

# The New Ontario Autism Program — What’s Law Got to Do with It?

February 27, 2019

On February 6, 2019, Lisa MacLeod, Ontario’s Minister of Children, Community and Social Services, announced sweeping changes to the Ontario Autism Program, including:

- a doubling of funding for five diagnostic hubs to \$5.5 million over the next two years to help more children receive an autism diagnosis sooner and to help connect families to local services in their communities;
- the introduction of new “Childhood Budgets” for each family, based on the child’s age and the family’s annual income, enabling parents to use the funding on services they believe are most helpful for their child and family; and,
- the establishment of a new agency to assist families in registering for the program, assess their eligibility, provide them with their Childhood Budgets, and offer support to help them choose which services to purchase.

## Program Background

Approximately 20 years ago, the Ontario government initiated the development of regionally coordinated programs for children diagnosed with autism in order to provide intensive behavioural intervention (IBI) therapy and associated services. Acting in accordance with Ministry guidelines, the regional programs have been responsible to determine eligibility, intensity, and setting of a child’s IBI, and to make referrals to other community supports and/or programs if it is determined that a child is ineligible for IBI and that a different approach would better meet the child’s needs. While details about the new Autism Program are yet to come, the Ministry’s announcement suggests that the regional programs, which have been delivering Ontario’s autism program for years, may no longer be at the forefront of Ontario’s autism program.

Clinicians, parents, and advocacy groups have raised these concerns about the government’s announcement:

- The plan fails to adequately take into account that treatment for children with autism should be individualized based on clinical assessment. This impacts the level of intensity that any one child might need, and the required funding throughout their childhood and adolescent years.
- The plan does not ensure that families will acquire any IBI services, which evidence shows is most effective in treating children with autism.
- The province’s promise of “up to \$140,000” for each child is up to age 18 and for lower-income families. There are also annual caps on funding. This level of funding will be inadequate for many families, as it does not consider the cost of IBI therapies at the requisite intensity levels.

It is interesting to reflect back on the intersection of these issues with past legal challenges.

## Past Legal Challenges

Funding for autism services has garnered much public attention over the years and has been the subject of court proceedings. In 2004, the Supreme Court of Canada heard the case of *Auton v British Columbia*, which challenged the Province of British Columbia's decision not to fund IBI and applied behaviour analysis (ABA) services for children with autism. At the time of the court challenge, IBI and ABA were emerging therapies, and were starting to become desirable for treating children with autism. The plaintiffs in the case were children with autism and their parents; they argued that the province's decision not to fund these therapies was a violation of their equality rights under the *Canadian Charter of Rights and Freedoms*. The Supreme Court of Canada found that the province had not acted in a discriminatory manner by not funding IBI/ABA therapies because the province was not required by law to fund all medically required treatment. Rather, the province was required to provide core funding to fund only services delivered by medical practitioners and, at the province's discretion, other services provided by designated health care practitioners. Therefore the law did not require British Columbia to fund IBI/ABA therapy for children with autism.

Since *Auton*, a great body of research developed to support the efficacy of IBI/ABA therapy for children with autism such that behaviour therapies did indeed become funded in Ontario and other provinces.

In September 2000, Ontario instituted the intensive early intervention program (IEIP) for children with autism, age two to five. This younger group was targeted by the program to take advantage of the window of opportunity when the evidence indicated that it would be most effective. Again, there were legal challenges brought by parents of older children, with allegations that the IEIP discriminated against children with autism on the ground of age and/or disability. An enormous amount of legal and expert resources were brought to bear on the issue, including a very long evidentiary hearing in the Superior Court, with that decision subsequently reversed by the Ontario Court of Appeal, and leave to appeal was refused by the Supreme Court of Canada (*Wynberg v. Ontario*, [2006] O.J. No. 2732).

