Claim No: SCCH-448803

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Wall v. Newbridge Academy, 2016 NSSM 33

BETWEEN:

CHARMAINE DONNA WALL and JONATHAN A. WALL

Claimants

- and -

NEWBRIDGE ACADEMY, CAROLYN V. MacEACHERN, TREVOR MacEACHERN and ROBERT O'BRIEN

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on April 19, 2016, June 8, 2016 and June 14, 2016

Decision rendered on June 27, 2016

APPEARANCES

For the Claimants	self-represented
For the Defendants	Nathan Sutherland, Counsel

BY THE COURT:

Introduction

[1] The Claimants are the parents of two daughters, Paikea Wall (aged 12) ("Paikea") and Kaya Wall (aged 14) ("Kaya").

[2] The Defendant Newbridge Academy ("the school") is a small private school located in Lower Sackville, Nova Scotia, with a satellite campus in East Hants for the upper grades.

[3] The three individuals named as Defendants, namely Carolyn V. MacEeachern, Trevor MacEachern and Robert O'Brien, are all associated with the school. Trevor MacEachern is the CEO of the school. He alone, of the three, figures in the narrative. The others are either in an ownership or administrative relationship with the school. None of them acted in any form of personal capacity. As such, it should be said at the outset that none of the individual Defendants bears any personal liability for the claims that the Claimants make. They were named by the Claimants out of an abundance of caution, which is not an unusual occurrence in this court. Nevertheless, the claims against them personally must be dismissed as (upon a closer look) the only arguable claims are against the school, Newbridge Academy, itself.

[4] Put simply, the Claimants are seeking a refund of tuition and related charges paid for the two girls for the 2015-16 academic year. The amount claimed is $7,600.00. The Wall children attended the school from September 2015 to early February 2016.

[5] The school disputes the Claim and counterclaims against the Claimants for $6,125.00 as the balance of tuition owed for the same academic year.

[6] The Claimants' allegation, in a nutshell, is that the school did not deliver the promised, enriched education for Paikea that she had received in the previous academic year. The events culminated in Paikea being removed from her Grade 6 class on February 5, 2016, amidst attempts by the Claimants to get the school to respond to the family's concerns. Some days later, on February 10, 2016, Kaya was removed from her Grade 9 class after a confrontational meeting between the Claimants and the CEO, Mr. MacEachern. The Claimants contend that Kaya was, effectively, expelled. The school denies that she was expelled and says that the Claimants acted precipitously.

[7] In this decision I will have to decide several key things, including:

a. Did the Claimants' concerns about Paikea's education rise to the level of a breach of contract, or fundamental breach?

b. Is there a cause of action against a school (private or otherwise) for allegations that the school has not delivered the expected quality of education?

c. In the case of Kaya Wall, did what happened at the meeting of February 10, 2016 amount to an expulsion, such that the Claimants were justified in concluding that the school had effectively repudiated the contract under which Kaya attended the school?

Factual findings and discussion

[8] There is no disputing that the Claimants are passionate about their children's education, and that the two children are exceptionally bright and

talented. I see it as a mark of good parenting that the Claimants are invested so heavily in their children's education, both in financial terms and also in terms of the effort that has gone into finding the best schools for them and supporting them in every way.

[9] The family moved from California to Nova Scotia in or about 2013 and enrolled the children in public schools, which they found less than satisfactory. Prior to the 2014-5 academic year they looked at a number of possible private schools and chose Newbridge because it appeared to offer a type of individualized or student-centred education that they believed would be ideal for these children. It also had a strong sports program. The brochures and website for the school touted both the academic and athletic programs, in terms such as these that appear on the website:

> Newbridge Academy is an independent school committed to providing interactive, engaging and innovative academic and athletic programs to students in Junior Primary through High School.
>
> Located in Lower Sackville, Nova Scotia, Newbridge Academy is leading the way in creatively delivering enhanced curriculum, through passionate, Nova Scotia-licensed teachers. Small class-sizes, a safe learning environment and daily physical activity makes Newbridge Academy an easy choice for families looking to take control of their child's education.

[10] Other content on the website promised "personalized education" and "top of line technologies and programs integrated into everyday classroom learning." There are many glowing testimonials from other parents featured prominently on the website.

[11] The older girl, Kaya, started Grade 8 and had a good year. She was also doing well and enjoying Grade 9 until her stay at Newbridge abruptly ended. The quality of her education is not in dispute, so there is no need to say anything more about it.

