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Occupational Health and Safety Rights of Staff and Special Education Rights of Students: Are they complementary or contradictory?

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1. INTRODUCTION

In recent years, there has been increasing discussion about the potential for conflict between the educational rights of special needs children, and the health and safety rights of school staff, especially teachers and educational assistants. This approach to the intersection between educational rights, and health and safety rights implies that these rights are somehow opposed, that, in the classroom, the teacher's fight for his/her safety is simultaneously a fight against the rights of a special needs pupils, and vice versa. In this paper, we argue that the rights framework for special education—including accommodation requirements under human rights legislation—is often fundamentally aligned with the workers' rights framework set out in occupational health and safety legislation. That is, these rights—far from necessarily being in conflict—are often supportive of one another, if, of course, they are approached in this fashion.

To illustrate this key point, we will canvass both the central rights for educational workers set out in the *Occupational Health and Safety Act*[3] and its regulations, and those for special needs students under the *Education Act*[4] and its regulations and under the *Human Rights Code*[5]. We will also analyze how existing commentary has generally approached the intersection of these diverse rights; this commentary often stresses the competition, not co-operation, between these rights. The remainder of this paper will centre on how this "conflict"-based model fails to account for the many common concerns that motivate the search for appropriate special needs accommodation, and the protection of worker health and safety. Frequently, appropriate accommodation for a special needs

[3] R.S.O. 1990, c. O.1 ("*OHSA*").
[4] R.S.O. 1990, c. E.2 ("*EA*").
[5] R.S.O. 1990, c. H.19 ("*Code*").

student will bear striking similarities to appropriate precautions necessary to protect against workplace violence and occupational hazards for an educational worker. These similarities are seen best in decisions from the Special Education Tribunal, empowered to review school board placement and identification decisions about special needs students, and the Child and Family Services Review Board, responsible for appeals of student suspensions and expulsions. The analysis in these decisions is quite detailed and focuses on the behaviour demonstrated by the student and what can be done to manage it, and, while not specifically rooted in considerations of occupational health and safety rights, the decisions describe how advance preparation, and precautions to ensure violence-avoidance techniques are often crucial considerations in special needs accommodation. Ultimately, we argue that school boards and administrators can make use of Occupational Health and Safety legislation and documentation requirements under the Education Act and Ministry of Education policy and program Memoranda to track both intentional and unintentionally violent behaviour by students and to plan appropriate Safety Plans that protect the student requiring accommodation, other students, and staff.

Thus, rigorous documenting of behaviours through violent incident reports or Safe Schools reports from staff, IPRC committee study, and specialist recommendations will assist in understanding and accommodating the rights of special needs students while at the same ensuring that student Safety Plans are designed for a dual purpose: to ensure student rights to accommodation and to protect staff rights to a healthy, safe and, correspondingly, violence-free work environment.

Special education accommodation is a vast topic, complex and multi-faceted. For the purposes of this paper, we have narrowed our focus to the issue and cases of student behaviours posing risks of physical injury to staff or others.

2. LEGISLATIVE AND REGULATORY FRAMEWORK

A) *Education Act*

The *Education Act* contains a clear commitment to an accommodated education for special needs students, defined as "exceptional pupils" under s. 1(1) of the *Act*, and encompassing, under that definition, "pupil[s] whose behavioural, communicational, intellectual, physical or multiple exceptionalities are such that he or she is considered to need placement in a special education program by a committee". Section 8(3) of the *Act* provides:

> The Minister shall ensure that all exceptional children in Ontario have available to them, in accordance with this Act and the regulations, appropriate special education programs and special education services without payment of fees by parents or guardians resident in Ontario, and shall provide for the parents or guardians to appeal the appropriateness of the special education placement, and for these purposes the Minister shall,
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> (a) require school boards to implement procedures for early and ongoing identification of the learning abilities and needs of pupils, and shall prescribe standards in accordance with which such procedures be implemented; and
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> (b) in respect of special education programs and services, define exceptionalities of pupils, and prescribe classes, groups or categories of exceptional pupils, and require boards to employ such definitions or use such prescriptions as established under this clause.

This Ministerial special education obligation has a necessary counterpart at the school board level. Paragraph 170(1)(7) of the *Act* requires school boards to "provide or enter into an agreement with another board to provide in accordance with the regulations special education programs and special education services for its exceptional pupils".

It is only in the regulations to the *Act* that more specific parameters for special education are to be found. O Reg 181/98 ("Identification and Placement of Exceptional Pupils") establishes identification, placement and review committees, (IPRC) with at least one such committee for each school board.[6] These committees receive referrals from school principals—spurred either by the principal him/herself, through teacher, or a parent of an exceptional pupil—for the identification and placement of exceptional pupils.[7] The committee is required to perform an educational assessment of the pupils brought before it, and may order a health and/or psychological assessment of the pupil.[8] The committee is required to consider information submitted by the pupil's parents or, with older pupils, by the pupil him/herself, and any other relevant information.[9] The committee may even interview the pupil.[10] The committee can "make recommendations regarding special education programs and special education services", but makes decisions only about how the pupil should be identified as "exceptional"—that is, whether the pupil has special needs and, if so, in what ways—and about the nature of an exceptional pupil's placement.[11] If a placement in a "regular" classroom coheres with parental preferences and the pupil's needs, then the pupil must be so placed.[12] When the committee makes a placement decision, the appropriate school board must develop a "special education plan" for the pupil.[13] This plan sets out "a) specific educational expectations for the pupil; b) an outline of the special education program and services to be received by the pupil; and c) a statement of the methods by which the pupil's progress will be reviewed".[14]

