

EXECUTIVE SUMMARY

Special Education Complaint and Appeal Processes in Ontario in a Social Justice Context Identifying inefficiencies, costs and effective resolution in the students' best interest June 2017 - Horizon Educational Consulting / Conseillers en éducation www.horizoned.ca

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*.

Internal review processes included the school level and school board level Identification Placement Review Committee process, the school board Special Education Appeal Board 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 and the Human Rights Tribunal of Ontario.

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.

The School Board Special Education Appeal 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 Individual Education Plan, the quality or frequency of Special Educations services, or the personnel assisting the student.

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 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 who must hire a representative to advocate for their child's needs.

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. It also lacks oversight or enforcement, leaving the parents and students vulnerable to school board discretion in process engagement. This process ultimately negates the best interests of the student as it gives rise to

potential conflicts of interest for personnel and potential reprisal situations for employee parents involved. Trustees facilitate communication between parents and school board personnel but not complaint resolution since their role does not include mediation.

The Ontario College of Teachers' 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.

There is no complaint mechanism available to parents either in legislation or in the operational structure of the Ministry of Education. Complaints from parents have been redirected to school boards as a human resources matter or to the Ombudsman Ontario office for investigation.

Complaints made to the Ombudsman are external to the school board itself, as an independent officer of the legislature who acts as a watchdog by investigating complaints made by the public against public sector bodies such as school boards. However, as survey respondents in 2016 indicated, over 70% of parents were unaware that they were able to make a complaint to the Ombudsman's office. An additional obstacle 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.

The Ontario Special Education Tribunal is an appeal mechanism available to parents of children with Special Education needs who disagree with a school board's decision regarding their child's exceptionalities or placement. The scope of this Tribunal is narrow, focusing on identification and placement, and not service delivery, quality or frequency to meet required accommodations or professional recommendations. However, no decisions have been rendered by this Tribunal between 2014 and 2017 and very few between 2006 and 2014.

The Human Rights Tribunal of Ontario 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 case law between 2010 and 2016. The investigation yielded 11 cases related to Special Education. Parents must be aware that the Tribunal does not address all aspects of Special Education, rather, the role of the Tribunal is to determine whether the student experienced discrimination under the Human Rights Code. The Tribunal acts in a post mortem capacity rather than an intervention mechanism when a complaint arises.

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

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

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. The total of cost estimates received from these 10 school boards was \$6,780.39.

There were a total of 6 school boards which refused to comply with the Freedom of Information request. The boards cited specific reasons, the most surprising of which was solicitor-client privilege. However case law to support that solicitor-client privilege was not properly applied and that fees should have been disclosed is explored in Appendix 4 of the report.

A number of school boards (7) also requested additional time to comply with the request, 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 Freedom of Information request.

There were 11 school boards from whom no response was ever received despite each school 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 request.

Since 62% of remaining school board costs related to Special Education complaints, appeals and litigation could not be obtained, a significant gap in transparency and accountability is evident. In addition, any settlements between the school board and parents remain confidential, yet the costs are paid by the taxpayer. Accessible information as to how taxpayer funding is spent remains unknown and inaccessible to the public.

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

Evidently, no Special Education Complaint Resolution Process currently exists for service delivery issues.

Alternative resolution processes explored to help address inefficiency, relevancy, credibility and delay issues with Special Education matters included a third party appeal process, enhancing the role of mediation in early complaint resolution, and a school board Ombudsman similar to that which exists within universities.

Recommendations to the Minister of Education and the Ontario government focus on establishing a Special Education Complaint Framework that is easily understood, proactive, responsive and timely; improving client relations with customer service excellence policies, protocols and procedures for school boards as a public education service provider; mandating school boards to disclose complaint, appeal and litigation costs related to Special Education; and providing parents equitable access to legal advice and support through taxpayer funds as school boards currently access through provincial operating grants.