HRTO File No.: 2019-36437-I

BETWEEN

NB AS REPRESENTED BY HER LITIGATION GUARDIAN PB

(Applicant)

- and -

OTTAWA-CARLETON DISTRICT SCHOOL BOARD
JULIE DERBYSHIRE and JANINE BLOUIN

(Respondents)

AMENDED SCHEDULE "B" TO THE RESPONSE TO A REQUEST FOR A SUMMARY HEARING

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1. P[redacted] B[redacted] ("PB") acts as litigation guardian for her daughter, N[redacted] B[redacted] ("NB"), and has brought this application on her behalf against the Ottawa-Carleton District School Board ("the OCDSB"), Janine Blouin ("Ms. Blouin") and Julie Derbyshire ("Ms. Derbyshire") for discrimination on the grounds of sex, gender and gender identity, contrary to section 1 of the *Human Rights Code*, RSO 1990, c H.19.

2. The Applicant is bringing this Application due to a series of lessons in which OCDSB teacher Ms. Blouin explicitly stated that "boys and girls were not real," causing distress, confusion, and psychological harm to NB, who identifies strongly as a girl. The Applicant's attempts to engage with the OCDSB regarding her concerns about the impact of these discussions on children whose lived identity and sex is female were unsuccessful. The only proposal which came out of these discussions was for NB to be removed from the classroom whenever classroom discussions about gender identity occurred.

3. The Respondents seek dismissal of this Application by way of Summary Hearing. The Applicant opposes the Respondents' request for dismissal and requests that the Application proceed.

The test and other considerations

4. To establish *prima facie* discrimination under the *Code*, the Applicant must show that:

a. She has a characteristic protected from discrimination;
b. She has experienced an adverse impact within a social area protected by the Code; and,
c. The protected characteristic was a factor in the adverse impact.[1]

5. Intentions and motivation are irrelevant to a finding of discrimination or harassment. It is not necessary that the person alleged to have discriminated intended to do so.[2]

Ms. Blouin's awareness of students' self-identity as female

6. Ms. Blouin was aware that NB and other students did identify as female. On one occasion, Ms. Blouin drew a gender spectrum on the board and asked each student to identify where they fit on the spectrum. NB indicated that she was on the furthest end of the spectrum marked "girl." Ms. Blouin then told the Grade 1 class that "girls are not real and boys are not real." This statement caused NB a great deal of distress and confusion, as she had just indicated that she identified strongly as a girl.

Discrimination

7. The Applicant asserts that repeated denial of the existence of "girls" created a poisoned learning environment for NB and students who identified clearly with the female gender and sex. For students whose sex and lived gender identity is female, Ms. Blouin's statements denied the sex and gender with which they identify, and portrayed only fluid genders as genuine. After numerous unsuccessful attempts to resolve the issue with the Respondents, NB's parents felt they had no choice but to withdraw her from this environment.

8. Furthermore, the Applicant asserts that the response of Ms. Derbyshire and the OCDSB amounted to institutional discrimination against students who identify as female. Ms. Derbyshire and the OCDSB failed to "reasonably investigate and address the multiple complaints"[3] the Applicant brought to Ms. Blouin, Ms. Derbyshire, the parent council, and others at the OCDSB, or to work with the Applicant on an acceptable accommodation that did not involve excluding NB from the classroom.

Points raised by the Respondents

9. The Applicant wishes to specifically address a number of statements made in the Respondents' Request For Summary Hearing, namely:

a. "(T)he concerns expressed by the Applicant are with respect to whether the content discussed in class was age-appropriate" (Schedule "A," para. 11); and, "The

[1] *Moore v. British Columbia (Education)*, 2012 SCC 61; *R.B. v. Keewatin-Patricia District School Board*, 2013 HRTO 1436 at para. 204.
[2] *Ontario (Human Rights Commission) and O'Malley v. Simpson-Sears Ltd.*, 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536 at para. 14.
[3] Vanderputten v. Seydaco Packaging Corp., 2012 HRTO 1977 (CanLII) at 89.

Applicant's concerns appear to arise from the issue of whether the classroom discussions were age appropriate" (Schedule "A," para. 13);

b. "The Application does not disclose any disadvantage or adverse treatment to NB due to the conduct of the Respondents. However, even if the allegations with respect to the impact on NC of the discussions of gender identity and gender expression were considered to be a disadvantage or adverse treatment, the Applicant cannot show that a prohibited ground was a factor in the disadvantage or adverse treatment" (Schedule "A," para. 14); and,

c. "Classroom discussions about gender identity and gender expression cannot be the basis of a *Code* infringement" (Schedule "A," para. 15).

"Whether the classroom discussions were age appropriate"

10. The Applicant respectfully disagrees that her issue is with the age-appropriateness of Ms. Blouin's lessons on gender identity. She also agrees that teachers enjoy discretion in how they address certain subjects in the classroom, and when they teach certain concepts.

11. The Applicant takes serious issue, however, with the manner in which this discussion was conducted. Rather than present a variety of gender identities, acknowledging and valuing each one, the Respondent Ms. Blouin denied the existence of two genders on the gender identity spectrum (boys and girls) and of binary sex categories.

