprocal means of communication between parents and schools;*
- *The inability of special needs students to access adequate programming and services;*
- *Lack of implementation of IEP or psychologist's recommendations;*
- *Stigmatization of learning disabilities, special needs or psychological disabilities;*
and
- *Lengthy timelines for the implementation of processes and accommodations.*

It is relevant to note that parents facing access issues have not regularly turned to OSET in recent years:

- *of only 31 OSET decisions published between 2006 and 2016, none were published between 2013-2016,*
- *only between one and five decisions were published annually between 2006 and 2012.*
- *The only exception to this pattern occurred in the year 2006, in the course of which 12 decisions were published. This is to be contrasted with an approximate 95 OSET decisions published in the last 10 years with the tag “Special Education”.⁹*

This trend may indicate a preference of parents to bring their cases to the Human Rights Tribunal of Ontario as human rights issues rather than to the OSET.

Qualitative data obtained through interviews indicates that parents feel that the OSET is not equipped to enforce its decisions on schools and school boards and that the process to take a case to the OSET is too lengthy. One parent said:

‘We did not go to the OSET because it was not clear when you read the laws that the tribunal has enough power to implement accommodations [...] they can only rule on a limited number of things, we did not have a guarantee that the school will implement the decision of the tribunal. [...] It is a lengthy process and requires a great amount of work, since Special Education laws are hard to understand.’

Another parent cited fatigue and lengthy timelines as being their reason for abandoning the OSET process:

‘I disagree with my son's placement in the mainstream class and have challenged the placement as per the IPRC through the Ministry's dispute resolution process. I made it through the Appeal Board stage before I became exhausted, and gave up.’

Finally, another parent indicated that their school board convinced them not to turn to the Tribunal:

‘They were dismissive, bullying, aggressive, and intimidating. They threatened that if we brought our grievance to the Special Education Tribunal it would cost lots of money and that the Board would send a lawyer.’

This research did not yield sufficient data to identify conclusively the factors motivating parents to choose one appeal mechanism over the other.

Human Rights Tribunal of Ontario

The Human Rights Tribunal of Ontario (HRTO) is an alternative legal forum for parents and guardians who are dissatisfied with the dispute resolution scheme under the *Education Act*.

The 2016 report identified and examined HRTO case law between 2010 and 2016. The investigation yielded 11 cases related to Special Education.

Appropriateness & Relevancy:

The *Education Act* and the Ontario *Human Rights Code* (“Code”) each provide a separate dispute resolution process for the complaints of students and their parents or guardians. Researchers have previously cited the HRTO decision in *Campbell v Toronto District School Board* as evidence that the *Education Act* and the Code share the common goal of ensuring that students with special needs receive accommodation.¹⁰

However, these statutory schemes are not identical. Parents and guardians must be aware that the HRTO does not address all aspects of Special Education.

In two decisions that follow *Campbell*, the HRTO explained the differences between the *Education Act* and the Code for the purpose of adjudicating Special Education disputes. In *Schafer v Toronto District School Board*, the HRTO clarified that the Tribunal’s role is neither to second guess the IPRC placement nor supervise a school’s implementation of an IEP; **rather, the role of the Tribunal is to determine whether the student experienced discrimination under the Code.**¹¹

The HRTO also clarified its role in adjudicating Special Education disputes in *D.S. v London District Catholic School Board*:

It is not necessary for me in this Decision to address [...] what the respondent and its employees might have done better. The sole issue for me is whether the respondent’s actions violated the *Code* by discriminating against D.S. because of his disabilities and by failing to provide him with proper accommodation for needs arising from his disabilities.¹²

Thus, the issues that are of concern to parents and students may not necessarily be appropriate for the HRTO because when parties pursue alternative legal forums outside the jurisdiction of the *Education Act*, the nature of the dispute can be transformed into a narrower set of issues that do not adequately reflect the most relevant concerns of students and parents. This research project identified many examples of this problem in the HRTO case law.

One issue found in many Special Education disputes involves the student’s level of comfort with proposed accommodations. In *Schafer*, the student applicant was reluctant to use assistive technology in the classroom for fear of being targeted and bullied by his peers.¹³ Likewise, in *DS*, teachers decided not to follow expert advice to place the student in a separate space for completing assignments, as this measure would effectively alienate the student from his peers.¹⁴

There are other access issues that have been identified in the HRTTO case law. One such issue is the inability of parents to build open, responsive, and functional lines of communication with teachers and school board agents.¹⁵

Often, this issue prompts a complaint to the Tribunal system without parents' knowledge of the quasi-judicial forum they find themselves in. They then have difficulty navigating this forum as either self-represented individuals or seeking legal counsel, which only adds to the frustration and personal cost to the parent (client experience statements from Horizon records).

Despite the prevalence of these types of issues, the threshold test for finding a violation is whether the school board failed to properly accommodate the student's disability; this is not synonymous with whether the school board agents could have implemented IPRC placement guidelines and IEP accommodations in a more effective manner.

Delay

Information provided to parents at the outset of a complaint to a Tribunal is that the process may last up to 18 months before resolution (client experience statements from Horizon records). This delay further aggravates parents' frustration as they must find immediate relief for their child or youth to alleviate the school situation and find current Special Education services.

Early intervention, recognized as beneficial to address Special Education needs at the time of a diagnosis, is not recognized as a need in the system when concerns or problems arise in a placement regarding accommodations or level of support.

Oversight and Enforcement

The HRTTO can exercise broad remedial powers if it finds that a violation has occurred. For applications filed by individuals, there are three general categories of remedies.¹⁶ First, the HRTTO can award monetary compensation for any loss incurred as a result of the infringement. Losses can include injury to dignity, mental health, and even logistics (e.g., transportation costs on account of switching school boards).¹⁷

Second, the HRTTO can also award non-monetary remedies. A common example in this context includes reversing a school board decision.¹⁸

Lastly, the HRTTO has the authority to issue an order that directs a party to take measures that the HRTTO believes will promote compliance with the Code. This option can include ordering a school board to implement a policy or plan that prevents the violation from recurring.¹⁹ However, monitoring and follow-up for enforcement are unusual.

