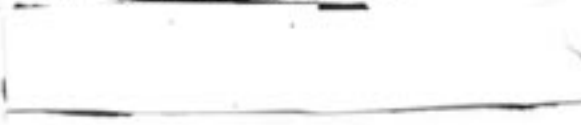


  
Ombudsman  
ONTARIO

ONTARIO'S WATCHDOG  
CHIEN DE GARDE DE L'ONTARIO

March 13, 2009

Ms Taline Sagharian  


Dear Ms Sagharian,

**Re: Our File No. 207449**

Further to our conversation on March 13, 2009, I am writing to confirm that the Ombudsman's Office will not be investigating your complaint regarding the lack of services for children with autism spectrum disorders (ASD) in Ontario's public education system, as well as about wait-times for intensive behavioural intervention (IBI) through the Autism Intervention Program (the Program).

On April 23, 2008, I wrote to you and explained that the Office would be deferring any decision on whether or not to investigate your complaint until after the Ontario Court of Appeal rendered its decision in the case of *Sagharian et al v. Ontario (Education)*, which involved a lawsuit against the Ontario government as represented by the Minister of Education and Minister of Children and Youth Services and a number of named school boards. You and a number of other named individuals were plaintiffs in this action. According to the Ontario Court of Appeal, this claim focused on alleged deficiencies in the provision of services for school-age children with autism, including the provision of or denial of Applied Behavioural Analysis treatment (ABA) by Ontario and the refusal to provide ABA in public schools. The action also challenged the limited budget available for the IEIP (Intensive Early intervention Program), and waiting lists, which exist for this program.

The defendants in this action moved to strike the claim based on the Court's previous decision in *Wynberg v. Ontario*. In that the decision of the Court of Appeal denied claims that the government violated the rights of children with autism under Section 15(1) of the *Charter* on the basis of age and disability, and found that the IEIP's age six cut off did not constitute discrimination and that the IEIP would not fit within the public education system.

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The Court of Appeal released its *Sagharian* decision on May 23, 2008. The Court struck down a number of aspects of the claim based on its previous decision in *Wynberg v. Ontario*. It did however grant leave for certain claims based in negligence to be amended so that they may proceed in the future, subject however to the possibility of further challenge. On December 4, 2008, the Supreme Court of Canada denied leave to appeal the Court of Appeal's decision. You have indicated that the plaintiffs are currently considering whether to amend their claims in accordance with the Court of Appeal's decision.

As part of our review of your complaint, we reviewed the Court decisions referred to above, as well as documentation and information you and other parents of children with ASD provided to our Office, relevant legislation, policies and guidelines. We also interviewed Ministry of Children and Youth Services and Ministry of Education staff, as well as reviewed documents and other information provided by the Ministries.

**Ministry of Education:**

You complained about a lack of services for children with ASD in the public education system. Specifically, you alleged that the Ministry of Education's refusal to direct the use of intensive behaviour intervention (IBI), which is used by the Program, in Ontario's schools discriminated against children with ASD.

The *Sagharian* decision dealt with claims of discrimination based on age and based on disability. The Court of Appeal determined with respect to age-based discrimination that this claim could not proceed in light of the Court's previous decision in *Wynberg*, which found that the IEIP's age six cut off did not constitute discrimination. The Court of Appeal also noted that the Court in *Wynberg* determined that the "*intensive nature of the IEIP program could not fit with full-time attendance at school.*"

With respect to discrimination based on disability, the Court of Appeal noted that this claim was argued on the basis of the denial by Ontario and the school boards to accommodate simultaneous access to both ABA and public education. The Court of Appeal noted that "*it is far from clear that the appellants can plead a disability claim that is compellingly different from that already determined in Wynberg.*" The Court noted however that it may be possible to plead a claim based upon the duty to accommodate and a denial of that duty in comparison to other children with disabilities. In light of the above, the Court struck the claim of discrimination but granted leave to amend the claim based on its comments.

As you are aware, in September 2006, the Ministers of Children and Youth Services and Education created an ASD Reference Group (the Reference Group), comprised of experts and stakeholders, whose mandate was to advise the Ministries on the most effective ways to meet the needs of students with ASD in Ontario schools. The Reference Group held a series of meetings from September 2006 through January 2007 to accomplish its goals. In January 2007, the Reference Group made 34 recommendations to the Ministries and the Ministry of Education has implemented or is in the process of implementing the majority of the recommendations.

The Reference Group recommended that evidence-based educational programs and services be implemented for students with ASD. Ministry of Education staff explained to our Office that both the Ministries of Education and Children and Youth Services are supporting seven models of collaborative service delivery for students with ASD, involving eight school boards and local community agencies. As you are also aware, the Ministries are in the process of expanding the number of school boards involved in collaborative service delivery for September 2009. The Ministry of Education has also advised that in 2010, all school boards in the province will be expected to have transition teams for children with ASD who are transitioning from the Program to the education system.