There is no practical reason why an IPRC committee document cannot form the basis or the starting point for a Safety Plan which sets out how to ensure

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[6] O Reg 181/98, s 10.
[7] *Ibid*, ss 14(1)-(2).
[8] *Ibid*, ss 15(1)-(3).
[9] *Ibid*, ss 15(6)-(7).
[10] *Ibid*, s 15(4).
[11] *Ibid*, ss 16(2), 17(1).
[12] *Ibid*, s 17(2).
[13] *Ibid*, ss 6(1)-(2).
[14] *Ibid*, s 6(3).

not only the student's safety, but staff and community safety, provided appropriate safeguards are made to protect confidential IPRC committee information.

The committee can also review—through a principal, parent or "the designated representative of the board that is providing the special education program to the pupil"—a pupil's identification or placement.[15] The board's representative is generally required to ensure that a given pupil's identification or placement is reviewed annually.[16] During the review process, the committee has broadly the same obligations and authority as it has during the initial identification and/or placement process, though the committee is also required to "consider the pupil's progress with reference to the pupil's individual education plan" if requested by one of the pupil's parents.[17] The committee has the authority to modify a pupil's identification and/or placement as it deems appropriate.[18] Ongoing review of the student's progress should also be reflected in Safety Plans so that Safety Plans are amended as necessary to modify any further protective measures needed to protect against violence.

A school board must implement a committee's initial or review identification and/or placement decisions where one of the pupil's parents consents to the committee's decision, or where the deadline to appeal the decision has passed.[19] Committee decisions can be appealed first to a special education appeal board, which can either agree with the committee decisions or recommend—not order—the board to change the pupil's identification and/or placement.[20] The school board simply has an obligation to consider any recommendations the appeal board provides to it.[21] Decisions of a special education appeal board, in turn, can be appealed to the Special Education

[15] *Ibid*, s 21(1).
[16] *Ibid*, ss 21(3)-(4).
[17] *Ibid*, ss 23(1)-(2).
[18] *Ibid*, s 23(5).
[19] *Ibid*, ss 20(1), 25(1).
[20] *Ibid*, ss 26(1), 28(6).
[21] *Ibid*, ss 30(1)-(2).

Tribunal, which has the final authority either to dismiss the appeal, or to grant the appeal and to "make such order as it considers necessary with respect to the identification or placement".[22] It is on decisions of the Special Education Tribunal that our analysis in subsequent sections of this paper will centre, in part.

Alongside this elaborate legislative structure for the identification and placement of special needs students, the *Education Act* contains provisions that require principals to consider the relevance of a student's special needs in deciding to impose a suspension or an expulsion. S. 306(2) of the *Act* provides that a principal "shall take into account any mitigating or other factors prescribed by the regulations" in determining whether a suspension should be imposed on a student. The principal must also consider these factors in assessing the length of a suspension, even in cases where the *Act* requires that a suspension be imposed,[23] and in assessing whether he/she should recommend the expulsion of a student to the school board.[24] The school board, in any expulsion hearing following a principal's expulsion recommendation, likewise must take into account these same factors in analyzing the validity of an expulsion, and the validity and/or duration of a suspension in cases where the board decides that a student should not be expelled.[25]

The "mitigating and other factors" referenced so frequently in the *Act* itself are set out specifically in the "Behaviour, Discipline and Safety of Pupils" regulation[26] made under the *Act*. The mitigating factors comprise the following:

1. The pupil does not have the ability to control his or her behaviour.
2. The pupil does not have the ability to understand the foreseeable consequences of his or her behaviour.

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[22] *EA*, ss 57(4)-(5).
[23] *Ibid*, ss 306(4), 310(3).
[24] *Ibid*, s 311.1(4).
[25] *Ibid*, ss 311.3(7)(b), 311.4(2)(b).
[26] O Reg 472/07.

3. The pupil's continuing presence in the school does not create an unacceptable risk to the safety of any person.[27]

The "other factors" contemplated in the *Act* are:

1. The pupil's history.

2. Whether a progressive discipline approach has been used with the pupil.

3. Whether the activity for which the pupil may be or is being suspended or expelled was related to any harassment of the pupil because of his or her race, ethnic origin, religion, disability, gender or sexual orientation or to any other harassment.