While parents may perceive the HRTTO as a credible alternative because it is outside the ambit of the *Education Act*, the tribunal is not necessarily an efficient

alternative. In addition to the issues discussed in the previous section, quasi-judicial processes are generally arduous, lengthy and inefficient as a means of intervention.

Ontario Civil Courts and the Supreme Court of Canada

The review of Special Education cases in the Ontario court system and the influence on school board practice of the precedent-setting 2012 Supreme Court of Canada case regarding the provision of Special Education services - *Moore vs British Columbia (Education)* - was limited to time constraints and the publishing of this report. Further research is necessary to explore this area of case law and its impact on shifting operational practice in school boards.

6. Taxpayer resources spent by school boards on defending legal actions with parents related to Special Education matters

After researching the cases heard at the OSET and HRTTO tribunals, requests were made to each of the 72 school boards in Ontario as to the legal fees incurred over the past ten years relating to Special Education matters. The requests for legal fees were made under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*.²⁰

Freedom of Information Requests (FOI)

The school boards were contacted through the Freedom of Information and Protection of Privacy officer once this person was identified within each school board. If no specific officer was identified as a contact, the request was made to human resources with a request to relay the enquiry to the appropriate person within the school board.

Observations

It was noted that many initial telephone inquiries were met with a general lack of understanding of the request, a lack of knowledge of the corporate officer who deals with the request and the overall lack of familiarity with what a Freedom of Information (FOI) request entails, and the procedure to follow, since the initial contact person had to verify further with internal sources. The inquiry results indicated that such requests to school boards seem relatively rare.

Methodology

Initial requests were made by telephone but only three school boards responded, one with the requested information and two stating there were no cases. As most school boards requested that inquiries be made in writing, requests were then sent via email in November-December 2016. The deadline for responses was February 15, 2017. **(Appendix 2)**

Many school boards denied the email requests, citing section 17(1) under the Access Procedure part of the *MFIPPA* which requires the request to be on a standard provincial form, in addition to the payment of a prescribed fee.²¹ Additionally, school board responses indicated they were only required to keep records of such expenditures for a period of seven years.

Requests were then resent on the standard provincial form or school board form, as specified, along with the required \$5.00 fee. All requests were sent via regular mail to each school board by January 13, 2017. *MFIPPA* indicates requests must be responded to within 30 days.

Results of Freedom of Information Requests concerning Legal Fees related to Special Education Appeals or Litigation

Not all school boards complied with requests nor provided the information requested.

Of the 28 school boards which provided information (34%), the total costs associated with Special Education appeals processes and/or litigation (actual or estimated for ongoing cases) was \$1,162,637.10 (Appendix 3-Table 1).

The results from school boards who complied with the request, ranged from school boards having no fees associated with Special Education matters to other boards who incurred significant legal fees relating to Special Education.

Several boards cited third party arbitrator or mediator costs in order to help reach a settlement with the parent as part of the fees incurred.

School Boards Providing a Fee Estimate Prior to Complying with the FOI Request

Some school boards responding to the request chose to apply section 45 of the *MFIPPA*, which allows a school board to charge fees relating to the searching of records and retrieving information.²² (Appendix 3 –Table 2)

The fee quotes from these 10 school boards varied greatly, and it is unknown if this amount is an indicator of

- a) the total number of records that would need to be searched to find the information requested,
- b) an indicator that the school board had a large number of legal files related to Special Education,
- c) an obstacle presented to avoid complying with the FOI request to a member of the public.

Some school boards indicated costs were related to organizing the information according to the request, as it differed from the internal recording of their legal costs, or there were no unit costs associated with Special Education. A few school boards had in-house counsel which accounted for a different fee structure for the requested information.

Since the total of cost estimates received from these 10 school boards (\$6,780.39) exceeded the budget of this field research project, no further steps were taken to obtain records from these 10 school boards and the data remains incomplete.

However, these additional costs present a barrier to access information which should be public and readily available, as it is sourced from taxpayers.

School Boards Refusing to Comply with FOI Requests (Appendix 3- Table 3)

There were a total of 6 school boards which refused to comply with the Freedom of Information request. The boards cited specific reasons as listed in the table, the most surprising of which was solicitor-client privilege.

Since the FOI request specified fees only to the school board regarding Special Education matters, it could be separated from the legal advice to the school board. The amount of legal fees paid should have been provided, since only data on fees was requested:

- 1) The legal fees on a file by file basis paid by the school board related to Special Education matters,
- 2) The total number of such files,
- 3) The number of cases reached through settlement with the parties.

Case law to support that solicitor-client privilege was not properly applied and that fees should have been disclosed, is found in Appendix 4.

Similarly, compliance to the FOI request by 25 other school boards indicates that the request is not covered under solicitor-client privilege.

Additionally, some boards refused on the basis that they did not keep separate records relating to Special Education legal fees. The fact that these records are not kept separately does not mean that the school boards are not required to comply with the request. If there were extensive records the boards should have provided a fee estimate for searching the records, as some school boards chose to do, as shown in Table 2.

School Boards Requesting Additional Time to Comply with the Request

A number of school boards (7) also requested additional time for clarification of the parameters of the request in order to comply. These school boards are listed in (Appendix 3- Table 4).

However, as at April 30, 2017, no information was received from these school boards, well beyond 60 days after the request was made and double the time considered appropriate to receive information. This delay further contributes to incomplete results, partial data and non-compliance with the FOI request.

No Responses Received

There were 11 school boards from whom no response was ever received (Appendix 3-Table 5) despite each board receiving follow-up reminders of the request and the fee being cashed by some of the institutions. This lack of accountability and responsiveness requires further investigation as it is uncertain whether these boards are administratively negligent or were unwilling to comply with the FOI request.

7. Conclusion Based on FOI Request Results

Although the FOI request process was initiated to obtain information helpful to the project to capture the value for money investment by taxpayers in resolving Special Education matters, it proved to be of limited benefit as partial data was obtained from only 38% of school boards in Ontario.

This partial data revealed school board spending at approximately \$1,162,637.10 (actual costs and estimates).

Therefore a large gap in accessible information remains, as 62% of remaining school board costs related to Special Education could not be obtained and costs for complaints, appeals and litigation remains unknown and inaccessible to the public.

