



Superior Court of Justice  
Divisional Court  
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## Facsimile Transmittal

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<b>From:</b> Julia Bryan	<b>Date:</b> January 11, 2010
<b>RE:</b>	Delaine Ceretti v. Hamilton Health Sciences-McMaster Children's Hospital
<b>Court File No.:</b> 151/09	<b>Pages (including coversheet):</b> 12
<b>Cc:</b>	
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NOTE: Please find attached a copy of the Reasons for Judgment from the Justices Leitch, Dambrot and Swinton with regard to the above-noted matter.

If you have any questions please feel free to contact the Divisional Court office at 416-327-5100.

ONTARIO  
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

LEITCH, DAMBROT AND SWINTON JJ.

B E T W E E N:

DELANIE CERETTI (by her litigation  
guardian PAUL CERETTI)

Applicant

- and -

HAMILTON HEALTH SCIENCES-  
McMASTER CHILDREN'S HOSPITAL  
("HAMILTON-NIAGARA REGIONAL  
AUTISM INTERVENTION PROGRAM")

Respondent

)  
)  
) *Elle Venhola, for the Applicant*  
)  
)  
)

)  
) *Cindy Clarke and Cara Zwibel, for the*  
) Respondent  
)  
)

) HEARD at Toronto: December 1, 2009

SWINTON J.:

**Overview**

[1] This application for judicial review challenges the decision to discharge the applicant, a child with autism, from the Regional Autism Intervention Program delivered by the Hamilton Health Sciences-McMaster Children's Hospital ("HHSC"). The applicant claims that she was denied procedural fairness by the respondent.

**Factual Background**

*The Program*

[2] Approximately ten years ago, the Ontario government initiated the development of regionally coordinated programs for children diagnosed with autism in order to provide Intensive Behaviour Intervention ("IBI") therapy and support services. HHSC

became one of the designated Autism Intervention Programs in the province, funded by the Ministry of Children and Youth Services ("the Ministry"). HHSC runs the Regional Autism Program under the name "Hamilton-Niagara Regional Autism Intervention Program" ("the Program").

[3] Dr. Tristram Smith, an internationally renowned expert in the field of autism and IBI therapy, filed an affidavit in this proceeding describing IBI and giving his expert opinion, as a clinical psychologist, on the decision to discharge the applicant from the Program. He described IBI as a "time-limited intervention intended to accelerate the development of children with autism in order to help them succeed in community settings" (at para. 19). He stated that IBI is intended for toddlers and pre-school children with autism, summarizing his current understanding of the effectiveness of IBI for children with autism as follows (at para. 27):

IBI is not successful for every child with autism. When it is not proving to be successful (i.e. improving cognitive functioning and accelerating overall development), I believe it is appropriate to discharge a child from IBI treatment and consider alternative therapies or approaches tailored to the child's individual needs.

[4] Regional Programs are delivered under the *Child and Family Services Act*, R.S.O. 1990, c. C.11 (the "CFSA"). They operate under Program Guidelines issued by the Ministry. While the Guidelines set out eligibility criteria, they do not contain any specific criteria for discharge from the Program. Prior to April 2005, the Ministry had mandated that IBI was to be directed to children aged two to six years. When it removed the age criterion, the Ministry did not replace it with any discharge criteria.

[5] In regard to duration of therapy, the Guidelines provide:

As a child is identified as approaching transition from the program to school or other community settings, various additional assessments may be undertaken. A discharge assessment is required.

[6] The Program developed its own Discharge and Transfer Policy based on the premise that clinical evaluation of a child's progress with IBI therapy is essential. All children receiving IBI therapy are evaluated at the outset and every six months thereafter using a comprehensive assessment process that includes family feedback, observation and standardized testing of the child.

[7] The Discharge and Transfer Policy explicitly provides at para. 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.

***The Applicant's Involvement with the Program***

[8] The applicant and her twin sister were assessed as eligible to receive IBI therapy from the Program on July 20, 2005, and they were put on the wait list. At the time, the girls were two and a half years old.

[9] Space became available in the Program in March 2007, when the girls were four years old. An entry assessment was done, which included a number of standardized tests, including the Vineland and Mullen's Scales of Early Learning, as required by Ministry Guidelines.

[10] At that time, the children's parents, Tina Howard and Paul Ceretti, signed a Service Agreement, a document setting out the details of the services offered by the Program and explaining what the family could expect from the Program. The parents chose the direct service option ("DSO") for both children, meaning that IBI therapy would be delivered on the Program's premises through its employees. The other option was direct funding ("DFO") to a service provider.

