

**Human Rights Tribunal
of Ontario**

**Tribunal des droits de la personne
de l'Ontario**



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March 29, 2010

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Re: **Bunda v. Hamilton Health Sciences – Hamilton-Niagara Autism Intervention Program
HRTO File Number: 2009-04401-I**

Please find enclosed a decision of the Tribunal in this matter, dated March 29, 2010.



HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

Sebastian Bunda by his next friend Maria Bunda

Applicant

-and-

**Hamilton Health Sciences – Hamilton-Niagara Autism Intervention Program
and Jo-Ann Reitzel**

Respondents

DECISION

Adjudicator: David A. Wright
Date: March 29, 2010
File Number: 2009-04401-I
Citation: 2010 HRTO 698
Indexed as: Bunda v. Hamilton Health Sciences

APPEARANCES

Sebastian Bunda, by his Next Friend)
Maria Bunda, Applicant)
)
)

Maria Bunda

Hamilton Health Sciences –)
Hamilton-Niagara Autism Intervention Program)
and Jo-Ann Reitzel, Respondents)
)
)

Cindy Clarke, Counsel
and Damien Hornich,
Student-at-Law

[1] The following Decision was delivered orally at the hearing held on March 29, 2010:

1. This is an Application under s. 34 of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended, alleging discrimination in goods, services, and facilities. The applicant is a six-year-old boy with autism. Through his next friend, his mother, he alleges that the respondent discriminated against him by terminating funding for IBI (Intensive Behavioural Intervention) therapy. In a previous Interim Decision, 2010 HRTO 53 (CanLII), the Tribunal dismissed a Request for Interim Remedy, allowed a Request to Expedite, and gave directions about the conduct of the hearing. At paras. 10-14 of the Interim Decision, the Tribunal, among other things, highlighted the issues that the Tribunal has jurisdiction to consider, outlined the importance of expert evidence to a case such as this one, and directed that the parties be prepared to argue at the outset of the hearing whether the Application can succeed, in light of the law and the evidence the applicant intended to present.

2. The Tribunal heard arguments on this question at the hearing on March 29, 2010. Having heard the evidence that the applicant's next friend intends to present and her thoughtful arguments, I find, for the reasons that follow, that the Application cannot succeed in light of the law and the evidence. For the reasons that follow, the applicant cannot meet the burden of proof to show that, on a balance of probabilities, Sebastian has been discriminated against on the ground of disability. Accordingly, there is no need to hear oral evidence from the respondents' witnesses.

BACKGROUND

3. The organization respondent is the lead agency in the Hamilton-Niagara region for the Autism Intervention Programs created by the Ministry of Children and Youth Services ("MCYS"). It is the responsibility of the regional program to determine eligibility, intensity and setting of a child's IBI. Parents of children admitted to the program can choose to receive services directly from the regional program or to receive funding and arrange for the delivery and payment of the services themselves. In either case, the regional program is required, by the Program Guidelines, to complete a baseline skills assessment and evaluate the child's progress every six months.

4. Prior to April of 2005, the MCYS had mandated that IBI was to be directed to children aged two to six years. The Ministry did not, however, replace the criterion of age with any other discharge criteria. The organization respondent has established an IBI Discharge and Transfer Procedure that includes the following provisions:

1) All children in IBI will receive up to 12 months of treatment, during which time there will be a continuous process of evaluating the child's progress in individual treatment sessions and formally twice yearly using standardized clinical measures (see below).

2) Clinical assessments (Vineland Adaptive Behaviour Scale – adaptive skills, and functional skills assessment) will be completed every 6 months as a means to evaluate a child's progress in IBI.

3) Assessment information and evaluation of the child's progress will be reviewed with the family every 6 months.

4) Children in IBI may be transferred to alternate programs and services based on their clinical/developmental needs as determined by clinical assessments and review of the information from their IBI sessions. These programs and services will be integrated with community services for children with special learning needs, and are geared towards fostering the child's social, communication and play skills. This transfer will result in IBI being discontinued.