Significant gaps in transparency and accountability are evident. The additional fees costs requested by school boards, openness to releasing information, as well as information from any settlements between the school board and parents remain confidential, yet the costs are paid by the taxpayer.

In addition, invisible data for abandoned appeals and civil actions would also compound these costs to a further projected amount which remains unknown.

Parents who faced challenges but did not pursue appeals or civil actions are also left uncaptured by any data.

Further investigation of school board costs related to Special Education complaints, appeals and litigation is warranted.

8. Alternatives to Existing Complaint Resolution Processes

Upon reviewing the relevant cases that have been heard at the OSET and HRTO tribunals, in addition to the information provided by school boards through the *MFIPPA* requests, existing alternative resolution processes to help address inefficiency, relevancy, credibility and delay issues with Special Education matters include:

Third Party Appeal Process

The IPRC appeal process could change to one that is handled by a third party, independent of both the school board and parents.

The current process may leave parents uneasy, as the potential for bias toward the school board exists with the appeal being handled internally. Some school boards have indicated they use mediators in order to help facilitate discussions between the board and parents who are unsatisfied. This is indicative of a step in an objective resolution direction, however, mediators are still chosen and compensated through the school board, which may have the potential to affect impartiality.

An external appeal mechanism would help address any concerns of impartiality or inherent bias on behalf of the school board. If a third party were appointed externally to hear all appeal matters, and their tenure was not based on outcome or decisions made, it would reflect impartiality throughout the decision-making process.

Communication and lack of transparency were cited by parents as some of the concerns they had with accessing Special Education for their children.²³ A third party decision-maker could handle both of these issues. Parents would be able to make an appeal to the third party who would set the date and time for the appeal. This would prevent any communication difficulties between parents and school boards in attempting to schedule an internal appeal. Issues of transparency would also be better managed if a third party conducted the appeal process.

Parents also identified needing to spend a great deal of time and money as a barrier to securing access to adequate Special Education for their children.²⁴

The third party appeal process would potentially help alleviate these stresses for parents. If parents are able to appeal a decision to a third party, orchestrating the appeal may be streamlined and require less time and energy, making the process more efficient.

Additionally, if parents feel that the outcome of the appeal has been decided in a fair, impartial and transparent manner, it may prevent them from pursuing the matter further, bringing efficiencies in cost to both the school board and the parent.

Continued engagement in further complaint resolution processes and litigation results in significant financial burdens for parents who remain dissatisfied with the outcome of an internal appeal. Satisfaction with the outcome would also mean that school boards would not be required to defend themselves or their actions at a further point in time. This would alleviate the financial burden of continued litigation on both parents and school boards, benefiting the public interest and reducing taxpayer expenditures on litigation.

School Board Level Ombudsman

An alternative to the existing complaint resolution process would be a school board-level ombudsman. This approach has already been taken by some of the public sector bodies

that are currently overseen by Ombudsman Ontario, including many universities. This approach helps to address some of the same issues as a third party appeal process, including communication, transparency, and reduction in financial burdens.

Ombudsman Ontario is an external mechanism for filing a complaint, which helps deal with any issues of internal bias on behalf of the school board which makes it a better option for parents over internal appeal mechanisms.

However, the responsibility of Ombudsman Ontario to oversee the provincial government in addition to over 1,000 other public sector bodies results in a process that incurs delay for parents who file a complaint. **The appointment of an ombudsman specifically dealing with school boards would potentially solve delays. Furthermore, parents would be made aware of this ombudsman by school board personnel and they could file a timely complaint, unlike the provincial Ombudsman of whom many parents are unaware.**²⁵ (client experience statements from Horizon records)

If a school board ombudsman were appointed, there also needs to be a mechanism for monitoring and enforcement to oversee and enforce their decisions. The interventions of the Ontario Ombudsman with regard to school board complaints at this point in time are only interventions. There is no enforcement of recommendations even after full investigations are conducted by that office. An authority with power to implement and ensure their recommendations are adhered to are additional requirements to having an ombudsman.

The implementation of a school board ombudsman may also result in greater efficiency hearing complaints from parents. The complaint process could be simpler, less confusing and easier to navigate than processes with the HRTO or the OSET. This means that parents would be able to navigate the process without having to hire their own lawyer, reducing the financial burdens that are associated with existing complex complaint resolution processes. School boards would also likely require less legal support and could reduce their legal costs funded by taxpayers.

Mediation

A third alternative to the existing complaint resolution process would be to enhance the role of mediation in Ontario's Special Education scheme. The Ministry of Education should provide for mandatory mediation when a parent appeals a decision by the IPRC, which is the first stage of appeal. Alternatively, the Special Education Appeal Board (SEAB) should routinely offer mediation services once the first stage of appeal has been triggered.

Several boards cited third party arbitrators' or mediators' costs in order to help reach a settlement with the parent as part of the fees incurred. This is indicative of some school boards engaging proactively with parents in order to avoid adversarial litigation.

The Advantages of Mediation in Special Education Disputes

Research in education law has generally focused on the experiences of teachers and school boards as they encounter students with special needs. This emphasis has overlooked the material, psychological, and social impact on parents and families who must advocate for their students.²⁶ The findings of the 2016 report support the literature review on the challenges and barriers encountered by parents.

The 2016 project survey identified barriers and obstacles for students, parents and teacher-parents in accessing Special Education in Ontario. Some of the most common challenges that were flagged by parents included communication issues, lack of transparency, lack of resources, and lack of experience and empathy among school board staff for children with special needs.²⁷

Most parents who responded to the 2016 survey also felt that they had to initiate nearly all communications with school board staff.²⁸ A large majority (89.80%) of the parents found it challenging to speak with a classroom teacher about their child's needs.²⁹ One process that can alleviate these challenges and barriers in the event of a dispute is mediation.

Mediation can shift the dynamic so that school board agents and parents and guardians can become collaborators rather than adversaries.³⁰ This is particularly advantageous because parents can provide valuable information about students' needs. In practice, however, parental information generally takes a backseat to formalized assessments.³¹ While mediation may not always repair damaged relationships, it is generally effective in reducing communication barriers and equipping parties with the tools to resolve future conflict.³²

Mediation is also relatively cost-effective compared to appeals and litigation.

