

Backgrounder

Autism Class Action Lawsuit (Sagharian)

In 2004, five families representing six children with autism filed a class action lawsuit against the Ministry of Education, Ministry of Children and Youth Services, and seven school boards in Ontario for failing to provide or fund ABA/IBI (Applied Behaviour Analysis/Intensive Behavioural Intervention) in the education system or without excessive and detrimental delays.

The plaintiffs have spent their savings, mortgaged and down-sized their homes, borrowed money and taken extra jobs to fund the services that their children require. They have had to make tough decisions about which services to access when they could not get both.

The case highlights key short-comings of services to children with autism. The families are suing the government and school boards for forcing the families of children with autism to make the impossible choice between the specialized services that help children with autism develop, and their right to a public school education. The families are also challenging the extensive waitlists for the AIP (Autism Intervention Program). The families want to ensure better access to publicly funded and quality services for children with autism in Ontario. They seek a change to the current approach to autism services, as well as compensation for the expenses that they have incurred as a result of the government and school boards' past errors.

In 2006, the government and school boards brought a motion to strike the plaintiffs' claim, and in March of 2007 a judge of the Superior Court of Justice, Mr. Justice Maurice Cullity, did strike portions of the claim. In response, the plaintiffs have appealed this decision to the Court of Appeal, with the hearing scheduled for February 11, 2008 at 10:30am.

In the aforementioned motion to strike, the government and school boards went after these families for \$85,000 in legal costs. Fortunately for the families, Justice Cullity ruled in June 2007 that they should not have to pay these costs because they were raising an important public interest issue. In his decision, he stated:

"The public interest was involved not merely because this was Charter litigation but also because the community as a whole has a legitimate concern and interest in the welfare of disadvantaged children who are particularly vulnerable members of Canadian society.... It is not disputed that many of the parents have made significant financial sacrifices and have suffered serious financial consequences because of the lack of public funding for the programs they consider to be necessary for the educational and social development of their children. The fact that the Crown has now accepted a number of their contentions illustrates the value of this kind of public interest litigation and... the objectives of behavioural modification and access to justice are, I believe, sufficiently engaged to bear on the question of costs."

Autism Program in Ontario

In 1999, the province of Ontario, initially through the Ministry of Community and Social Services and now through the Ministry of Children and Youth Services, introduced the Intensive Early Intervention Program for Children with Autism (the "IEIP", renamed the Autism Intervention Program "AIP" in August 2006) to provide services to children with autism. Initially, the program was only available to children under the age of six.

Both an Ontario Ombudsman report released in April 2004 and the report of the Office of the Provincial Auditor for Ontario in November 2004 identified several significant problems with the administration of the IEIP, including the difference between what it pays to the families and the actual cost of the treatment.

When Justice Kitley ruled in Wynberg/Deskin that the IEIP age cut-off violated the Charter's equality guarantee under section 15(1), the government suspended the age cut-off (as of April 2005). This decision was over-turned by the Court of Appeal. Nevertheless, the IEIP/AIP has operated without discriminating based on age since Justice Kitley's decision.

Unfortunately, the IEIP/AIP has long had a considerable waitlist that continues to result in eligible children not receiving necessary services. When the age cut-off existed, the waitlist was already so long that children would become ineligible for the program based on their age before ever receiving services. Since the elimination of the age six criterion for cut-off, the waitlists have become much lengthier, with the result that children with autism continue to be effectively denied necessary care.

The province spends millions of dollars every year on special education. In Ontario, all other children who require therapeutic or medical services are able to access services in a harmonized fashion alongside or with their education. However, when children with autism reach school age, they must either, enter a public school system that does not provide adequate education or support, where they will inevitably fail to improve and may regress, or enrol in a private program at considerable expense to their families and without the benefit of an integrated classroom setting. In contrast, children with autism in the United States are able to access ABA/IBI through the education system until the age of 21, and have been doing so for over 15 years.

Following the February 2007 recommendation in the Report of the Ministers' Autism Spectrum Disorder Reference Group, Education Minister Kathleen Wynne announced that the Ministry would be directing school boards to provide ABA in their schools. This was an acknowledgment by the Minister that ABA was not previously being provided in school, that it could be, and that it should be. However, in a memo to school boards shortly afterwards, the Ministry indicated that ABA was already being used in some schools and that it would not be directing the use of IBI.

Then during the election campaign in the fall of 2007, the Liberal Party included in its party platform document the following promise:

"Helping more students with autism by providing \$10 million to prepare schools to deliver IBI therapy on-site for the first time, a step forward made possible by our earlier decision to scrap the age-six limit for children with autism."

Previous Autism Litigation in Canada

Auton: In 1998, families in British Columbia filed a lawsuit arguing that ABA is a medically necessary treatment and should be covered through the health care system. Although this case succeeded in the two lower courts in BC, it lost at the Supreme Court of Canada. The Supreme Court stated that the government did not have to provide ABA as ABA professionals are not registered health care practitioners and ABA is not delivered in a health care setting such as a hospital. Under provincial health care legislation, ABA could only be included as an add-on health service, in which case it would be at the discretion of the province as to how much to fund, which children would receive funding, and whether the province would fund the service at all.

Wynberg/Deskin: In Ontario, the Deskin case was filed in 1999 by a single plaintiff. This was followed by the Wynberg case filed in 2000, which eventually included 28 families. The cases were against the Ministries of Health, Education, and Social Services and were based on the Auton case. The families challenged the age cut-off in the IEIP as discriminating based on age and disability. They argued that the government acted negligently in the design and implementation of the IEIP. They also argued that the government breached their rights to life, liberty and security of the person by denying their children the benefit of an education.

When the 2004 Supreme Court decision in *Auton* was released, the Ontario cases had to reframe their claims, removing health and refocusing on ABA as an education issue. The Court allowed them to refocus their case, but prevented them from bringing evidence in support of this change in focus.

The *Wynberg* and *Deskin* cases succeeded at the trial court but then lost at the Ontario Court of Appeal. In denying their claims, the Court of Appeal specifically noted that it lacked significant evidence relevant to the case, including evidence related to ABA and education. It also stated that it was unfair for the comparatively small group of families participating in the case to get compensation while other families of children with autism languished. The trial judge, Justice Kitley, noted that the government had indicated that the school boards were the proper defendants to the claim and should have been a party. The families sought and were denied leave to appeal to the Supreme Court of Canada.