The Reference Group recommended that a range of placement options be available to students with ASD, including ABA based practices. The Reference Group report explains that ABA employs methods based on scientific principles of learning and behaviour and that IBI is based on the principles and techniques of ABA. The Reference Group recommended that the Ministry of Education distribute a memorandum on the implementation of ABA in the schools.

The Ministry of Education issued Policy/Program Memorandum No. 140 (Policy No. 140) on May 17, 2008. The subject of Policy No. 140 is to incorporate methods of ABA into programs for students with ASD. The requirements are that school boards must offer students with ASD special education programs and services, including, where appropriate, special education programs using ABA methods. The Ministry of Education advised that in order to support the implementation of Policy No. 140, over 7,400 educational assistants have received ABA training.

The Ministry of Education advised the Ombudsman's Office that it is monitoring the implementation of Policy No. 140 with a survey measuring how many schools are meeting the specific requirements of the policy. Staff at the Ministry of Education advised our Office that it will be collecting further data from boards about the ongoing implementation of Policy No. 140. Staff also advised our Office that parents of children with ASD will be able to provide feedback on the implementation of Policy No. 140 through Autism Ontario. The Ministry of Education has also advised that to support the implementation of Policy No. 140, school boards will receive new funding to hire board level staff with ABA expertise. Our Office will be following up with the Ministry of Education on its monitoring of Policy No. 140.

You also complained that some schools are not allowing IBI therapists to work with students in the schools, whereas others are. The Ministry of Education explained that the boards have the authority to allow IBI therapists to come in and use space in their schools. The Ministry of Education explained that it is up to the individual schools and the school boards to determine whether IBI therapists will be allowed to use space in the schools.

The Ombudsman's Office will continue to follow-up with the Ministry of Education regarding its monitoring of Policy No. 140 and its implementation of the models of collaborative service delivery.

**Ministry of Children and Youth Services:**

You complained that the waitlists for children with ASD to receive IBI through the Program have grown both by the number of children waiting and by the length of time children are waiting.

In its decision in *Sagharian*, the Court of Appeal referred to Ministerial responsibilities imposed by legislation, specifically s. 7(1)(a) of the *Child and Family Services Act* and s. 8(3) of the *Education Act*. The Court stated at paragraph 49 that, "*As the court in Wynberg concluded, these statutory duties are owed to the public as a whole and involve balancing multiple interests, including the allocation of limited public funds.*"

You raised concerns about financial problems for some of the regional autism service providers and indicated that this may cause an increase to the amount of time children are waiting for IBI. There are nine regional autism service providers across the province that are responsible for administering the Program in the areas they serve. Ministry of Children and Youth Services staff explained that it has taken steps to address the immediate needs of the service providers by providing additional in-year funding. The Ministry also advised that it is working with some service providers to find cost savings. The Ombudsman's Office will continue to monitor the Ministry's progress in this area.

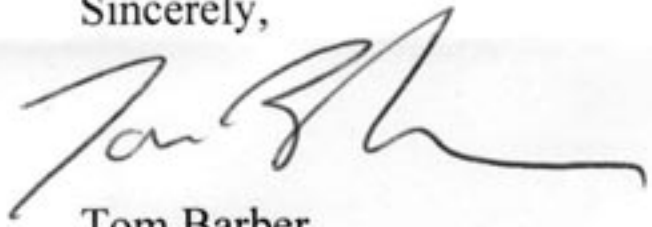
You also raised concerns regarding the development of benchmarks to be used by the Program. As you are aware, the Ministry of Children Youth Services established an arms-length Expert Clinical Panel to develop a standard set of clinical practice guidelines. In January 2008, the Expert Clinical Panel completed its report and recommended that benchmarks be developed to measure change and to be used in conjunction with the clinical practice guidelines. In early 2008, the Ministry created another arms-length panel, the Benchmark Development Expert Panel, to develop benchmarks to use to support the implementation of the clinical practice guidelines. In September 2008, the Benchmark Panel submitted its report to the Ministry as well as released it to the public.

Staff from the Ministry's policy branch advised our Office that the Ministry is currently reviewing the reports and recommendations of both the Expert Clinical Panel and the Benchmark Panel. Ministry staff also explained that during its review of these reports, they would also review any submissions from stakeholders, parents, or other experts regarding these reports.

Given that the Ministry is currently reviewing the reports of the Expert Clinical Panel and Benchmark Panel, the Ombudsman's Office will not be investigating complaints about clinical decision making and clinical appeals at this time. Our Office will however continue to monitor the Ministry's progress in this area.

Based on the above information, including our review of the *Sagharian* and *Wynberg* decisions of the Ontario Court of Appeal, the Ombudsman's office will not be proceeding with an investigation into your complaints at this point in time. In light of this, your file with the Ombudsman's Office will be closed. The Office will however continue to monitor the issues outlined above and the Ministry's progress in related areas. Should you have any questions or future concerns, please do not hesitate to contact us at anytime through our main complaints line at 1-800-263-1830 or at [info@ombudsman.on.ca](mailto:info@ombudsman.on.ca).

Sincerely,



Tom Barber  
Investigator