Enhancing the Role of Mediation in Ontario's Special Education Scheme

There is a two-stage appeal process under the *Education Act* for parents and guardians who disagree with school board decisions regarding the identification or placement of their student.³³ Although mediation is generally accessible under Ontario's Special Education scheme, it is only routinely offered at the final stage of appeal under the *Education Act*.³⁴

Mediation should play a proactive role at the initial stage of resolution with the unresolved concerns of a parent in Special Education matters.

Mandatory mediation is certainly not unprecedented in the Ontario legal system. Section 24.1 of the *Rules of Civil Procedure* requires litigants in the Ontario civil court system to undergo mediation "in specified actions, in order to reduce cost and delay in litigation and facilitate the early and fair resolution of disputes."³⁵ As discussed in the previous section, mediation is particularly well-suited for the Ontario Special Education scheme based on the challenges cited by parents and public resources spent on defending legal

actions. Moreover, enhancing the role for mediation would advance the Ontario Ministry of Education's policy on reducing conflict.

In 2007, the Ontario Ministry of Education issued a publication to encourage special educators to rely on alternative methods of dispute resolution to avoid litigation.³⁶ In *Shared Solutions: A Guide to Preventing and Resolving Conflicts Regarding Programs and Services for Students With Special Education Needs*, the Ministry of Education recommends techniques that are the distinctive features of mediation. For example, the ministry encourages active listening, use of a third-party facilitator, and exploring common ground to enhance communication between parents and school boards.³⁷

In sum, there are three major advantages to enhancing the role of mediation in Ontario's Special Education scheme. First, mediation can shift the dynamic of the dispute so that school board agents and parents and guardians are collaborators rather than adversaries. Second, mediation can significantly reduce the public resources devoted to defending legal actions. Finally, a greater role for mediation would advance the Ontario Ministry of Education's policy on reducing conflict.

9. Recommendations to the Minister of Education and the Government of Ontario

- 1. Repeal the legislated internal School Board Special Education Appeal Process and the Ontario Special Education Tribunal as ineffective and inefficient avenues for the resolution of parent concerns with Special Education programs and services.**
- 2. Create a public complaint process for parents that is easily understood and easy to use in order to adjudicate impartially in Special Education matters without the characteristics and practices of quasi-judicial forums.**
- 3. Create and implement a School Board Public Service Excellence Policy and Delivery Model for initial complaint resolution for parents to align with public service standards in customer-client relations.**
- 4. Create and implement a School Board Public Service Excellence Policy and Protocol for Transparent and Responsive Communication to reduce 'gate-keeping' in parent attempted communication with school board personnel and to promote documented communication.**
- 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. Implement a time-sensitive resolution framework, policy and procedures for dealing with Special Education programs and services when concerns or**

problems arise with a Special Education student to avoid delay and enhance early intervention in the best interests of the student. Within this framework, mediation, third party resolution, and a school board ombudsman should all play a role.

- 7. Initiate a full investigation and review of school board costs related to Special Education complaints, appeals and litigation with parents.**
- 8. 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.**

10. Conclusion

The 2017 study assessed the efficiency, relevancy, and appropriateness of the existing complaints resolution processes that are available to parents and guardians who are dissatisfied with the outcome or implementation of an IPRC decision or services related to Special Education. The credibility of each process and time delays experienced by parents were also examined.

Based on the results of this study, the existing complaints resolution processes are inadequate. There exists no process to resolve Special Education matters which fall outside of identification and placement or accommodation provisions, where the majority of dissatisfaction and dispute issues arise.

The internal school board IPRC Appeal Process presents challenges to parents and guardians as to impartiality. Third parties who conduct Special Education appeals may be employed by the school board and cause real or perceived conflict of interest and there exists the potential for reprisal if a parent is also an employee. The other weakness of the IPRC Appeal Process is delay.

While Ombudsman Ontario is a credible alternative that is independent of school boards, the broad scope of the Ombudsman's jurisdiction results in significant time delays for investigations. Moreover, parents and guardians typically do not have the knowledge to access Ombudsman Ontario.

Quasi-judicial processes such as tribunals are generally lengthy, arduous, costly and unable to address many aspects of a Special Education dispute. For these reasons, many parents find that the OSET is inefficient and not equipped to resolve their disputes because it only deals with identification and placement. While the HRTO can determine a human rights violation if it finds that a school board has failed to accommodate a student's disability, the role of the HRTO is neither to assess the appropriateness of an IPRC identification or placement nor to oversee and enforce a school's implementation of an IEP.

This report recommends alternatives to the existing complaint resolution processes such as an external appeal process in which a third party is chosen by both parties, a schoolboard-level ombudsman and mediation. The advantages of alternate mechanisms shift the dynamic of the dispute to collaborative problem-solving rather than adversarial approaches. Impartiality and timeliness are enhanced at a reduced cost to taxpayers. All of these alternatives promote best practices in the students' best interest and benefit the public interest, both goals of the Ontario Ministry of Education.

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References

Brenda Bowlby, Catherine Peters, & Martha Mackinnon, *An Educator's Guide to Special Education Law*, 2nd ed (Aurora: Canada Law Book, 2010)

Carrie Griffin Basas, "Care Advocacy Fatigue: Self-Care, Protest, and Educational Equity" (2015) 32 Windsor YB Access to Just

DS v London District Catholic School Board, 2012 HRTO 786

Horizon Educational Consulting, Client experience statements (statements anonymized and generalized to maintain client confidentiality)

Monika Ferenczy and Jasmine van Schouwen, "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", *Horizon Educational Consulting*

Moore vs. British Columbia (Education), 2012 Supreme Court of Canada
<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12680/index.do>

Ontario, Ministry of Education, *Shared Solutions: A Guide to Preventing and Resolving Conflicts Regarding Programs and Services for Students with Special Needs* (Queen's Printer for Ontario, 2007)