[12] In the case of Paikea, she entered Grade 5 in September 2014 and was being taught (primarily) by teacher Tyler Deacon. Suffice it to say, she thrived in that environment. She worked on a variety of interesting projects and was making considerable use of technology, mostly on the iPad that the school issued to each student.

[13] The Claimants were extremely happy with the school and recommended it to others, including a friend in Boston who sent their child up to Nova Scotia to be billeted with the Claimants and attend Newbridge.

[14] The Claimants expected that Grade 6 would be a continuation of what Paikea had experienced in Grade 5.

[15] Although there was no suggestion that the school had failed in any way to meet the provincial curriculum during the 2014-5 year, unbeknownst to the Claimants (and likely to any other parents) the academic staff - including the headmaster and teachers - held meetings over the summer of 2015 to plan some changes to the way the curriculum would be delivered.

[16] One of the concerns which the school felt needed to be addressed in Grade 6 was cursive writing and sentence structure, which it believed were suffering with the extent of computers and iPads being used. Some of the

subjects, such as math, would be taught differently by eliminating the separate math class and integrating math instruction with other subjects that raised math issues.

[17] Paikea entered her Grade 6 class in September 2015, which was being taught by Lynn McCarthy. As Paikea herself described it, the experience was very different for her, and much less engaging. She was not working on projects as she had done the previous year. She did not have a separate, daily math class, which she appears to have enjoyed. Much less school work was being done using the iPad.

[18] I am not sure if one could pin down a time when it reached a critical mass, but by sometime in November it was clear that Paikea was bored and unhappy and not having a good experience with her schooling. She also had some concerns about her teacher's behaviour, such as by leaving the class unattended for periods of time, which when communicated to her parents gave rise to concerns about safety. There were additional safety issues which arose, but in many respects they are an additional symptom rather than a cause of the problem. The real issue was that the Claimants had an unhappy child on their hands, and they saw it as their duty to explore why this was happening and engage with the school in an effort to fix things.

[19] On November 25, 2015, the Claimants attended a parent teacher interview where they expressed to Ms. McCarthy that Paikea was unhappy and had been expecting an experience much like she had had with Mr. Deacon. It does not appear that much came out of this meeting, other than a general sense that Ms. McCarthy understood Paikea's situation better and would make an

effort to challenge her more. As Ms. Wall stated, they gave the teacher the benefit of the doubt.

[20] It does not appear that anything meaningfully changed, and so about two weeks later, on December 11, 2015, Ms. Wall started an email exchange with the headmaster, Jason Wolfe, asking for a meeting to address the concerns more seriously. Unfortunately, the school was on the verge of closing for an extended stretch over the holidays so the reply did not come until January.

[21] Efforts to schedule a meeting dedicated to the Claimants' concerns were delayed, in part because of Mr. Wall's travel schedule and because of bad weather.

[22] In the meantime, the school scheduled a meeting on February 4, 2016, to which all parents were invited, ostensibly to explain the changes to the school's approach to delivering the curriculum. Present were (among others) the headmaster Mr. Wolfe, Ms. McCarthy, another teacher and several parents. The Claimants showed up, with Paikea - who was the only student present and whose attendance came as something of a surprise to the school.

[23] It appears that Paikea asked a lot of pointed questions, such as "why is there less project-based learning?" and "why is there less use of the iPad?", to which the answers were that there would simply be less project based learning and that instead of technology they would be concentrating on cursive writing skills.

[24] According to both Ms. Wall and Paikea, the school personnel did not appear to treat Paikea's concerns very seriously or respectfully to the point that she ran out of the room crying. The Claimants left the meeting, and the next day pulled Paikea out of her class, pending some resolution of the issue. The Claimants were hoping that something might be resolved at the meeting with the school's CEO that had, by then, been scheduled for February 9. That meeting did not happen because of a snowstorm. Fortuitously, perhaps, another meeting the next day had been scheduled by another set of parents, the Perrys, but in the end was extended to include the Claimants. Nathan Perry, the father of another (now former) Newbridge student, Skye, was present at the meeting and his testimony will be referred to later, as pertains to the issues surrounding Kaya. Ms. McCarthy was also at the meeting.

[25] By then, it appears that word had spread to the effect that the Claimants were unhappy with the school and with Ms. McCarthy, and rumours of some kind were circulating. The Claimants tried to go over their issues with Trevor MacEachern, the CEO. My impression from all of the evidence is that he was extremely defensive. Clearly the Claimants were challenging both the school and the teacher, Ms. McCarthy, but there did not appear to have been any interest on the part of Mr. MacEachern to address the substance of the Claimants' concerns.