4. How the suspension or expulsion would affect the pupil's ongoing education.

5. The age of the pupil.

6. In the case of a pupil for whom an individual education plan has been developed:

    a. whether the behaviour was a manifestation of a disability identified in the pupil's individual education plan,
    b. whether appropriate individualized accommodation has been provided, and
    c. whether the suspension or expulsion is likely to result in an aggravation or worsening of the pupil's behaviour or conduct.[28]

Mitigating factors 1 and 2 clearly specifically contemplate that principals and school boards should be attentive to any cognitive, developmental or behavioural disabilities that a pupil potentially subject to suspension or expulsion might have. The same is true of additional factor 6, which explicitly references the individual education plans that underscore the accommodation of special needs pupils in the school system. Moreover, mitigating factor 3 introduces into

[27] *Ibid*, s 2
[28] *Ibid*, s 3

expulsion and suspension decisions a balancing between the characteristics of a student's special needs and the rights to safety of other people in the school, including staff members. Mitigating factor number 3 requires an assessment of what is an "acceptable level of risk" for staff or others in permitting the student to continue to attend school. As will be described in more detail below, this assessment which rests on the principal must be made in the context of statutory obligations to provide a safe workplace, to notify educational staff of the risk of violence, and to take all reasonable precautions in the circumstances to protect them from it.

The parent or guardian of an expelled pupil, or, in certain circumstances, the pupil him/herself, can appeal a school board expulsion decision to the Child and Family Services Review Board.[29] These decisions will also figure prominently in our analysis about the intersection between occupational health and safety rights, and the accommodation of special needs pupils with aggressive tendencies.

A last notable feature of the "Behaviour, Discipline and Safety of Pupils" regulation concerns the right—established under the regulation—of all school board employees to refuse to respond to "a pupil of a school of the board behaving in a way that is likely to have a negative impact on the school climate" where "responding would, in the employee's opinion, cause immediate physical harm to himself or herself or to that of a student or another person".[30] This right enshrines an exception to the obligation imposed on employees to respond to student misbehaviour set out at s. 300(4) of the *Act*, and functions as a re-iteration, in a sense, of the right to refuse unsafe work set out in the *Occupational Health and Safety Act*. Importantly, the "Access to School Premises" regulation permits principals, vice-principals and other people authorized by a school board to deny a person—including a student—access to school premises "if [that person's] presence is detrimental to the safety or well-being of a person on the

[29] *EA*, s 311.7, and O Reg 472/07, ss 1, 6(4).
[30] O Reg 472/07, s 8.

premises".[31] This weighing of whether to suspend or expel under the Education Act in Mitigating Factor #3 and the Access to School Premises regulation which permits exclusion where the student's presence creates an unacceptable risk should not be made without considering the rights of teachers and other educational workers to notice of the potential risk and the exercise of their right to refuse "unsafe" work. What a principal may think is an "acceptable level of risk" for an education worker may not be perceived in the same light by the worker entitled to a safe workplace.

B) *Human Rights Code*

Ontario's *Human Rights Code* prohibits discrimination on the basis of disability in the provision of services.[32] The *Code*'s definition of disability encompasses both physical and mental impairments, covering developmental disabilities, learning disabilities and mental illnesses.[33] Moreover, schools, as a service, are certainly subject to the prohibition. As such, because of the *Code*, school administrators cannot discriminate against special needs students in providing educational services to these students. S. 17(2) of the *Code* requires that, among others, service-providers accommodate people with disabilities up to the point of undue hardship. Undue hardship can be reached because, as noted at s. 17(2), "health and safety requirements" do not allow for further accommodation. On this basis, a school board is required to provide accommodation to its special needs students, but not in an unlimited fashion: occupational safety, for example, can theoretically limit a special needs student's right to accommodation.

As under some of the provisions of the *Education Act* and its regulations, a health and safety approach is woven into the *Code*'s approach to disability, discrimination and accommodation. Thus, to consider suspension, expulsion or

[31] O Reg 474/00, s 3(1).
[32] *Code*, s 1.
[33] *Ibid*, s 10(1).

barring access to school premises under the *Education Act*, to consider not responding to an incidence of student behaviour, or to consider the accommodation of special needs students under the *Code* might necessitate simultaneously considering the health and safety rights of school workers. An investigation into student discipline might also be an investigation into a school board's responsibility to provide a safe workplace.

C) *Occupational Health and Safety Act*

The *Occupational Health and Safety Act* sets out a variety of rights for Ontario's workers. By operation of the "Teachers" regulation, the *OHSA* applies to teachers;[34] educational assistants, and child and youth workers require no such regulation to bring them within the scope of the *OHSA*.

Section 25(2) of the *OHSA* establishes several wide-ranging obligations for employers. The most relevant of these obligations for our purposes in this paper are as follows, and require the employer:

1. to "provide information, instruction and supervision to a worker to protect the health or safety of the worker";[35]
2. to "acquaint a worker or a person in authority over a worker with any hazard in the work";[36]
3. to "take every precaution reasonable in the circumstances for the protection of a worker";[37] and
4. to "prepare and review at least annually a written occupational health and safety policy and develop and maintain a program to implement that policy".[38]

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[34] RRO 1990, Reg 857, s 2.
[35] *OHSA*, s 25(2)(a).
[36] *OHSA*, s 25(2)(d).
[37] *OHSA*, s 25(2)(h).
[38] *OHSA*, s 25(2)(j).