<http://candidates.ontarioschooltrustees.org/en/school-boards-and-trustees.html>

Schafer v Toronto District School Board, 2010 HRTO 403

Appendix 1 Special Education process and resolution mechanism process	efficiency	relevancy	appropriateness	credibility	delay	oversight	enforcement
School IPRC	YES -Must be held within 15 days of a parent request	YES - Only legal mechanism to recognize special needs for a student in the education system	YES - but school personnel tend to downplay the process as unnecessary to receive support	YES - Legislated process (Education Act)	VARIABLE - parent not given enough notice or told to wait until spring or fall cycle of IPRC meetings at the school	YES - School principal's legal responsibility	LIMITED - Varies depending on the expertise and knowledge of school staff and involvement of the superintendent
School board System IPRC	LIMITED -Hard to coordinate all persons involved for scheduling	YES - for access to system level special needs classes or dissatisfaction with school level IPRC meeting	YES - involves parents, parent advocate, school staff, school board personnel	YES Superintendent or system designate must attend	YES -Many months can go by before it is held	YES Superintendent or system principal in charge of learning support services must sign off on it	YES - a change in placement occurs with higher level of service in place through staffing allocations; superintendent follow-up required with school principal
School board SPEC ED appeal	LIMITED – no data Anecdotal information indicates school boards evade it	YES - for placement and identification only	NO – potential internal bias to/by school board staff	NO – potential internal bias to/by school board staff	YES -Months to a year in order to occur	YES – Ombudsman Ontario	NO
OSET	NO	LIMITED - for placement and identification only	YES - for placement and identification issues only	LIMITED – not used in recent years	YES	NO	NO
HRTO	NO	LIMITED- Provision of accommodations only	NO-matters should be resolved outside of a quasi-judicial process	YES- Independent tribunal.	YES –up to 18 months.	NO	NO , however orders can be filed in Ontario Superior Court for enforcement
Elected school board trustees	LIMITED	YES	LIMITED	YES	n/a	NO	NO
Ombudsman	YES-First response within two weeks of complaint	YES - jurisdiction over school boards	YES – avenue of recourse to parents for a complaint not resolved at a school board level	YES- Depends on resolution of the complaint to the satisfaction of the parents	YES- investigations may take months to years	YES- Has oversight of school boards but is not overseen as a government body	NO
Ontario College of Teachers	NO- up to 120 days for a complaint to be processed	LIMITED- only as related to teacher conduct	LIMITED - only as related to teacher conduct	n/a	YES- up to 120 days for a complaint to be processed	NO	LIMITED - only as related to teacher conduct
Ministry of Education	No data	YES - creates legislation, policy and programs regarding Special Education	YES – but has a hands off approach to matters brought to its attention stating them as operational issues belonging to school boards	NO - bureaucratic behemoth with limited action ; lack of credibility, efficiency, school board monitoring	YES – responses may take weeks or months	YES – Ombudsman Ontario	LIMITED- legislated jurisdiction for enforcement but does not often exercise it (hands off approach)
Ontario Superior Court-civil	Not researched						
Ontario Divisional Court – Judicial Review	Not researched						
Ontario Court of Appeal	Not researched						
Supreme Court of Canada	NO-long judicial process	YES – new jurisprudence Moore vs. British Columbia (Education)	NO- matters should be resolved outside of court	YES	YES – up to 10 years for resolution	YES- Court of final appeal over prior court decisions	YES – rulings must be implemented but monitoring capacity afterwards is unknown

Appendices

Appendix 2

Freedom of information Request

I, _____, request the following financial information:

- 1) The legal fees on a file by file basis paid by the school board related to Special Education matters from January 1, 2006 to December 31, 2016
- 2) The total number of such files,
- 3) The number of cases reached through settlement with the parties.

These files may include, among others, appeals before the school board under the Education Act by parents and guardians who are not satisfied with the school board's identification or placement of a child with exceptional learning needs, Special Education matters that resulted in proceedings before the Ontario Special Education Tribunal or the Human Rights Tribunal of Ontario, and Special Education matters that proceeded in the court system. For each file, in addition to the amount of the legal fees, please indicate the final resolution of the matter (if it has been concluded).

Please provide this information by February 15, 2017 in one electronic document (.pdf) to the following email address _____@uottawa.ca

This information will be used in the context of a law project with Pro Bono Students Canada from the Faculty of Law, University of Ottawa.

Sincerely,

(name)

Pro bono law student, Faculty of Law, University of Ottawa

Demande d'accès à l'information

Par ce document, je _____ ouvre une demande d'accès à l'information financière du conseil scolaire sur les points suivants :

1. Les frais juridiques et les déboursés payés par le conseil scolaire pour chaque dossier relié à un élève ayant un profil de l'Enfance en difficulté entre le 1^e janvier, 2006 et le 31 décembre, 2016,
2. Le nombre total de ces types de dossiers,
3. Le nombre de dossiers résolus par une entente entre les parties.

Les dossiers peuvent comprendre, entre autres, des plaintes par les parents devant le Tribunal des droits de la personne de l'Ontario ou le Tribunal de l'Enfance en difficulté de l'Ontario, des plaintes devant les processus internes du conseil scolaire liés à l'identification d'un enfant, aux programmes et aux services en enfance en difficulté livrés à l'enfant et les dossiers menés devant les tribunaux de la justice.

Pour chaque dossier veuillez indiquer le montant des frais juridiques et déboursés ainsi que la résolution du dossier, ou, son statut actuel si cela est encore en cours. Veuillez fournir ces informations avant le 15 février 2017, dans un fichier électronique (pdf), à l'adresse courriel suivant : _____

Les informations obtenues seront utilisés à fin d'un projet par les étudiants du *Réseau national des étudiant.e.s pro bono* de la Faculté de droit à l'Université d'Ottawa.

Veuillez agréer nos salutations distinguées,

(nom)
Étudiante en droit

Appendix 3

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

School Board	Number of Files	Costs Associated with Each File
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.

