Notebook on Ethics, Legal Issues and Standards in Counselling

Glenn Sheppard, Ed.D., CCC

Special Education and the Charter: No Presumption in Favour of Integration

In this Notebook I have decided to review a landmark decision of the Supreme Court of Canada that will be of interest to all our members, but it has particular implications for those CCA members who work in public schools and more especially for those who participate with colleagues in making programming and placement decisions for students with special needs.

As you know, our society like many others continues to strive towards providing the most appropriate educational environment to meet the many diverse needs of students with special needs. Over the past several decades various ideological labels have emerged that capture these educational strivings: integration, mainstreaming, normalization, least restrictive environment, and more recently the ideology of inclusion.

There are those who take the view that all children with special needs are entitled to be educated within the regular classroom with their disabled peers regardless of the degree of disability or the extent of their special needs. Some such advocates take the view that the Canadian Charter of Rights and Freedoms guarantees this right. Well, the Supreme Court of Canada in the case of Eaton v. Brant County Board of Education (February. 1997) has decided otherwise. It unanimously ruled, in the case of 12 year old Emily Eaton, that the Charter provides for no such guarantee since there is no presumption under the charter in favour of integration. Rather, the justices concluded that the Charter protects the best interest of the child and that this 'best interest' and the child's special needs may mean, as they concluded in Emily's case, that a best placement is other than in the regular classroom.

At the time of this decision Emily was a 12 year old student in Burford County. Ontario. She has cerebral palsy and according to the Court decision, "...is unable to communicate through speech, sign language or other alternative communication system, has some visual impairment and who is mobility impaired and mainly uses a wheelchair". After several years of working to meet her special needs in regular class, including the provision of a fulltime student assistant, it was decided that her needs could best be met by placement in a special education classroom. This decision was appealed by her parent's but it was upheld by a Special Education Appeal Board, the Ontario Special Education Tribunal, and by Divisional Court. It was overturned by the Ontario Court of Appeal. It was this later decision that was appealed by the Brant County Board of Education to the Supreme Court of Canada. The Court concluded that a placement decision is not discriminatory nor does it violate a child's equality rights if the decision makers

1. determine the best possible placement for the child
2. take into account the child's best interest and special needs when doing so
3. provide for ongoing assessment of the child's needs and make changes accordingly
4. determine placement of an,"...exceptional child from a subjective, child-centred perspective--one which attempts to make equality meaningful from the child's point of view as opposed to that of the adults in his or her life."

It concluded that the educational authorities had met all these conditions in Emily's case and, therefore, it upheld the placement decision. It further argued that any attempt to provide an alternative curriculum for Emily while in regular class would be inappropriate since it would only serve to isolate her more. In other words, placement of an exceptional child in regular class can for some children, in the view of the Court, be a most restrictive placement rather than a least restrictive one. The Court supported the view expressed by the Special Education Tribunal when it heard the Eaton's appeal. It concluded that the provision of a parallel curriculum for exceptional children when in regular class can

be beneficial only when it is realistically parallel but may very well have the effect of isolating the child when it is not so.
This landmark decision still stands to provide some guidance to those charged with the challenging task of providing for the special educational needs of exceptional children. Since 1997 it has been used as a benchmark in a number of subsequent judicial challenges to placement decisions. For example, in the case of Pokonzie v. Sudbury District Roman Catholic Separate School Board (O.J. No. 4698) the court upheld a previous decision of the Special Education Tribunal in its support of a special education placement for a boy with developmental disabilities. It also noted that his parents who were appealing the placement decision had an "unrelenting commitment to full classroom integration" without regard for "his cognitive skills, his abilities or his behaviours." In other words, in the view of the court a parent's view of their child's best interest may not always be determinative of the best educational placement.

Eaton v. Brant County Board of Education (February 7, 1997) No. 24668. S.C C.

P.S. I have found the **Education Law Reporter for Elementary and Secondary Schools** invaluable in my professional work. It is has been published by a private company since 1989 and is available, by subscription, ten times per year. The authors report on the most recent legal issues in education in Canada including a review of all case law in education as such decisions are rendered by the courts. They write their reviews in a clear and user friendly style and draw our attention to implications and applications. School counsellors and school psychologists will find many court decisions reviewed in the **Education Law Reporter** have immediate and significant application to their work. The Supreme Court decision that I have reviewed in this Notebook, for example, I first became aware of by reading about it in this publication. You can learn more about this useful resource by visiting their web site at http://wviw.edlawcanada.com