Supervisory staff have a variety of obligations that correspond closely to those of employers. In school settings, the *Act* and the "Teachers" regulation stipulate that principals, vice-principals and department heads constitute supervisors.[39] These individuals must:

1. ensure that employees work in accordance with the *Act* and the regulations;[40]
2. "advise a worker of the existence of any potential or actual danger to the health or safety of the worker of which the supervisor is aware";[41]
3. where required by the *Act* or the regulations, "provide a worker with written instructions as to the measures and procedures to be taken for protection of the worker";[42] and
4. "take every precaution reasonable in the circumstances for the protection of a worker".[43]

Alongside these managerial obligations, workers have the right to refuse work where, among other contexts, "the physical condition of the workplace or the part thereof in which he or she works or is to work is likely to endanger himself or herself", or "workplace violence is likely to endanger himself or herself".[44] Notably, the "Teachers" regulation circumscribes the extent of this right for teachers. They cannot refuse to work where the health and safety of a student is immediately endangered.[45]

The reference to workplace violence in the *Act*'s work refusal provisions derives from a package of amendments centring on workplace violence and

[39] *OHSA*, s 1(1); RRO 1990, Reg 857, s 3.
[40] *OHSA*, s 27(1)(a).
[41] *OHSA*, s 27(2)(a).
[42] *OHSA*, s 27(2)(b).
[43] *OHSA*, s 27(2)(c).
[44] *OHSA*, s 43(3)(b)-(c).
[45] RRO 1990, Reg 857, s 3.

harassment introduced into the *Act* in 2009.[46] These new provisions require employers to develop written workplace harassment and violence policies, and review them at least once a year.[47] Workplace violence is defined as threatening to injure, attempting to injure or actually injuring a worker in the workplace.[48] Workplace harassment is cast as "engaging in a course of vexatious comment or conduct against a worker in a workplace".[49]

The employer is required to create a program to implement its workplace violence policy. In this connection, the employer must assess the risks of workplace violence in a way that is attentive to the kind of work performed in the workplace, and to the unique qualities of the workplace.[50] These risks must be re-assessed as often as is necessary to ensure that the policy and the program properly protect against workplace violence.[51] Any assessment or re-assessment is to be shared with the joint health and safety committee.[52] The program, based on this assessment, must contain risk-control measures, "procedures for summoning immediate assistance when workplace violence occurs or is likely to occur", and reporting and workplace violence response protocols.[53]

Employers are also obligated to educate and train workers on the contents of the workplace violence policy and associated program, [54] though the *Act* provides no detail about the nature or extent of this education and training. These educational statutory duties, in addition, apply to specific information, and even "personal information", about individuals in the workplace who have

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[46] See also CAPSLE paper 2010: Victoria Réaume and Christopher Perri "Health and Safety: The Intersection of Perspectives on What Makes a School Safe"; Grant Bowers "Competing Rights: Bill 168 and the Human Rights Code" LSUC Continuing Legal Education, March 2010; Victoria Réaume and Janina Fogels "From Zero Tolerance to Progressive Discipline: Ontario's Bill 212" CAPSLE 2008
[47] *OHSA*, s 32.0.1(1)-(2).
[48] *OHSA*, s 1(1).
[49] *Ibid.*
[50] *OHSA*, s 32.03(1), (2)(a)-(b).
[51] *OHSA*, s 32.03(4).
[52] *OHSA*, s 32.03(3), (5).
[53] *OHSA*, s 32.02(1), (2)(a)-(d).
[54] *OHSA*, s 32.0.5(2)(a).

histories of workplace violence, with whom a worker is likely to come into contact, and who might cause a worker physical injury.[55] Such individuals, on the plain wording of the *Act*, would include special needs children with established violent behaviour patterns. The *Act* explicitly links these workplace violence provisions to the broader duties of the workplace parties discussed above.[56] In essence, these provisions enhance rights and obligations stemming from the principles of hazard identification, prevention and notification already present in the structure of the *Act*.

There is a recognition that the "personal information" provided to workers about these individuals must be limited to what is "reasonably necessary to protect the worker from physical injury. [57] but information about the risk (and arguably, details about the assessment by the principal of whether or not the student should be denied access to the school under the mitigating factors) must be shared with teachers or other staff. In other words, if the principal is considering whether or not the student's access presents an "unacceptable" or "acceptable" level of risk, this involves a clear recognition that there is indeed, risk involved.

If the student is permitted access, despite this risk, those persons responsible for interacting with the student should be notified under the *Occupational Health and Safety Act.* This notice would present the opportunity to discuss the protective measures necessary to enable access in such a way as to respect everyone's rights.

Currently, it is these provisions which cause administrators and educational workers the most concern. There are no clear guidelines or cases yet regarding this disclosure requirement and there is a concern on the part of administrators that privacy should "trump" the notice requirements under OHSA,

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[55] *OHSA*, s 32.0.5(2).
[56] *OHSA*, s 32.0.5(1).
[57] *OHSA*, s 32.0.5(4).

while educational workers point out that the sharing of information is mandatory, subject only to the proviso that the information shared is to be what is reasonably necessary to protect the worker from physical injury.

3. EXISTING COMMENTARY

Largely, the existing commentary on special education rights for pupils, and the occupational health and safety rights of school staff has dealt with the intersection of these rights in a way that assumes that these rights are conflicting in nature, rather than complementary.