[11] The Service Agreement is in effect for up to 12 months. It deals with assessments and termination. As well, it deals with intensity of services at paragraph 9, stating,

The Clinical Director and/or Clinical Supervisor will monitor the intensity and settings of IBI, the program goals and my child's progress by reviewing my child's IBI programs and/or Individual Service Plan every three to six months. Increases or decreases to the intensity of the program, changes to the settings, and/or the program goals are clinical decisions, and may be made to address my child's needs and his/her community program placement.

[12] The Agreement provides that discharge from IBI funded service will be discussed for a number of reasons, including that "[d]elivery of IBI programming is not resulting in improvements for a child, as determined by the Clinical Director through a review of the data collected over a 6 month period."

[13] The Agreement also provides parents with information on the Discharge and Transfer Policy, stating that a child may be discharged from the Program where "IBI is not effective with the child and another type of approach or treatment is more appropriate to meet the child's needs."

[14] While the applicant was receiving therapy, there was an outbreak of lice that disrupted her IBI therapy. All acknowledge that she did not receive an optimal number of IBI therapy hours during the lice outbreak.

[15] Due at least in part to frustration about the lice issue, the applicant's parents opted to change streams and move their daughters from the direct service option to the direct funding option. Under that option, the parents would select their service provider from a registry of approved providers.

[16] The applicant now receives her therapy from the Behaviour Institute ("BI"), a for profit company in the business of providing IBI and other services to children with autism and their families. The Program continues to be responsible for overseeing and evaluating her progress in IBI therapy, and it determines the quantity of IBI therapy and its duration.

[17] BI assessed the applicant in September 2007, shortly before assuming responsibility for her therapy. Based on its assessment and the approval of the Program, the applicant began to receive 40 hours per week of IBI therapy.

[18] At the time that the applicant switched to BI, her parents signed another agreement, which clearly addressed the Program's role in assessing the child and making decisions regarding the termination of IBI therapy. Article 5.1 of the DFO Agreement provides,

The Regional Program is to ensure that children receiving IBI have been assessed at the beginning of their funded service, every six months while receiving funded service and at the end of the funded service.

The assessments are to be completed by the Regional Program.

[19] Again, the agreement is in effect for 12 months, and Article 6.3 provides for discharge if the IBI programming is not resulting in improvements for the child, as determined by the Clinical Director, through a review of data collected over a six month period.

[20] The Program conducted a comprehensive 12 month assessment for the applicant, as it does for all children receiving IBI therapy. Prior to the assessment, the staff asked Ms. Howard to provide progress reports and curriculum assessment updates from BI, as the Program is unable to obtain information from the service provider without parental consent.

[21] Information from BI was ultimately received in late July 2008, but it was less detailed than expected, according to Dr. Jo-Ann Reitzel, a clinical psychologist and the Clinical Director of the Program.

[22] Dr. Reitzel considered a number of tools in making her assessment of the applicant. She reviewed the IBI progress information provided by BI, and her staff observed one of the applicant's IBI sessions. She also used the Vineland Adaptive Behaviour Scales, which includes an interview with a parent (in this case, Ms. Howard), and the Mullen Scales of Early Learning.

[23] The assessment demonstrated that the applicant's cognitive functioning was in the very low range when compared to children her age. The assessment scores were very similar at 12 months to those obtained during the entry assessment. Dr. Reitzel stated in her report,

Taken together the current assessment results are consistent with the diagnoses of autism spectrum disorder and developmental disability. Delanie's adaptive and cognitive functioning skills and abilities have remained fairly even in 12 months of IBI. In particular, there has been limited development measured in her cognitive abilities during 12 months of IBI. Delanie is continuing to learn at a slow rate in comparison to other children her age and her rate of learning appears to be consistent with her level of functioning.

[24] After considering all the information gathered, Dr. Reitzel concluded that IBI was not offering meaningful improvement for the applicant, and that it was appropriate to begin the discussion about discharging her from IBI therapy and providing transition to other services and school-based programs. It was her clinical opinion that the applicant needs and will benefit from structured programming based on Applied Behaviour Analysis ("ABA"). It uses many of the techniques of IBI, but its primary focus is on teaching skills and dealing with problem behaviour and aims to enhance the child's ability to function in society. It has much less emphasis on measuring cognitive changes.

[25] Following the Program's standard practice, a meeting was arranged with Ms. Howard on August 8, 2008 to discuss the results of the 12 month assessment, explain the Program's decision-making and provide an opportunity for parental feedback.

[26] Numerous attempts were made to schedule a further meeting with Ms. Howard to discuss a discharge plan, but she refused to participate. Instead, Mr. Ceretti, the applicant's father, requested a review pursuant to the Program's independent review mechanism and he obtained legal counsel.

[27] Given that a meeting could not be arranged, Dr. Reitzel set a discharge date in December 2008 and informed the parents.

[28] Through counsel, the parents provided a new progress report from BI on November 20, 2008. The report was dated October 29, 2008, and provided more detailed information than provided in June 2008. Dr. Reitzel reviewed the report and concluded that nothing in it would cause her to alter her opinion.