12. These statements undermined NB's sense of self and impacted her confidence in identifying as a girl. The statements were discriminatory against two genders on the gender identity spectrum and against the female sex, and were inappropriate regardless of age.

No "disadvantage or adverse treatment to NB due to the conduct of the Respondents"

13. The Applicant has set out in paragraphs 38-40 of the Application the impact of these discussions on NB, an impact which continues to the present.

14. NB identifies as a girl, a fact which Ms. Blouin knew. NB had clearly identified her gender for her teacher and class. NB's gender identity as female, which Ms. Blouin was aware of and yet denied, is very much a factor in the disadvantage and adverse treatment that NB experienced.

"Classroom discussions about gender identity and gender expression cannot be the basis of a *Code* infringement"

15. The Applicant respectfully disagrees with this statement. In this case, classroom discussions on gender identity were conducted in a way that explicitly denied the existence of the female gender identity and sex. Ms. Blouin did not explain identity as a spectrum or present a variety of gender identities; she simply indicated that "Boys and girls are not real." For NB, who identifies as a girl, this discussion created a lasting impression and had a serious impact on NB's sense of self and her lived gender identity and sex.

16. The School Board has a responsibility under the *Human Rights Code* to ensure that educational services are provided without discrimination, in a manner which recognizes the dignity and worth of every person, and so that each person feels a part of the community.

17. Under s. 169.1(1)(a.1) of the *Education Act*, R.S.O. 1990, c. E.2, the School Board has an obligation to "promote a positive school climate that is inclusive and accepting of all pupils of any race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability [emphasis added]." All pupils, including those in the majority in a given category, are entitled to be included and accepted for, and despite, their immutable qualities.

18. The refusal by the Respondents to correct, or refrain from teaching, lessons on "gender fluidity" and the non-existence of binary sex categories stigmatizes, degrades and alienates gender-conforming and biologically-female students, and leads to the conclusion that the School Board believes, and intends to convey through its lessons, that there is something wrong or abnormal about gender-conforming or biologically-female students. Such lessons are directly contrary to the equality rights of females, in particular, as a protected class which has been historically disadvantaged.

19. Gender identity is a new concept which is poorly defined and logically convoluted. As a protected ground under the *Code*, it is important that the Tribunal develop a body of case law to understand the limits and manifestations of discrimination under this ground, especially when it conflicts with protections previously in existence, namely that of sex – particularly for women and girls. As the Tribunal said itself in *Lewis v. Sugar Daddy's Nightclub*, 2016 HRTO 347 at paragraph 39, "The law on these Code grounds [gender identity and gender expression] is constantly developing, in all social areas, as new issues are raised and considered."

Proposal to withdraw NB from the classroom

20. When PB brought the adverse impact these lessons were having on NB to the attention of the Respondents, the Respondents failed to take action to address the poisoned educational environment PB identified.

21. The Respondents informed PB that a student in NB's class had expressed an interest in being other than his or her biological gender, that a specialist on gender fluidity was consulted, and that the lessons were to support that student.

22. PB expressed concern that these lessons were failing to support, and in fact were detrimental to, students who were *not* gender fluid, such as NB.

23. The Respondents simply offered to withdraw NB from the classroom when these topics were discussed. At no point did Ms. Derbyshire or Ms. Blouin offer to consult the specialist on how to constructively include NB in these gender discussions, or conduct gender identity discussions in a way that supported both NB's lived gender identity as a female and that of students who do not identify as female.

24. The proposal of NB's exclusion from the classroom during gender identity discussions simply exacerbated the discriminatory nature of the Respondents' approach to the topic of gender identity.

25. The Applicant understands that the Respondents' intentions were not to discriminate against students who identify as female, but to support the student who did not identify as female. However, the Applicant remains concerned about the Respondents' lack of understanding of, or action to correct, the impact of these discussions on students who did identify as female.

26. At para. 42 in *Ross*, the Court states that "[t]he school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate. As the Board of Inquiry stated, a school board has a duty to maintain a positive school environment for all persons served by it."[4]

27. Denying NB's lived gender identity, and proposing her exclusion from further discussions about this topic rather than changing the manner in which these discussions are conducted, creates a school environment in which not all persons can "feel equally free to participate."

This Application

28. The Applicant wishes to engage constructively with the Respondents on these issues. NB is not the only student in the OCSDB whose lived gender identity and sex is female. The Applicant hopes that by entering into a process of discussion and review of what occurred in this situation will ensure recognition at the OCSDB of all students' lived gender identities.

29. In *Hassell v Parkdale United Church – Ottawa*, 2010 HRTO 991, at para 47, the Tribunal stated "[i]t is well-established that the threshold for establishing a prima facie case of discrimination is not high; the Tribunal recognizes that discrimination is often not overt and it does not hold the applicant to an exacting standard of proof at this stage of the proceeding".

30. The Applicant submits that the facts previously outlined in Schedule "A" to the Application and additional facts outlined in this Response, if presented in a hearing, could reasonably lead to a finding of discrimination on the basis of sex and gender identity. The Applicant respectfully requests that the Tribunal proceed with this Application.

Dated June 7, 2019; Amended October 28, 2019

[4] Ross v New Brunswick School District No. 15, [1996] 1 SCR 825 [Ross] para 38.