Certainly, the Ontario Court of Appeal's decision in *Bonnah (Litigation Guardian of) v. Ottawa-Carleton District School Board*[58] is, in many ways, emblematic of the existing approach to this intersection. In that case, the Court of Appeal found that Zachary Bonnah, a special needs student, could be excluded from school premises on the basis, in part, of subsection 3(1) of the "Access to School Premises" regulation under the *Education Act*, cited above. The Court reasoned that exceptional pupils could not be placed beyond the reach of provisions like subsection 3(1): to do so would be "not only inconsistent with the language used in the *Act* and the regulation, but would seriously imperil the safety of exceptional pupils and other children who interact with that exceptional pupil".[59] Cases like *Bonnah* are structured in a way that set up a conflict-based model of the interaction between health and safety rights—whether of pupils or staff—and special education rights. In *Bonnah*, it was either that the child be excluded from the school premises, or that the students surrounding the child be subject to unwarranted safety dangers on these premises.

[58] 64 OR (3d) 454 (CA).
[59] *Ibid* at para. 35.

In *Bonnah*, the Court of Appeal did not delve into the nature of the rights at issue. Perhaps, given the context, it might not have been appropriate for it to have done so. However, in structuring its analysis in the way it did, the Court of Appeal made it appear that the safety rights of pupils were trumping the right to education of the special needs child. Greg Dickinson noted in his article "Court of Appeal Rejects Use of 'Safe Schools" Provisions to Transfer Exceptional Pupil":

> Viewed in its broadest context, this case is about the equality rights of disabled persons. If this had been a human rights code complaint there would have been a significant onus on the person or body depriving a disabled person of equal treatment to show that there were reasonable and *bona fide* reasons for doing so and that reasonable attempts to accommodate the person's disability up to the point of undue hardship had been made. In the present case there is only the scantest mention in the Court's review of the facts about the presence of an Educational Assistant in the first year of Zachary's attendance at the school from which the Board sought his removal. One is left wondering what steps if any the school and Board took to ameliorate the safety concerns or whether 'safe schools' rhetoric conspired with inadequate funding for special education support services and long delays in the special education appeals process to create the anomalous situation that would see Zachary remain out of school for an entire year.[60]

In a sense, what Dickinson advocates in this passage is an analysis that views the safety rights of pupils through a human rights and special education lens. Cases about safety in schools should be seen fundamentally as cases about equality: that, in taking human and special education rights seriously, pains should be taken to avoid disrupting the educational path of special needs students. What is missing from Dickinson's assessment, however, is an acknowledgement that cases involving the intersection of health and safety rights, and special education rights are not fundamentally about either set of rights, but rather about both sets of rights. To emphasize one set of rights at the expense of the other is almost to engage in the "trumping" reasoning implicitly endorsed by the Court of Appeal in *Bonnah*. A more productive way of confronting the intersection of both sets of rights is to use the common features

[60] 13 Educ. & L.J. 455 at 459-460.

of the rights in a complementary fashion: these rights can function together to provide an analysis attuned to human rights concerns, special education goals and requirements, and rights to a safe school environment.

This complementary approach also recognizes that, in the vast majority of cases, transferring, expelling or suspending a special needs student will not be necessary if staff health and safety rights, and the human and educational rights of exceptional pupils are considered in concert. The same is true of work refusals initiated by school staff who work with special needs students. In their article "When Special Needs Education and Safety Collide", Jennifer Trepanier and Brian Nolan speak explicitly about the "conflict between [the] two competing interests" respectively motivating special education and the desire for safe schools.[61] Their analysis thoroughly endorses a conflict model in assessing special education rights, and occupational health and safety rights. They discuss the Superior Court's decision in *Bonnah*, upheld by the Court of Appeal in its decision, and argue that "an administrator/school board, when balancing these competing interests should give precedence to the maintenance of a safe school environment".[62] They emphasize, too, alternatives to thorny issues of integrating potentially violent exceptional pupils into "'regular' classrooms", suggesting "home instruction or home schooling"[63], or placement in special "government approved facilities".[64] This way of painting the accommodation of special needs students may under-emphasize the central importance of integration and accommodation in special education.

The authors' discussion of staff occupational health and safety rights likewise centres on the most drastic such right, namely, work refusals. They note, "it is increasingly more common for educators to refuse to work where the educator believes that a special needs pupil poses an unacceptable safety

[61] "When Special Needs Education and Safety Collide: How School Boards Can Balance the Competing Interests of Special Needs Students and Maintaining a Safe School Environment" at 1.
[62] *Ibid* at 4.
[63] *Ibid.*
[64] *Ibid* at 5.

risk".[65] This way of reading health and safety rights fits into the same conflict-based model implied in *Bonnah*: the authors emphasize educational staff's refusals to teach—which has the necessary corollary that a special needs pupil's education is being disrupted. In both situations, the preservation of one sort of right—either educational or occupational health and safety-based—means the diminution of the other.