[29] Dr. Reitzel was of the view that further discussion was needed with the parents. As a result, the applicant's discharge date was extended to the end of March 2009. At a meeting on January 19, 2009, Dr. Reitzel and others met with the parents and their lawyer, and the reasons for the discharge decision were explained again. In February 2009, an independent reviewer confirmed the discharge decision.

[30] This application for judicial review was launched in early April 2009. As a result, the parties agreed, on a without prejudice basis, that the applicant's IBI therapy would continue pending the outcome of this proceeding.

### **The Issues**

[31] The applicant argues that the discharge decision was unauthorized or invalid. Counsel states that the application is primarily about the unfair process leading to the discharge decision, although counsel appears to argue, as well, that the decision cannot be justified on the merits, as it was unreasonable.

### **The Standard of Review**

[32] To the extent that the applicant argues that the decision is unjustified, the standard of review is reasonableness. As set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 53, the standard of reasonableness is generally applied when the decision under review involves questions of fact, discretion and policy.

[33] In this case, the Program was required to make an assessment of the applicant's progress and to decide whether IBI therapy was providing the desired benefit. The decision to discharge her from the Program is a clinical decision requiring the exercise of specialized expertise. Clearly, the staff members of the Program are much better situated to make clinical decisions about the efficacy of IBI therapy for an individual child than this Court.

[34] The applicant also alleges a denial of procedural fairness. The role for this Court, when procedural fairness is in issue, is to determine whether the appropriate level of fairness has been accorded, in light of the factors set out in cases such as *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 23-27). Those factors include the nature of the decision and its importance to the applicant, the statutory scheme that informs the decision-making, the legitimate expectations of those affected and the procedural choices made by the decision-maker.

### **Was the Applicant Denied Procedural Fairness?**

[35] The applicant submits that the process used by the Program was fundamentally flawed for a number of reasons: the lack of transparency in respect of documentation, communications and process; the failure to keep proper records; the failure to provide regular and meaningful consultation with the appropriate service providers (BI) and the family; and the failure to develop appropriate policy, procedures and criteria that promote child and evidence-centred decision making.

[36] The applicant also argues that s. 2(2) of the *Child and Family Services Act*, R.S.O. 1990, c. C.11 ("CFSA") obligates a fair decision-making process with clear and consistent criteria and with procedural safeguards. It reads:

Service providers shall ensure,

...

(b) that decisions affecting the interests and rights of children and their parents are made according to clear, consistent criteria and are subject to procedural safeguards.

[37] There is no doubt that the decision to discharge a child from the Program is of great importance to her and her family. However, in the circumstances, I am satisfied that the Program met its duty of procedural fairness and complied with the requirements of the CFSA.

[38] The decision was made following a clearly established process of evaluating the applicant's progress in the Program. Her parents were made aware of the process for making discharge decisions from the time she began therapy. They signed two contracts that explicitly set out the process for making discharge decisions. Those contracts stated that a lack of progress could result in the discharge of a child from the Program.

[39] The parents were also given opportunities to provide input into the ongoing planning for the applicant's care and treatment. For example, Ms. Howard was directly involved in the applicant's evaluation and assessment by participating in the parent interview component of one of the tests used for evaluation.

[40] The applicant submits that the Program denied it access to the raw data and supporting documentation underlying its assessments, and thus denied procedural fairness. As well, the decision was so important to her that written reasons should have been provided.

[41] In my view, the parents have been provided with adequate reasons for the decision. Ms. Howard met with Program staff to discuss the discharge decision in August 2008. Both parents have had access to Dr. Reitzel's evaluation report recommending discharge.

[42] Although Mr. Ceretti may be critical of the procedures applied, the Program has developed criteria and policies with respect to discharge decisions, so that all children in the Program will be subject to similar criteria and policies.

[43] The applicant argues that the contract of service created a legitimate expectation that she would continue to receive IBI therapy in accordance with her needs. In fact, the contract makes it clear that the services will be provided for up to 12 months, and a child will be assessed to determine whether continued participation in the Program is warranted.

[44] The applicant also submits that the private service providers and the parents were excluded from a meaningful role in the discharge determination. I reject this submission. The applicant's mother was invited to participate in the evaluation, and she did so. She

was also asked to obtain information from BI and eventually did so, although the information was not as detailed as Dr. Reitzel would have liked.

[45] Ultimately, the decision to discharge was a clinical decision to be made by the Program. That decision was made based on the information provided by the applicant's mother as well as BI. The Program has also considered the parents' views and the updated BI report when it became available.

[46] While the independent reviewer was not given a copy of the updated BI report, this is not a denial of procedural fairness. His/her role was to review the original decision of the Program Clinical Director, based on the information available to her.