Huron Perth Catholic DSB	Six files relating to Spec Ed, one of which was an IPRC appeal and the rest were IEP arbitrations.	1. \$203.40 2. \$101.70 3. \$610.20 4. \$97.18 5. \$9,395.10 6. \$13,790.70 – IPRC appeal
Huron-Superior Catholic DSB	One file relating to Spec Ed, settled.	1. \$67,850.85
Lambton Kent DSB	Three files relating to Spec Ed, two settled and one ongoing.	1. \$106,118.47 2. \$4,262.11 3. \$4,074.78 Case on going.
Limestone DSB	Eight files relating to Spec Ed, all settled.	1. \$6,082.29 2. \$1,244.64 3. \$1,316.45 4. \$790.58 5. \$833.24 6. \$459.00 7. \$2,462.72 8. \$1,066.66
Moose Factory Island DSAB	No files relating to Spec Ed.	nil
Moosonee DSAB	No files relating to Spec Ed.	nil
Ottawa-Carleton DSB	<u>09/10</u> – 1 appeal, 7 cancelled appeals and 2 appeals carried into 2010/11 <u>10/11</u> – 5 appeals, 2 pending appeal and 1 appeal carried into 2011/12 <u>11/12</u> – 6 dropped appeals <u>12/13</u> – 3 dropped appeals <u>13/14</u> – 3 dropped appeals <u>14/15</u> – 2 pending appeals, 4 dropped appeals <u>15/16</u> – 1 pending appeal, 2 dropped appeals <u>16/17</u> – 2 dropped appeals	09/10 - \$10,527.56 10/11 - \$21,992.84 11/12 - \$1,469.00 12/13 - \$2,334.00 13/14 - \$1,017.00 14/15 - \$2,825.00 15/16 - \$0.00 16/17 - \$0.00
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>HRTTO 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. 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

Total amounts disclosed for estimated costs on special education files: \$1,162,637.10

Table 2: School Boards Providing a Fee Estimate to Comply with Request (10 or 13%)

School Board	Estimated cost to comply with request
Algoma DSB	No specific costs given, however mentioned around 100 invoices to request and cipher through, in addition to hiring a part time employee to do so, as their Superintendent of Special Education has retired, and would have to also be brought in for the process.
Conseil scolaire du Grand- nord	\$150.00
Catholic DSB of Eastern Ontario	\$612.00
DSB of Niagara	\$60.00
Dufferin-Peel Catholic DSB	\$2,148.00
Halton Catholic DSB	\$191.40
Kawartha Pine Ridge DSB	\$100.00
Ottawa Catholic DSB	\$1,618.99
Upper Grand DSB	\$700.00
York Region DSB	\$1,200

Total estimated costs to obtain requested information: \$6,780.39

Table 3: School Boards Refusing to Comply with Request (6 or 8%)

School Board	Reason for refusing
Algonquin and Lakeshore Catholic DSB	Identified that two cases relating to Spec Ed existed in their records, however the school board cited solicitor-client privilege as a reason for refusing to comply with the FOI request for providing the fees associated with each file. Both files were settled.
Durham Catholic DSB	Claimed that the records are not in the school board's possession, and that there is no obligation at law for an institution to provide the service requested (distilling any existing records and generating a report that summarizes the information requested). Notwithstanding this defect, the DSB claimed that the records are subject to solicitor-client privilege.
Grand Erie DSB	Refused to comply with the FOI request, citing that they did not keep track of their records in a manner where they would be able to isolate the information requested.
Greater Essex County DSB	Refused to comply with the FOI request, citing that they did not keep track of their records in a manner where they would be able to isolate the information requested.
Peterborough Victoria Northumberland and Clarington Catholic DSB	Identified records that are pertinent to our request, consisting of legal invoices from the board's legal counsel. However, the school board was unwilling to provide an index of the records due to solicitor-client privilege.
Wellington Catholic SB	Claimed the decisions of the Ontario courts, Human Rights Tribunal of Ontario and the Ontario Special Education Tribunal are publicly reported and readily accessible through various mediums and that access could not be provided because the records did not exist.

Table 4: School Boards Where Responses were pending at time of writing (9 or 12%)

School Board	Reason for pending request:
Conseil des écoles publiques de l'Est de l'Ontario	Request not sent to appropriate department, requested use of school board specific FOI form and requested clarification on definition of 'file' in the request.
Conseil scolaire de district catholique centre-sud	Required a deadline extension to determine the costs associated with the request.
Dufferin-Peel Catholic DSB	Required a deadline extension to determine the costs associated with the request. Case records are not maintained on file, necessary for them to search legal invoices.
Hamilton-Wentworth Catholic DSB	Letter requesting an extension of the deadline until April 28, 2017.
Hamilton Wentworth DSB	Email received on March 27 claiming they had received the written request on March 20, and required 30 days' time from the receipt to comply with the request.
Near North DSB	Acknowledgement of the FOI request on January 26, 2017 but never heard back.
Peel District School Board	Requested an augmented version of the search to include the number of files related to special education matters rather than the number and costs associated with each.
Sudbury Catholic DSB	Required an extension of the deadline to comply with FOI request.
Thames Valley DSB	Request for extension to search records.

Table 5: School Boards from Which No Response was ever Received (17/72 or 23%)

Conseil scolaire de district catholique de l'Est ontarien
Conseil scolaire de district catholique des Grandes Rivières
Conseil scolaire de district catholique du Centre-Est de l'Ontario
Conseil scolaire de district du Nord-Est de l'Ontario
Conseil scolaire de district catholique du Nouvel Ontario
Conseil scolaire de district catholique Providence (du Sud-Ouest)
Kenora Catholic DSB
Lakehead DSB
London District Catholic School Board
Niagara Catholic DSB
Nipissing-Parry Sound Catholic DSB
Northwest Catholic DSB
Penetanguishene Protestant Separate SB
Renfrew County Catholic DSB
Superior North Catholic DSB
Waterloo Region DSB
Windsor-Essex Catholic DSB

Appendix 4

The question of whether legal fees are to be disclosed in response to a freedom of information request is not one with an entirely clear answer. Court decisions have identified communications that are or are not protected by solicitor-client privilege based on case-specific facts and may vary depending on the circumstances. What may be considered privileged in one case may not be considered privileged in another. There is, though, a strong argument to make that the amount of the fees alone (and not the advice they paid for) can be disclosed in response to a freedom of information request.