However, the authors recommend at the conclusion of their paper the adoption of "preventative practical solutions": that school boards establish protocols for emergencies and violence hazards, and provide "intense training for staff", comprising, in part, "child specific training", and appropriate personal protective equipment.[66]

In our view, as soon as a student is identified as demonstrating behaviours that poses a risk of physical injury, preventative practical solutions should be immediately considered and implemented. Teachers and other education workers responsible for the student should be notified of the concerns promptly and a Safety Plan should be developed with teacher input, to minimize the risks of physical harm. Work refusals will be less likely if specific measures are taken in advance and if staff are well equipped with the training, strategies and equipment necessary to plan for their delivery of education to the student.

4. BUILDING A NEW ANALYSIS: DECISIONS OF THE SPECIAL EDUCATION TRIBUNAL AND THE CHILD AND FAMILY SERVICES REVIEW BOARD

Such recommendations for "preventative practical solutions" fit into a complementary and not conflict-based account of the interaction between occupational health and safety rights, and special education rights. It is

[65] *Ibid* at 6.
[66] *Ibid* at 9.

important, however, to investigate and research a more thorough account of these solutions. It is only in this way that we can see how occupational health and safety rights, and special education rights can complement one another in providing solutions to student aggression arising out of disability.

It is in this context that the decisions of Ontario's Special Education Tribunal ("Tribunal") and the school discipline decisions of the Child and Family Services Review Board ("Board") are noteworthy. While these decisions do not directly concern the *Occupational Health and Safety Act*, both tribunals provide detailed assessments of staff safety, and how such safety can be assured without concomitantly diminishing the rights of special needs children.

As a starting point, the Special Education Tribunal's decision in *G.B. and M.S. v. Ottawa-Carleton District School Board*,[67] the appeal decision about the placement of the same special needs child whose barring from school premises was at issue in *Bonnah*. The IPRC for the school board had decided that the pupil "be placed at a...special needs school with a segregated population".[68] The pupil, as noted in *Bonnah*, had a history of aggressive and violent behaviour: "vocalizations, hitting, kicking, throwing chairs, increased the longer that the student remained in the classroom and as expectations increased beyond the student's capabilities".[69] The pupil had also become violent with the educational assistant assigned to him.[70]

The Tribunal found that this behaviour was attributable to an improper classroom placement insisted upon by the student's parents—where he attended class with considerably younger children, and thus had to use "[t]ables and chairs, sinks and other equipment...geared to small children"—and to his "frustration at not being able to comprehend the academic expectations" placed

[67] *G.B. and M.S. v. Ottawa-Carleton District School Board* (2002) ("*Ottawa-Carleton*").
[68] *Ibid* at 2.
[69] *Ibid* at 19.
[70] *Ibid* at 9, 20.

on him.[71] These expectations, underscored by the student's parents, were based in standard "grade level expectations using the provincial report card".[72] The school board's accession to parental demands was inappropriate, and the school board had developed a behaviour management plan that did not effectively control the student's aggression. The Tribunal commented on this in the following way:

> It is the opinion of the Tribunal that the behaviour management plan as implemented by the board was inadequate. When the newly designed behaviour management plan (under the recommendations section) is put into effect, with particular emphasis on preventing behaviours from beginning, and carried out by all staff that comes in contact with the student with modifications to the plan as the year's progresses, that the behaviours will become less frequent and less severe.[73]

The Tribunal also found that, while in the regular classroom with the younger children, the student did not have the amount of staff support necessary for his aggression to be effectively handled. As such, it directed that the student be placed in a Dual Diagnosis class and a regular seventh grade class. The Tribunal stated:

> In this Dual Diagnosis class, the student will have, in addition to an academic program, a program that is carried out by people who have had experience and training in changing challenging behaviours and who can follow the behaviour management plan developed by board personnel. The opportunity to have behavioural experts on site will assist in dealing with behavioural issues immediately, rather than leaving an educational assistant to calm the student before returning to an integrated class or home. The Tribunal believes that the safety issues will be addressed through the Behaviour Management Plan as written under "Recommendations" which should be initiated and monitored by professional staff of the board. The Tribunal is of the opinion that an academic program geared to the student's intellectual needs will reduce much of the frustration that led to escalating behaviours when expectations became too demanding for the student.[74]

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[71] *Ibid* at 21.
[72] *Ibid.*
[73] *Ibid.*
[74] *Ibid* at 23.

The Tribunal recommended, in this connection, that a variety of school board staff, including "psychology and social work staff", work with the student's teachers to develop the behaviour management, and "train any and all staff to those antecedents [occurring before the acting-out behaviours] so that prior to acting out, the student is removed from a group setting". The student's parents were to be involved in providing information about measures that minimize the student's aggression, and "all staff who will come in contact with the student during the school day [should] be made aware of the plan and how the entire school staff can assist in preventing the student's behaviours from escalating to the point where the student disturbs others".[75]

In *Ottawa-Carleton*, the Tribunal set out a number of special education accommodations that, simultaneously, work to protect staff safety. The Tribunal recommended training and the proper provision of information to staff, and directed the reduction of workplace violence hazards through the proper classroom placement and management of the student. Notably, too, the Tribunal recommended that the measures implemented for the student be regularly re-assessed, so that the hazards caused by the student's disabilities would always be minimized. All these actions of the Tribunal directly reinforce the occupational health and safety rights of the staff encountering the student: their rights to the removal of workplace hazards, to information and training were upheld, and not at the expense of the accommodation of the special needs pupil.