[26] I accept, and there seems to be no controversy, that the Claimants made it very clear that there were no issues with Kaya's education. I also find that the Claimants did not expect Kaya's situation to come up at the meeting. It was supposed to be all about Paikea.

[27] The conversation somehow deflected from the substance of the Claimants' concerns to the fact that rumours were circulating and Mr. MacEachern's evident concern that the reputation of the school was being damaged.

[28] Each of the witnesses had a slightly different version of the conversation. Ms. Wall's recall of the conversation (essentially confirmed by Mr. Wall) went like this:

> MacEachern: "If you do not retract your statements (about the school) then Kaya is no longer welcome at Newbridge.
>
> Mr. Wall: "Are you kicking Kaya out?"
>
> MacEachern: (repeated his point that unless the statements were retracted, Kaya was no longer welcome at the school.)

[29] Ms. McCarthy's recollection seemed a bit fuzzy, but she confirmed that the Claimants made it clear that they wanted Kaya to stay.

[30] Mr. MacEachern recalled saying to the Claimants that if they continued to "bash the school" in the hallways, it "harms the culture" and causes other parents to become concerned. He claims that he said that if they continued to bash the school, Kaya "would not be welcome" but he flatly denied expelling her.

[31] The Claimants - who had not had their concerns about Paikea addressed, and who were not about to retract anything, left the meeting with the impression that Kaya was no longer welcome, and the next day they regretfully took her out of her class.

[32] Nathan Perry, who was at the meeting to talk about his own child, could not help but witness the conversation about Kaya. He essentially backed up the Claimants' version of events. He understood from Mr. MacEachern that as long as the Claimants did not retract their statements (whatever those were!) that Kaya was no longer welcome at the school and was, in effect, expelled. He testified that he was shocked by what he was hearing.

[33] Both Wall children finished out their school year in another school. Both girls testified to the effect that these events were very hard on them, as would be expected when one is taken out of a school and away from friends and familiar routines.

Kaya's situation

[34] Counsel for the Defendant attempted to portray the conversation as merely a threat to expel Kaya, which threat was never carried out. He says that the Claimants decided to withdraw Kaya from the school, and are thus responsible for the tuition for the balance of the year.

[35] I reject this theory. The results speak for themselves. The Claimants were happy with Kaya's schooling. They came to the meeting about Paikea with no intention of discussing Kaya. Kaya was happy with her schooling. I find that the Claimants, dedicated parents that they are, would <u>never</u> have removed Kaya unless they believed that they had no choice.

[36] Perhaps the words "expel" or "kicked out" were never used, but I find that Mr. MacEachern made it perfectly clear to the Claimants that, because they held the attitude they did, Kaya was no longer welcome.

[37] It is important to note that the Defendant produced no evidence that the Claimants were bad-mouthing the school to anyone. They would not deny that they had concerns that may have leaked out to other parents, but that is not the same as bad-mouthing or spreading rumours. The Claimants were entitled to their subjective opinions, which (I find) had some legitimacy. There was nothing that the Claimants could "retract" nor ought they to have retracted anything. They were standing up for their child Paikea's education, and should not have been punished for doing do.

[38] As such, the statements by Mr. MacEachern could objectively have been interpreted as an expulsion. Indeed, it is hard to interpret them otherwise. The argument that because the words "she is expelled" were never uttered, and that this was a mere threat, is sophistry. One might say that what occurred was a "constructive expulsion," a term which borrows from the employment law concept of constructive dismissal, where an employee reasonably believes they have been fired, based upon the actions of the employer.

[39] The decision to place Kaya's education in jeopardy by expelling her, was unjustified in the extreme. She had done nothing wrong. Her parents did nothing wrong.

[40] Even if this was all a misunderstanding, and had Mr. MacEachern actually believed that he had been misunderstood at the meeting, once he heard that Kaya had been pulled from her class, the only righteous course of action would have been to contact the Claimants <u>immediately</u> and implore them to return Kaya to her class. The "misunderstanding" could probably have been rectified. Obviously, he did nothing of the sort.

[41] I find that the school fundamentally breached the contract to provide an education for Kaya for the academic year 2015-6, and must refund any tuition paid by the Claimants. I will deal with the financial accounting arising from Kaya's expulsion later in this decision.