The leading case in favour of applying solicitor-client privilege to lawyers' fees is the decision of the Supreme Court of Canada in *Maranda v. Richer*, [2003] 3 S.C.R. 193. This case concerned a search warrant being applied to a lawyer's office in a criminal matter. The Supreme Court had to determine how the solicitor-client privilege rule applied to information concerning lawyers' fees, in the context of a criminal investigation being conducted by the police. The parties did not question previous rulings that lawyers' billings are protected by privilege when they contain information regarding the content of communications between the lawyer and his or her client, both about the legal advice given and about the terms for payment of the lawyer's fees or the financial situation of the person who consults the lawyer.

The argument in *Maranda* was that solicitor-client privilege did not apply to neutral information, the amount of the fees and disbursements paid, with no other details. This was a pure fact which was not such as would inform third parties about the content of the solicitor-client communication. That information would not facilitate the enlisting of the lawyer against his or her client, thus violating the client's constitutional protection against self-incrimination.

The Supreme Court held that the privilege did apply to the lawyer's disbursement accounts as these might enable an intelligent investigator to reconstruct some of the client's comings and goings, and to assemble evidence concerning his presence at various locations based on the documentation relating to his meetings with his lawyer. Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls *prima facie* within the privileged category would better ensure that the objectives of the privilege were achieved. That presumption was also more consistent with the aim of keeping impairments of solicitor-client privilege to a minimum.

The *Maranda* ruling was then re-assessed by the British Columbia Court of Appeal in the case of *Donell v. GJB Enterprises Inc.*, 2012 BCCA 135. The Court of Appeal agreed with the Supreme Court's ruling in that whether the financial records of a lawyer are subject to solicitor-client privilege depends on an assessment of the connection between the record in issue and "the nature of the relationship in question." As was held in *Maranda*, a lawyer's bill arises out of the solicitor-client relationship and generally will be protected. This is because bills flow out of communications between the solicitor and the client seeking legal advice.

The Ontario Court of Appeal in *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* (2005), 197 O.A.C. 278, however, concluded that the presumption of privilege is rebuttable “if there is no reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege” (para. 12). The Court of Appeal continued:

If there is a reasonable possibility that the assiduous inquirer, aware of background information available to the public, could use the information requested concerning the amount of fees paid to deduce or otherwise acquire communications protected by privilege, then the information is protected by the client/solicitor privilege and cannot be disclosed.

In *Donell*, the Court summarized its view as follows (para. 59):

1. at a minimum, *Maranda* establishes that lawyers’ bills, in the criminal law context, are presumptively subject to solicitor-client privilege;
2. this presumption flows from the connection between lawyers’ bills and the nature of the relationship between lawyers and clients; the account reflects work done on behalf of the client which involves communications that are privileged;
3. the presumption may be rebutted if it is established that there is no reasonable possibility that disclosure will directly or indirectly reveal any communications protected by privilege;
4. *Maranda* did not do away with the distinction between communications, which are privileged, and facts, which are not;
5. other financial records of lawyers are not presumptively subject to solicitor-client privilege insofar as they merely represent records of actions or facts, but they should not be produced automatically solely for that reason;
6. *Maranda* mandates that it is necessary to consider such records in order to determine whether they arise out of the solicitor-client relationship and what transpires within it, that is, communications to obtain legal advice;
7. if it is concluded that the records do arise out of that relationship and what transpires within it, they are presumed to be privileged, but the privilege can be rebutted and the document produced if it is established that production will not permit the deduction or acquisition of communications protected by solicitor-client privilege.

The Office of the Information Commissioner of Canada discusses section 23 of the federal *Access to Information Act*, R.S.C. 1985, c. A-1. This section reads as follows:

The head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.

There are two types of solicitor-client privilege. One is legal advice privilege, defined as all communications, verbal or written, of a confidential character, between a client and a legal advisor directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal advisor's working papers, directly related thereto). The other type of privilege is litigation privilege, defined as all papers and materials created or obtained specially for a lawyer's brief for litigation, whether existing or contemplated. Solicitor-client privilege only applies where the dominant or principal purpose for which the record was obtained or created is the litigation.

There are three exemptions to the privilege, namely:

- the informed waiver of the privilege by the client or implied waiver of a privileged document by its use in court;
- communications between a lawyer and a client are not privileged when the client attempts to obtain legal advice that would facilitate a crime or fraud; and
- the privilege extends only to communications and does not protect from disclosure certain facts discovered in the course of a solicitor-client relationship by either solicitor or client.³⁸

The last exemption picks up on the communication/facts distinction drawn in the *Donell* case discussed above. The Information Commissioner then states:

“Another exception to the [solicitor-client] privilege is that the privilege does not protect from disclosure certain facts occurring during the course of the solicitor/client relationship. For example, accounts submitted by the solicitor can be severed in order to remove from it the nature of the advice and then the amounts reflected in the account can be disclosed.”³⁹

In the case of *The Honourable Sinclair M. Stevens v. The Prime Minister of Canada (The Privy Council)*, [1998] 4 F.C.R. 89, affirming [1997] 2 F.C. 759 (F.C.T.D.), the Federal Court of Appeal held that the narrative portion of a solicitor's accounts (the formulating and giving of legal advice) submitted to the government in connection with a commission of inquiry was exempt from disclosure under section 23. The Court noted that communications between a lawyer and a client are privileged, subject to an exception for information which is not a communication but is rather evidence of an act performed by counsel or a mere statement of fact. Therefore, if there is simply an invoice for advice severed from any connection to what that advice was, there is an argument that solicitor-client privilege should not apply.

This argument was accepted by the Information Commissioner in the following case described in the 2011 Annual Report:

“The Canadian Wheat Board (CWB) received a request in March 2010 for the legal fees, internal and external, associated with the termination of an employee. The subsequent

complaint focused on whether the CWB correctly refused to release any information, on the grounds that it was protected by solicitor-client privilege.

Upon reviewing the responsive records, we were unconvinced that the CWB had properly applied the solicitor-client privilege exemption (section 23) to all the withheld information. We based our view on recent jurisprudence that held that when it can be shown that privileged communications cannot be deduced from the disclosure of the fees, the fees are considered “neutral information” and are no longer protected by the privilege. In our view, disclosure of the aggregate amount of fees in this instance would not reveal privileged communications. Consequently, we recommended that the CWB release the total amount of fees paid. The CWB subsequently released the aggregate costs.