Similar issues were at play in *J.K. v. Toronto District School Board*,[76] which concerned an student diagnosed as "autistic". The student engaged in "seven to thirteen [aggressive or violent] incidents each week. The evidence showed that the escalation of disruptive behaviours began upon the student's entry into the combination HSP/Regular Class. Whenever the student was anxious and frustrated, undesirable behaviours increased".[77] The student's

[75] *Ibid* at 30.
[76] *J.K. v. Toronto District School Board* (2009).
[77] *Ibid* at 13.

parent had removed her child from school, because of this behaviour; however, the Tribunal emphasized that such a removal was "not the solution. The student needs to be in school and a safety plan that may require restraint measures, needs to be in place. All parties must work together to design a plan that can be used when the need arises".[78] Among the parties mentioned here was the student's parent. Communication had broken down between the parent and the school board, and the Tribunal recommended that interaction between the parent and the school board be more regular and more productive, because of the information that the parents of a special needs child can provide in assessing and responding to the student's needs.[79] The Tribunal also recommended that current information about the student be collected through an educational assessment.[80]

Alongside these informational difficulties was a lack of school board protocols and full training for staff members. The school board had not communicated effectively with the Leaps and Bounds program which the student had attended previously, and so had not been prepared to receive the student. As such, the school board should have had a protocol in place so that the school and its staff were accustomed to the student's needs.[81]

Much of the student's anxiety, the root of the student's aggression, arose from classroom transitions, that is, changes to the student's environment. The Tribunal thus canvassed a number of placement options for the student that would minimize the number of transitions occurring throughout the school day. The Tribunal consequently chose an Intensive Support Program on an interim basis for the student: "This placement will offer the student stability and reduce the number of transitions because of the more controlled environment." That program—involving a small class—would also provide more "opportunities for

[78] *Ibid.*
[79] *Ibid* at 15.
[80] *Ibid* at 16.
[81] *Ibid* at 16.

direct supports for the student".[82] The Tribunal also emphasized that staff "who have direct contact with students with autism" should receive Applied Behavioural Analysis training focused on them.[83]

As in *Ottawa-Carleton*, the Tribunal was extremely sensitive both to the need to minimize the student's violent behaviour, and to keep the student in school and ensure the student's academic progress. Stated broadly, the decision demonstrates that analyzing appropriate educational paths for an exceptional pupil necessarily takes into consideration a school board's occupational health and safety responsibilities to staff. The school board has a responsibility to reduce workplace violence and hazards for its workers, just as it has a responsibility to provide an education to a special needs pupil. Moreover, the Tribunal's decision—unlike, for example, the decision in *Bonnah*—engages in an assessment that does not diminish one set of rights in favour of another. It manages to examine both occupational health and safety rights, and special education rights in a complementary fashion.

The key in both of these decisions appears to be a fulsome investigation of the student's past and present behaviour and detailed advanced planning. The decisions point out that the following information is important:

1. advance knowledge of history of behaviours;
2. documentation on "triggers" and reactions,
3. knowledge of previous programs attended, and available programs;
4. staff knowledge;
5. staff training;
6. established protocols

Decisions of the Child and Family Services Review Board in suspension and expulsion appeals often involve the same kind of nuanced analysis seen in

[82] *Ibid* at 15.
[83] *Ibid* at 17.

the Special Education Tribunal's decisions. That is, while not specifically invoking the provisions of the *Occupational Health and Safety Act*, the Board discusses in detail what kinds of measures a school board should implement in trying to eliminate the violent behaviour of a student with disabilities.

In *M. v. Toronto District School Board*,[84] the Board dealt with the expulsion of a student from all schools of the school board. The student had thrown rice at a hall monitor, and had pushed the vice-principal of the school that he was attending.[85] The student had special needs, and the school board had established an individual education plan, "but never had an Identification Placement and Review Committee (IPRC) to identify him formally as a special needs student and determine the appropriate school placement".[86] The student's special needs led to "low cognitive functioning", and this low functioning, in turn, "contributed to his acting out. The Principal felt that pupil should be at a technical school...where he could get more resources".[87]

The Board quashed the expulsion on the grounds that the act of pushing the vice-principal did not constitute an assault under either the *Education Act* or the school's board policy. Nonetheless, the Board stated that it would have quashed the expulsion in any case "because of the application of mitigating and other factors".[88] A large part of this reasoning was based on the Board's conclusion that the student's behaviour was related to his special needs,[89] and that the Board had failed to accommodate these special needs properly:

> The pupil has low cognitive functioning, problems with distractibility and a related high frustration level. In addition to trying to manage the pupil's behaviours, the school should have clearly identified his needs through the IPRC and assessment processes and developed a plan to help remediate the student who was functioning at least

[84] *M. v. Toronto District School Board*, 2008 CFSRB 105 (CanLII).
[85] *Ibid* at 2.
[86] *Ibid* at 3.
[87] *Ibid.*
[88] *Ibid* at 5.
[89] *Ibid* at 7.