Paikea's situation

[42] Despite having been invited to do so, I will not try to pass judgment on Ms. McCarthy's credentials or qualifications as a teacher. She is evidently well qualified on paper and is highly regarded by the school. Nor is it my place to question whether the school overall did a good job or a bad job in delivering the curriculum that is required in Nova Scotia, or whether the changes instituted over the summer of 2015 were wise and/or ought to have been better communicated to parents. I do find, however, that they (everyone associated with the school) were curiously tone-deaf to the Claimants' concerns and reacted defensively to the suggestion that, just perhaps, their change of approach was failing one of their brighter students. Instead of trying to find a solution that would meet Paikea's needs and provide her with the student-centred learning that they had promised, they essentially spouted the party line and offered nothing concrete that might have given the Claimants some hope that Paikea's situation might improve. The school ought to have known as well as anyone else, that a child who is unhappy in the classroom, and who brings that unhappiness home, is an urgent situation calling out for cooperation in finding a solution.

[43] These facts, however, are far from sufficient to ground a legal cause of action against the school, as I will elaborate upon below.

[44] I do want to mention the Claimants' safety concerns, which occupied a considerable amount of time at the hearing. Ms. Wall's testimony raised the following issues:

a. Teacher leaving class unattended for long periods of time;

b. The fact that there was an outside door in the classroom, out of which children could theoretically escape;

c. The fact that volunteers (or some of them) were not asked for background checks;

d. The lack of a sign-in process for anyone entering the classroom (such as a parent or volunteer);

e. Allowing a very young and upset child to be brought into the classroom, ostensibly for him to calm down;

f. The fact that classroom doors were not locked;

g. The fact that there seemed not to be enough fire drills and lock down drills.

[45] I have heard the explanations from the school's witnesses and am satisfied that there were reasonable explanations for these things. For example, the outside door was actually a fire exit. This door could not be opened from the outside, and as such was a plus, in the sense that it enhanced rather than endangered safety. Issues such as fire drills or lock down drills were not within the school's control, but rather in the control of the municipal facility which owns and operates the space, and were happening according to some schedule. Other concerns seemed rather minor.

[46] I do not believe the Claimants would ever have staked their case on these issues, but (again) the school did not explain things properly and more likely

than not these issues took on an outsized importance to the Claimants, in combination with the issues surrounding Paikea's educational experience.

The Law

[47] Boiled down to its essence, the Claimants' complaint is that Paikea did not receive the educational experience that was promised, most notably the project-based, student-centred learning that she had received in Grade 5. They say that this was a fundamental breach of contract that should entitle them to end the contract and receive a refund for the tuition paid.

[48] The law appears to be that this kind of claim, referred to in some of the cases as "educational malpractice," will rarely (if ever succeed), mostly for policy reasons. The principle was summed up well in the BC case of *R.(L.) v. R.*, (1998) 65 BCLR (3d) 382:

> [43] The plaintiffs claim that the defendant denied the students a sufficient opportunity to obtain an education. Although it is largely a question of semantics, the defendant characterizes the claim as the alleged failure to provide students with a proper education. Either way, the claim is one commonly referred to as "educational malpractice", based in negligence, or on breach of contract for failure to provide a proper education.
>
> [44] Claims for failure to educate have received considerable judicial scrutiny in the United States. In *Ross v. Creighton University*, 740 F. Supp. 1319 (N.D.IU 1990) the court noted, at 1327:
>
> > Educational malpractice is a tort theory beloved of commentators, but not of courts. While often proposed as a remedy for those who think themselves wronged by educators (see, e.g., J. Elson, *A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching*, 73 Nw.U.L.Rev. 641 (1978); *Comment, Educational Malpractice*, 124 U.Pitt.L.Rev. 755 (1976)), educational malpractice has been repeatedly rejected by the American courts (see, e.g., *Peter W. v. San Francisco*

> *Unified School District,* 60 Cal.App.3d 814, 131 Cal.Rptr. 854 (1976); *Hoffman v. Board of Education of City of New York*, 49 N.Y.2d 121, 424 N.Y.S.2d 376, 400 N.E.2d 317 (1979); *Donohue v. Copiague Union Free School District*, 47 N.Y.2d 440, 418 N.Y.S.2d 375, 391 N.E.2d 1352 (1979); *Wilson v. Continental Ins. Co.*, 87 Wis.2d 310, 274 N.W.2d 679 (1979); *D.S.W. v. Fairbanks North Star Borough School District*, 628 P.2d 554 (Alaska 1981); *Hunter v. Board of Education*, 292 Md. 481, 439 A.2d 582 (1982); *Tubell v. Dade County Public Schools*, 419 So.2d 388 (Fla.App.1982)).

