SHIBLEY RIGHTON LLP
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Education Law eBulletin

A newsletter for educators

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BC Court: Assignment re-write is a "privilege" not subject to Judicial Review

Despite academic honesty policies and continued efforts to curb cheating, plagiarism remains an ongoing issue in all levels of our academic system. A recent decision by the British Columbia Supreme Court entitled *Albu v. University of British Columbia*, [2014] B.C.J. No. 263 provides some insight with respect to the manner in which some institutions are dealing with plagiarism and the consequences students may face when given a second chance.

In 2008, a dentistry student at the University of British Columbia (the "University") was found to have committed plagiarism with respect to a course assignment. The student admitted to the academic dishonestly and apologized. Following a hearing before the disciplinary committee, the President of the University issued a letter of reprimand. The student appealed this decision to the Senate committee; prior to the appeal being heard, the student entered into an agreement with the Faculty of Dentistry (which included a full and final release) whereby she would be permitted to repeat the assignment that she had failed in consideration for her withdrawal of the appeal.

The student did not withdraw her appeal, despite being given a second opportunity to complete the assignment, as per the agreement. When informed that she failed the second attempt, the dentistry student commenced an application for judicial review in an attempt to compel the Senate appeal committee to hear her appeal, arguing that the Faculty of Dentistry did not have the jurisdiction to enter into the agreement.

In dismissing the application for judicial review, the British Columbia Supreme Court held that the *University Act* clearly allowed a faculty may make rules for the government, direction and management of the faculty. In short, the Court held that there was no question that the Faculty of Dentistry had the jurisdiction to allow for a supplemental examination (or assignment) and that such supplemental examination was, in fact, a privilege and not a right. In consideration for this privilege, the student had agreed to waive her legal right to her appeal by signing an irrevocable full and final release. The agreement was valid, the student had sought and received legal advice prior to executing the agreement and the release; accordingly, the Court held that the agreement was binding on the parties and that there was no merit to the student's application for judicial review. In addition, the Court held that the remedy of mandamus, being an equitable remedy, is not available to an individual who does not come before the Court with "clean hands". In this case, the student clearly agreed to waive her right of appeal in consideration for the privilege of completing a supplementary exam. Having taken the benefit of the privilege and failing to withdraw her appeal, the Court held that the student had not acted in good faith and was therefore not entitled to any equitable remedy.

The idea of an agreement between student and faculty is an appealing concept for post-secondary institutions looking to resolve matters with individuals who have been caught violating standards of academic dishonest. Indeed, zero tolerance policies against cheating have been vilified by some academics, indicating that these types of policies discourage conversation about plagiarism and encourages a one-size-fits all approach insofar as even minor incursions are met with the same harsh consequences. Although this remains a hotly-contested debate, the agreement used by the Faculty of

Dentistry in the *Albu* decision may be an attractive alternative to members on both side of the debate to mitigate some of the harsh consequences associated with zero-tolerance policies.

Ontario Human Rights Tribunal : Board's refusal to communicate by e-mail is not discriminatory

In an atmosphere of ever-escalating requirements and demands from parents, a recent Ontario Human Rights Tribunal decision titled *Klassen v. Toronto District School Board*, 2014 HRTO 191, recognizes that school board policies, designed to be inclusive, will provide a full answer to unnecessary and superfluous demands.

In 2011, Klassen, who had twin children in the kindergarten program at the Toronto District School Board (the "Board"), sent an email to the principal of his children's school requesting that the school accommodate his stuttering disability by allowing him to communicate with teachers by email. This form of communication was contrary to the wishes of the majority of teachers at that school; a collective decision had been made to use other methods to communicate with parents. For example, parents were generally encouraged to communicate with teachers using written notes, speaking to teachers in person during pick-up or drop-off times, or arranging for telephone or in-person meetings with teachers. Klassen's email request was initially declined; however, the principal did later indicate that the teachers had "generously" agreed to an exception to the rule and that email communication would be permitted, albeit on a trial basis and on the understanding that Klassen would keep it "to himself". Despite the accommodation, Klassen challenged the conditions placed on the email communication and, upon learning that it was left to individual teachers as to whether they engaged email communication with parents, Klassen initiated a human rights complaint against the Board alleging discrimination.

During the three-day hearing, the Board presented evidence to the effect that the practice of not permitting email communication first came about as a result of ensuring positive communication; emails can often be lengthy and/or demanding and, in any event, can be easily misconstrued or misunderstood. Indeed, during the hearing the Board presented evidence that the teachers' union also cautioned its members against the use of emails; it also preferred face-to-face meetings. Klassen's argument included submissions that he was not able to use certain mediums of communication, such as the telephone, as effectively as others. Email use, in his opinion, was a reasonable accommodation.

Ultimately, the Tribunal took no issue with Klassen's disability. However, the Tribunal did not agree that Klassen had established that the Board's policies and practices resulted in discrimination. In its decision the Tribunal discounted Klassen's submissions that persons without a disability have notes or the phone, while persons with a disability only have notes. In fact, the Tribunal recognized that the Board encouraged various means of parent-teacher communication including handwritten notes, a "Friday File" system, emails to the Office or Administration, in-person meetings and telephone conversations. Because Klassen had used the several of the various other methods of communication, the Tribunal held that Klassen had failed to establish that he was, in any way, disadvantaged as a result of the Board's policies concerning email.

The Tribunal's decision drives home the point that the *Human Rights Code* requires the accommodation of *Code*-related needs, not individual preferences. Klassen's preference to use email did not discourage and, in fact, did not hinder his communication efforts with teachers. In holding that the various means of communication, other than email, were sufficient to meet Klassen's needs, the Tribunal's decision supports the proposition that reasonable policies that adequately address parental participation may withstand additional demands for unnecessary accommodation.

If you have any questions on either of these cases, or with respect to any other education, administrative or employment-related matters, please feel free to contact Bryce Chandler at 866-422-7988.