> three grade levels behind his current grade. Given the increase in the acting out behaviours, linked to his frustration level, it should have been evident that his learning environment was not effective and that further investigation and identification of supports was needed. While the Principal felt the pupil should be in a different environment, such as a technical school or a school with higher teacher-student ratio to meet his needs, letting him more or less self-destruct in the current environment was not the appropriate path to meeting his needs.[90]

As such, the school board had not taken the steps outlined in the *Education Act* in providing special education for the student. This failure simultaneously gave rise to the student's being an increased hazard to the school's population, including its staff members. The Board thus recommended that "the identification and accommodation" of the student's special needs occur.[91]

Inadequate accommodation also lay at the heart of the facts in *C.V. v. Simcoe Muskoka Catholic District School Board.*[92] The student at issue had been expelled for bringing a pullet gun to school. He had had been diagnosed with Oppositional Defiant Disorder. When the student had started taking classes at the school from which he was expelled, the school "was unaware of the Student's needs". The school had not received information from the student's prior school, nor from the student's parents.[93] Consequently, the student started school with "no transition plan" in place and "inadequate supports".[94] In quashing the expulsion—though still instituting a suspension—the Board directed that the school "plan appropriately for the Student's needs".[95] Such planning and consequent accommodation of the student's disorder would "redress his misbehaviour".[96] The school had a social worker treat the student, and had referred the student to the school board's psychologist, but more was needed.[97]

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[90] *Ibid* at 9.
[91] *Ibid* at 11.
[92] *C.V. v. Simcoe Muskoka Catholic District School Board*, 2010 CFSRB 5 (CanLII) ("*Simcoe Muskoka*").
[93] *Ibid* at 2-3.
[94] *Ibid* at 3.
[95] *Ibid* at 8.
[96] *Ibid.*
[97] *Ibid.*

Once again, in *Simcoe Muskoka*, we can see a convergence in interests between occupational health and safety rights, and the educational rights of special needs children. Hazardous behaviour in the workplace of school staff was tied to failures in accommodation; consequently, alleviating the hazard was linked inextricably to providing proper accommodation of the student's disability. The importance of facilitating information-sharing about the nature of the student's disability is also highlighted in the decision. As noted above, workers have rights to information not only about workplace hazards, but about individuals with histories of violent behaviour. Such information should be made available to school staff who interact with special needs students if it will reduce workplace violence risks, subject, of course, to the students' privacy rights and to subsection 32.0.5(4) of the *Occupational Health and Safety Act*.

Bill 157 Reports (Safe Schools Reporting Forms)

In response to concerns about Safe Schools, and corresponding to amendments to the Education Act requiring staff to respond to inappropriate student behaviour such as physical assault, the Ministry of Education released policy and program memorandum PPM 144. This PPM was intended to give guidance to school boards and educational workers about how to document incidences of inappropriate student behaviour which could lead to suspension or expulsion, whether such behaviour was intentional or not.

All employees are required to report serious incidences to the principal and to confirm any verbal report in writing in writing, using the "Safe Schools Incident Reporting Form – Part I" in Appendix 2 to PPM 144.

School boards are expected to provide information to board employees on completing the Safe Schools Incident Reporting Forms. Each such report is to be assigned a report number, and a receipt issued acknowledging that the report has been filed. The reports could form part of the OSR in certain circumstances.

These Safe School reports can be considered the "early warning system" from staff, including bus drivers, teachers or support workers that a student's behaviour is creating a risk of physical injury to staff. When the report is filed, the principal is required to assess whether or not the student will be suspended or expelled as a result of the behaviour described in the report. The mitigating factors will be assessed at this juncture, but even if suspension or expulsion does not result, these reports should be a clear signal that Occupational Health and Safety Act considerations are at play, and that a proper Safety Plan should be created to address potential student accommodation and preventative measures to protect health and safety.

To date, it is not clear from a teacher perspective that administrators have been provided with the tools necessary to coordinate Safety Plans at the earliest possible opportunity, before the issues escalate. There appears to be a real lack of practical guidance and assistance (not to mention funding) for administrators charged with making complex assessments on student accommodation and worker health and safety, which would permit administrators to gather pertinent information, to share necessary information and to coordinate student accommodation in such a way as to respect educational workers' rights to a safe workplace, free from physical threats or injury. For the most part, these issues are examined in hindsight, once the parent files appeals or other litigation, or once the teacher refuses unsafe work.

5. CONCLUSION

A framework that analyzes the interaction of occupational health and safety rights, and special education rights in terms of the conflict between these sets of rights misses their many fundamental similarities. Frequently, to accommodate a special needs student is to reduce workplace hazards for school staff, and vice versa. Notably, an approach that emphasizes these similarities does not seek to diminish either sort of right, but to promote both simultaneously.

School administrators should thus be attentive to how occupational health and safety rights, and special education rights can complement, and not undermine, one another in addressing any risks caused by special needs students at school.

The key is advance planning with the collaboration and cooperation of staff who are often in the best position to report on behaviour, issues and their impact in the classroom. Safety Plans should be living documents: prepared early; updated frequently as conditions change; and shared appropriately with all staff interacting with the student.