[45] Judicial reluctance to accept claims of educational malpractice has been founded on a number of considerations, including public policy; difficulties in establishing proximate cause and standards of care; the burden such litigation would place on the school system; and judicial reluctance to interfere with the formulation or implementation of educational policy.

[46] Canadian courts have been equally forceful in rejecting the existence of such an action*: Hicks v. Etobicoke (City) Board of Education* (1988), O.J. No. 1900 (Ont. Dist. Ct.); *Wong v. University of Toronto* (1989), 45 Admin. L.R. 113 (Ont. Dist. Ct.); appeal dismissed (1992), 4 Admin. L.R. (2d) 95 (Ont. C.A.); *Gould v. Regina (East) School Division No. 77*, 1996 CanLII 6807 (SK QB), [1997] 3 W.W.R. 117 (Sask. Q.B.); *Ronsford v. School District* (1996), File No. 275257 (Burnaby Prov. Ct.); *Haynes v. Lleres*, [1997] B.C.J. No. 1202 (North Van. Prov. Ct.).

[47] Although made in the context of the mandatory attendance provisions of a provincial School Act, the comment in *Jones v. The Queen*, 1986 CanLII 32 (SCC), [1986] 2 S.C.R. 284 neatly summarized the essential problem with claims of this kind:

> The courtroom is simply not the best arena for the debate of issues of educational policy and the measurement of educational quality.

[49] Other cases (such as *McKay v. CDI Career Development Institutes Ltd.* 1999 CanLII 5599 (BC SC), 64 B.C.L.R. (3d) 386) appear to leave open a tiny crack for some future exceptional case. The point is made at paragraph 7 of that case:

> I am not satisfied that this is an action that deserves dismissal as sought by the defendants. Much of the claim and the defence will rest on issues of credibility which are best attended by a trial. At this point I note that despite the fact that claims for educational malpractice have been rejected by courts both in the U.S. and Canada, there appears to be some situations where a court might accept such a claim. Given these findings and the uncertainty of the claim, I will decline to strike those parts of the Statement of Claim relating to educational malpractice.

[50] Despite this hopeful language, which did nothing more than refuse to strike out a claim at an early and arguably premature stage, I am not aware of a single case where the cause of action has actually succeeded at trial. Basically, for policy reasons the courts have shut the door on arguments that "my child is not getting the education which I expected."

[51] If such a case is to succeed, I humbly observe that this is not the right type of court to break such ground, nor is this the exceptional case which is contemplated. The matter might be different if fraud were pleaded or proved, but that is not the situation here. While one might look closely at the promotional material promulgated by the school, and question whether there is some exaggeration or "puffery," this would fall short of anything resembling actionable misrepresentation. The difference between the school and the Claimants, in the final analysis, is one of educational philosophy. The fact that one student was failing to thrive under the school's tutelage is not, in itself, evidence that the school was not performing its duty.

Conclusions

[52] For all of the reasons set out above, the Claimants do not succeed in their claims with regard to Paikea. The decision to remove her was one that the

Claimants were entitled to make, but they must also honour the contract they entered into when they enrolled her in Grade 6.

[53] As for Kaya, the Defendant had no reasonable ground to expel her and, I find, repudiated the contract. As such, I find that they are not entitled to any tuition for 2015-6.

[54] Conceptually, the Claimants are entitled to a refund of all moneys paid for Kaya, but are liable for the balance of what is owed for Paikea. Given the mixed success, the exact amounts can be a bit challenging to calculate, because the financial accounts for the two children are intermingled.

[55] Even so, I believe this can be simplified.

[56] The better way of looking at it is to consider what amount would be owing for the entire year for Paikea, and hold the Claimants to that amount. In light of my findings, there is nothing owing for Kaya, and the school must absorb that cost. The evidence is that the Claimants have already paid $7,000.00 in total for the two girls for the 2015-6 academic year, so that amount needs to be credited.

[57] A minor complication is that the school was offering the family a “sibling discount” or $525.00, which was applied to their total bill.

[58] I find that the Claimants would be responsible for $5,750.00 for Paikea’s fees for the year, less some amount for the sibling discount. I propose to split that discount and apply half ($262.50) to Paikea, resulting in a total tuition costs for Paikea for the year of $5,487.50. The Claimants having paid $7,000.00 to the school, the net result is that the Claimants have overpaid the school by

$1,512.50, which is to be refunded to them. The order shall reflect that this is the net amount owing on the claim and counterclaim.

[59] Because success has been mixed, I do not propose to award any costs to either party.

Eric K. Slone, Adjudicator