That legal challenge confirmed that the establishment of a program such as the IEIP was not mandatory, but one which the Ministry of Community and Social Services [as it was then known] had the discretion to undertake, in the allocation of limited available resources. By distributing the available resources as broadly as possible among those children who could benefit the most, the court held that the salutary effects of the age limit outweighed its deleterious effects. The court did acknowledge that under the *Education Act*, the Minister of Education had the obligation to ensure that appropriate special education programs and services were made available to exceptional pupils without payment of fees. Following this, the province expanded the Autism Program to provide for ABA-principled educational assistance in school settings, with transitional support provided through the regional autism programs.

Concurrently, however, in spite of its success in the *Wynberg* case, the province removed the age limits on eligibility for access to IBI therapies, leading to expanded waitlists for these services in spite of increased funding. Regional programs established clinical, evidence-based criteria for the duration, intensity, and setting of a child's IBI program, and the timing of discharge and transition to the school-based programs or other therapies where appropriate.

Between 2006 and 2016, regional autism programs faced several legal challenges to their clinical decision-making around these issues brought by parents, and in most if not all cases, successfully defended their decisions based on the clinical evidence as to how the individual child was or was not benefitting from IBI (BLG acted for several of the programs in such cases. See for example, *Ceretti v. Hamilton Health Sciences*, 2010 ONSC 252).

In 2016, the Ministry brought in a new Integrated Autism Program, which among other things, again restricted IBI funding to children between 2 and 4, while expanding access to ABA and other therapies, with the goal of cutting wait times, with faster and more individualized services.

### **Analysis**

At the risk of oversimplification, the hue and outcry from the political opposition at the time of the 2016 revamp, arguably now leading to the new 2019 program, seems somewhat disconnected from the prior legal analyses.

In short, distributing the available resources as broadly as possible among all children on the autism spectrum, as opposed to focusing the resources on those who would benefit the most based on standardized clinical assessment, is not a movement driven by legal precedent or concerns about future legal scrutiny.

This is not to say that there will not be attempts to recruit the legal system in the debate around how best to allocate limited resources in the treatment of children on the autism spectrum or with any other developmental disability. It remains to be seen whether Ontario's new Autism Program will face legal challenges, and if so, from which stakeholders.

In any event, it goes without saying that any significant transformation of a service sector generates issues involving governance, funding and accountability, contractual, risk management and liability, privacy, labour and employment issues. We will be keeping a very close eye on developments.

### **AUTHORS**

**Daphne G. Jarvis**  
T 416.367.6216  
[DJarvis@blg.com](mailto:DJarvis@blg.com)

**Lydia Wakulowsky**  
T 416.367.6207  
[LWakulowsky@blg.com](mailto:LWakulowsky@blg.com)

**Naveen Hassan**  
T 416.367.6052  
[NHassan@blg.com](mailto:NHassan@blg.com)

## **BLG OFFICES**

### **Calgary**

Centennial Place, East Tower  
520 3rd Avenue S.W.  
Calgary, AB, Canada  
T2P 0R3

T +1.403.232.9500  
F +1.403.266.1395

### **Montréal**

1000 De La Gauchetière Street West  
Suite 900  
Montréal, QC, Canada  
H3B 5H4

T +1.514.954.2555  
F +1.514.879.9015

### **Ottawa**

World Exchange Plaza  
100 Queen Street  
Ottawa, ON, Canada  
K1P 1J9

T +1.613.237.5160  
F +1.613.230.8842

### **Toronto**

Bay Adelaide Centre, East Tower  
22 Adelaide Street West  
Toronto, ON, Canada  
M5H 4E3

T 416.367.6000  
F 416.367.6749

### **Vancouver**

1200 Waterfront Centre  
200 Burrard Street  
Vancouver, BC, Canada  
V7X 1T2

T 604.687.5744  
F 604.687.1415

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing [unsubscribe@blg.com](mailto:unsubscribe@blg.com) or manage your subscription preferences at [blg.com/MyPreferences](http://blg.com/MyPreferences). If you feel you have received this message in error please contact [communications@blg.com](mailto:communications@blg.com). BLG's privacy policy for publications may be found at [blg.com/en/privacy](http://blg.com/en/privacy).

© 2019 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.