5) Children in IBI who, based on objective clinical measures, demonstrate little to no progress in their cognitive and language skills after 12 months of IBI will be transferred to a consultation model of intervention: Transition Support Services. Programming within the Transition Support Services will be individualized to address the needs of each child and family. This transfer will result in IBI being discontinued.

...

8) Children who demonstrate clinically significant progress after 12 months in treatment will continue in IBI. Clinical assessments of their adaptive and functional skills will continue to be completed and reviewed every 6 months. Transfers to alternate programs and services, and discontinuation of IBI will be based on the clinical needs of the child.

5. Prior to finalizing the discharge decision, the respondent conducted two assessment reports signed by the clinical coordinator and the clinical director. These reports were reviewed by an independent reviewer at the request of the applicant's next friend. The second report, dated November 5, 2008, concluded, on the basis of various clinical observations and measures, that "IBI has not been effective in changing [the applicant's] rate of learning in the 18 months he has had IBI".

DECISION

6. The applicant's next friend makes two principal arguments. First, she states, a review of the assessment reports suggests that the applicant was in fact making progress and that the respondent's conclusion is clearly and evidently wrong. This, however, is not an allegation that the *Code* has been violated. The *Code* does not give the Tribunal the power to sit on appeal from or evaluate individual decisions of government agencies for compliance with legislation or guidelines: see generally, *Zaki v. Ontario (Community and Social Services)*, 2009 HRTO 1595 (CanLII) at para. 16. Whether the respondents made a correct or incorrect clinical judgment about the applicant's progress is not an issue the Tribunal has the power to decide.

7. Second, it is alleged that the discharge policies applied by the organization respondent discriminate against children who are at the more severe end of the autism spectrum, as compared with other children served by the program with less severe autism. The applicant's next friend alleges that this is clear from a draft "clinical continuation criteria" document provided to her by the respondent at her request, which she says establishes specific benchmarks that each child in the program must meet to continue in the program. She says that these neutral criteria have a disproportionately negative impact on children with severe disabilities.

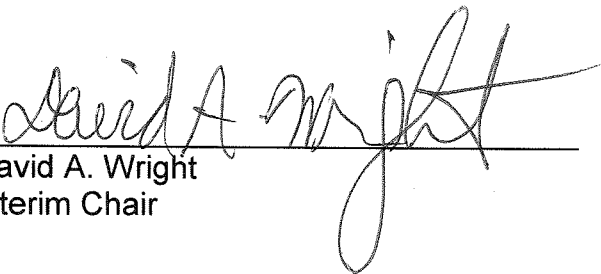
8. In my view, this argument cannot succeed for two reasons. First, it is evident from all of the documentation submitted by the applicant that the clinical continuation criteria were not what was applied to the discharge decision regarding the applicant. All of the reports suggest that his progress was evaluated. Moreover, establishing a disproportionate impact of a policy on children with a disorder at the more severe end of the spectrum would require expert evidence. These are complicated medical and scientific issues, and for an applicant to meet the burden of proof in our legal system, specific evidence on these questions must be presented. While the applicant has introduced an affidavit from an expert, it does not address whether the criteria applied have a negative impact on children with certain types of autism. Accordingly, there is no evidence put forward that could prove that the discharge policy discriminates on the basis of disability. I leave for another day the question of whether, assuming such a disproportionate impact could be shown, this would demonstrate a violation of the *Code*.

9. My only power in this case is to determine whether it can be proven that the respondents have violated the *Code*. The questions of funding for IBI and the most appropriate discharge criteria, unless discrimination is shown, are for the government and those administering the program. I recognize the severe challenges that Ms. Bunda faces as the parent of a

child with a significant disability, and her strong and tenacious advocacy on behalf of her son. That includes making logical and thoughtful legal arguments at this hearing. However, in light of the evidence and the law, the applicant's burden of proof to show discrimination cannot be met.

10. Accordingly, the Application is dismissed.

Dated at Toronto, this 29th day of March, 2010.



David A. Wright
Interim Chair