[47] In summary, the applicant was afforded procedural fairness by the Program throughout the decision making process.

### **Was the Decision Reasonable?**

[48] The applicant submits that the Program failed to consider matters that it should have considered, particularly the professional opinion of the private service provider, BI, about the applicant's progress. Supervising Psychologist Dr. Walton-Allen was of the opinion that the applicant made "clinically significant gains" during her period of IBI therapy at IBI (affidavit at para. 29).

[49] The decision to discharge the applicant was a reasonable one, based on a clinical evaluation of the applicant's lack of progress in the Program. The decision of Dr. Reitzel was supported by an independent reviewer and the expert of an international expert in IBI therapy.

[50] According to the evidence, IBI therapy is specifically targeted at measurable improvement in cognitive abilities and language development (Reitzel affidavit, para. 7). After the 12 month assessment, Dr. Reitzel concluded that IBI therapy was not resulting in cognitive and learning improvements for the applicant, and therefore, it was ineffective.

[51] The independent reviewer said the following:

I believe this child is not responding as one would expect to the IBI intervention. The changes that are observed may be due to expected change that one sees in children with ASD, to non-specific factors such as increased structure during the day, or due to the use of other alternative forms of communication (such as the use of PECS) that could be administered by a SLP or a treatment team that provides an ABA program but not in a IBI format.

I believe that she would be best served by transfer to another program that could better meet her needs with a focus on life skills, alternative forms of communication, and a positive behaviour management program.

[52] Counsel for the applicant submits that the Program inappropriately used quotas when coming to its discharge decision. It became clear in oral argument, however, that the objection was to the use of age benchmarks, said to be inappropriate because the Ministry decided in 2005 to stop limiting access to IBI to those under six years of age.

[53] In fact, the Program did not use an age benchmark in evaluating the applicant. The decision to discharge the applicant from IBI was not based on the fact that she had reached school age; it was based on the clinical decision that she was not making progress in cognitive skills development.

[54] Dr. Reitzel also considered the updated report from BI received in November 2008. She concluded that the report confirmed the Program's assessment. While the applicant is making progress with some of her behaviour management and development of functional skills, it does not support progress in cognitive skills development, which is the focus of IBI (affidavit, para. 62).

[55] The Program has a responsibility to be fair to the applicant and her family. However, it must also consider the interests of other children and their families seeking access to IBI therapy. As of March 20, 2009, there were 133 children on the waitlist for IBI in the Program's area, most of whom had been waitlisted for more than two years. As resources are not unlimited, the staff of the Program must make the difficult clinical decision as to which children will benefit from the scarce IBI resources in the community.

[56] While the applicant's father may wish that she continue in the Program, Dr. Reitzel has made the clinical decision that the applicant should be discharged. As a result, the applicant will have access to transition support services for a period of twelve months as she moves to other service providers and school based programs. The decision to discharge was within the range of reasonable outcomes, and the basis for Dr. Reitzel's decision was clearly explained. Therefore, there is no basis for this Court to intervene.

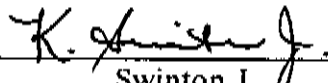
### **Conclusion**

[57] The decision of the Program to discharge the applicant was a reasonable one, and the process used to reach that decision was a fair one. Therefore, the application for judicial review is dismissed.

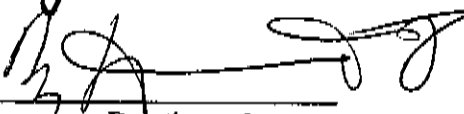
[58] The HHSC, in its factum, asked this Court to confirm Dr. Reitzel's decision and order that it would come into effect four weeks after the decision, with the result that the applicant's IBI hours would be reduced in a proposed schedule. It also sought an order with respect to the applicant's eligibility for transition support services for 12 months after IBI therapy terminates, as well as an order that her parents cooperate with the Program in discharge planning and register her in a school of their choice.

[59] This Court has no jurisdiction to make such orders on this application for judicial review. However, it is clearly in Delanie's best interests if both her parents work with the Program to assist in the discharge and transition process.

[60] If the parties cannot agree on costs, the parties shall make written submissions, through the Divisional Court office, within 30 days of the release of this decision.

  
Swinton J.

  
Leitch J.

  
Dambrot J.

Released: January 11, 2010

Released: January 11, 2010

SWINTON J.

REASONS FOR JUDGMENT

Respondent

HAMILTON HEALTH SCIENCES-McMASTER  
CHILDREN'S HOSPITAL ("HAMILTON-  
NIAGARA REGIONAL AUTISM  
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- and -

Applicant

DELANIE CERETTI (by her litigation guardian  
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B E T W E E N:

LEITCH, DAMBROT and SWINTON JJ.

DIVISIONAL COURT

ONTARIO  
SUPERIOR COURT OF JUSTICE

DATE: 20100111

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