When it can be determined that aggregate fees constitute “neutral information” they are not privileged.”

The Information and Privacy Commissioner of Ontario has released rulings that come to a similar conclusion as to the applicability of solicitor-client privilege to legal fees when those fees can be severed from the “narrative” or the legal advice those fees paid for. Some examples of these rulings include:

(Orders #M-213, M-258, P-624, M-274, P-667, P-676)

- Invoices and accounts from a lawyer to his or her client are not automatically covered by the common-law solicitor/client privilege. The institution must determine whether the contents of the legal account relate in a tangible and direct way to the seeking, formulating or provision of legal advice. The Commission ruled that, in this case, the legal account which set out in summary fashion the steps that the law firm took to complete its work assignment, did not contain legal advice and did not reveal any such advice indirectly. The account did not reveal the subjects which the law firm was asked to investigate, the strategy used to address these issues or the result of the advice. The Commission noted that the intent of the legislation would be ill-served by allowing this exemption to be used to shield a non-substantive record of this nature from public scrutiny, particularly in times when public bodies have to ensure that tax dollars are spent wisely.

(Orders #P-624, M-274)

- Although a legal account arises out of a solicitor/client relationship, this record category differs qualitatively from legal opinions or other communications which purport to provide legal advice from a lawyer to his or her client. The Commission referred to *Re Ontario Securities Commission and Greymac Credit Corp.*; *Re Ontario Securities Commission and Prousky* (1983) 41 O.R. (2d) 328 at 337 (Ont. Div. Ct.) where Southey J. stated that legal accounts are evidence of transactions and not subject to the privilege where the advice and communications are severed from them. The Commission noted that the purpose of the Act was to

provide a right of access in accordance with the principle that the exemptions are to be narrowly interpreted. As a result, the test was held to apply to legal accounts which would reveal the subjects for which legal advice was sought, the strategy used to address the issues raised, the particulars of any legal advice provided or the outcome of these investigations. This allows for legal accounts to be severed or information relating in a direct a tangible way to the seeking, formulating or provision of legal advice. In this case, legal accounts that disclosed a tally of the hours spent and disbursements made by the law as well as brief narratives of the steps taken to complete the assignments were disclosed.

Endnotes

- ¹ Ombudsman Ontario, "Who We Oversee" (3 March 2017), Ombudsman Ontario: Ontario's Watchdog (website), online: <https://www.ombudsman.on.ca/About-Us/Who-We-Oversee.aspx>.
- ² *Ibid.*
- ³ See Monika Ferenczy and Jasmine van Schouwen, "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", *Horizon Educational Consulting*, June 2016, pp. 17.
- ⁴ Ontario Special Education Tribunals, «What We Do », Social Justice Tribunals of Ontario (2015), on line: <<http://www.sjto.gov.on.ca/oset/what-we-do/>> [*OSET 1*].
- ⁵ *Education Act*, RSO 1990, c. E.2, s. 57(3) [*Education Act*].
- ⁶ *OSET 1*, *supra* note 4.
- ⁷ *Education Act*, s 57(3). See also Ontario Special Education Tribunals, «Frequently Asked Questions», Social Justice Tribunals of Ontario (2015), on line : < <http://www.sjto.gov.on.ca/oset/faqs/>> [*OSET 2*].
- ⁸ *Ibid.*
- ⁹ According to the Canadian Legal Information Institute (CanLII) database of Ontario Special Education Tribunal Cases. Tribunal cases are officially published by the Tribunal on the CanLII online database: <http://www.canlii.org/en/on/onset/>. The OSET confirmed that no new decisions have been issued since the database was last updated August 26th 2014.
- ¹⁰ Brenda Bowlby, Catherine Peters, & Martha Mackinnon, *An Educator's Guide to Special Education Law*, 2nd ed (Aurora: Canada Law Book, 2010) at 194; *Campbell v Toronto District School Board*, 2008 HRTO 62 at para 42 [*Campbell*].
- ¹¹ *Schafer v Toronto District School Board*, 2010 HRTO 403 at paras 15 and 71 [*Schafer*].
- ¹² *DS v London District Catholic School Board*, 2012 HRTO 786 at para 30 [*DS*].
- ¹³ *Supra* note 12 at para 30.
- ¹⁴ *Supra* note 13 at para 56.
- ¹⁵ *AN v Hamilton-Wentworth District School Board*, 2013 HRTO 67 at para 4.
- ¹⁶ *Human Rights Code*, RSO 1990, c H.19, s 45.2.
- ¹⁷ *Supra* note 11 at 243.
- ¹⁸ *Ibid.*
- ¹⁹ *Ibid* at 244.
- ²⁰ *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c. M.56 [*MFIPPA*].
- ²¹ *Ibid* at s 17(1).
- ²² *Ibid* at s 45.
- ²³ *Supra* note 3 at 16.
- ²⁴ *Ibid* at 19.
- ²⁵ *Supra* note 1.
- ²⁶ Carrie Griffin Basas, "Care Advocacy Fatigue: Self-Care, Protest, and Educational Equity" (2015) 32 Windsor YB Access to Just at 38.
- ²⁷ *Supra* note 3 at 15-16.
- ²⁸ *Ibid* at 11.
- ²⁹ *Ibid* at 8.
- ³⁰ *Supra* note 27 at 61.
- ³¹ *Ibid* at 63.
- ³² *Ibid* at 61.
- ³³ *Supra* note 11 at 137.
- ³⁴ *Ibid* at 129.
- ³⁵ RRO 1990, Reg. 194, s. 24.1.
- ³⁶ Ontario, Ministry of Education, *Shared Solutions: A Guide to Preventing and Resolving Conflicts Regarding Programs and Services for Students with Special Needs* (Queen's Printer for Ontario, 2007) at 129.
- ³⁷ *Ibid* at 25-40.
- ³⁸ *Weiler v. Canada (Department of Justice)*, [1991], 3 F.C. 617 (T.D.).
- ³⁹ Office of the Information Commissioner of Canada, *Investigators Guide to Interpreting the ATIA, Section 23 - Solicitor/Client privilege*, 25 May 2014.