



Ontario
College of
Teachers

Ordre des enseignantes
et des enseignants
de l'Ontario

Briefing Note

Therapy and Counselling Program Regulation

Issue

In May 2018, the Ontario Legislature passed Bill 31, the *Plan for Care and Opportunity Act (Budget Measure Act), 2018*. The amendments to the College's Act, contained in Schedule 19 of the Bill, included the establishment of a program to provide funding for therapy and counselling for claimants alleging sexual abuse or a prohibited act of child pornography against a member of the College in the course of his or her practice.

Council has the legislative authority to develop a regulation articulating aspects of the program that are not provided for in the Lieutenant Governor-in-Council regulation ("LGIC Reg") developed by the government.

Background

The legislated provision requiring the College to establish and administer a program for therapy and counselling comes into effect January 1, 2020.

Many Ontario regulators have similar program requirements in legislation. College staff undertook a comprehensive environmental scan of programs operated by health professional regulators under the *Regulated Health Professions Act, 1991* to better inform our understanding

of the historical use, and operation, of a therapy and counselling program.

Legislative Context

Statutory Framework

Section 58.1 of the College's Act outlines the funding for a therapy and counselling program. Claimants are eligible under subsection (3), if:

(a) it is alleged in a complaint or report against a member received by the College that the student was the subject of sexual abuse or of a prohibited act involving child pornography and, in the opinion of the College, the student was, at the time of the alleged sexual abuse or prohibited act involving child pornography, a student the member supervised or was responsible for in the course of the member's practice; or

(b) the alternative requirements prescribed by the regulations made by the Council are satisfied.

Despite subsection (3), claimants' eligibility to receive funding pursuant to the program purposes will cease upon the occurrence of prescribed circumstances. Identifying these cessation criteria fall within the jurisdiction of the College.

Council Authority to Develop Regulations

Council has the authority to establish alternative eligibility requirements by regulation. Council also has authority to delineate circumstances in which a claimant's eligibility for funding would cease.

The legislation requires the "College" to establish and administer a funding program. The legislation also requires that "a person's eligibility for funding ...does not constitute a finding against the member and shall not be considered by any committee of the College dealing with the member". Therefore, to avoid potential conflicts of interest and legal challenges, the Registrar will be responsible for administering the specifics of the funding program.

General Program Requirements

The following areas should be considered contextually in the development of and inclusion in a Council regulation to support the program:

1. **No retrospective application of funding provisions for incidents occurring prior to January 1, 2020**

Both the Act and the government regulation do not address whether students who were either sexually abused or the subject of prohibited acts of child pornography prior to the date the legislation comes into effect (January 1, 2020) will be eligible for funding. This is the retrospectivity issue.

There is an established legal presumption against retrospectivity, unless there is express legislative language to the contrary or where the language or circumstances imply that a retrospective interpretation be given. For example, provisions that create beneficial consequences typically would apply

retrospectively. However, those that impose negative consequences typically do not.

In the absence of express language in the Act, it could reasonably be presumed that funding, as it is a benefit, would be made available to claimants in respect of sexual abuse or prohibited act of child pornography that occurred before January 1, 2020.

The College's ability to recover costs from the member, which is a negative consequence, is presumed to begin on the effective date of the legislation and, thereby, apply forward-looking only. As a result, the College would be obliged to pay for therapy relating to past acts of professional misconduct but would be unable to recover those amounts from the members responsible.

The College's legal counsel has advised that there are several other issues associated with retrospective application of the program, including how definitions of "sexual abuse" and "prohibited act of child pornography" would apply to conduct that occurred before these definitions were included in the College's Act.

The College would also have a significant unfunded liability for matters that have been adjudicated by the College since its inception and other historical matters that may come to our attention in future years.

Recommendation:

That the Council regulation should include language to indicate that only sexual abuse or prohibited acts of child pornography occurring on or after January 1, 2020 will be eligible for funding under the program.

2. Nexus between member and student - “In connection with a member’s practice”

The nexus between the student and the teacher at the time of the sexual abuse or prohibited act of child pornography should be further defined to mean that the act occurred “in connection with a member’s practice”.

This reflects the Supreme Court of Canada’s decision that “the conduct of a teacher is evaluated on the basis of [their] position, rather than whether the conduct occurs within the classroom or beyond”. The Court upheld the expectation that teachers are held to a higher standard of responsibility, integrity and values, and that this role is assumed 24/7. The *Standards of Practice* and the *Ethical Standards* reflect the commitment to that same principle.

Recommendation:

That the Council regulation include a reference to “in connection with a member’s practice”.

3. Geographic limitation

Some regulators stipulate that the sexual abuse must have occurred in Ontario for claimants to be eligible for funding. However, the College has disciplined members for conduct that occurred outside Ontario. Further, the prohibited acts of child pornography would not necessarily be limited to Ontario, given the electronic nature of those offences. The sexual abuse or prohibited act of child pornography does not have to occur in Ontario, so long as College member is alleged to have committed the act.

Recommendation:

That the Council regulation should not include a geographic restriction.

Alternative Eligibility Requirements

In addition to claims based on a recent complaint or board report, claimants who satisfy one or more of the alternative eligibility criteria would be eligible for funding. All alternative eligibility criteria would rely on some form of evidentiary proof. For example, an admission by a member, or a finding in related prior criminal, civil or administrative proceedings, would be acceptable.

Recommendation:

That the Council regulation should include the following alternative eligibility requirements in the Council regulation:

1. **The Discipline Committee has made a finding of sexual abuse and/or child pornography against a member. Although the primary eligibility criterion is a complaint or board report alleging sexual abuse and/or prohibited acts of child pornography, the alternative criterion would be based on a Discipline Committee finding after a hearing supported by evidence.**
2. **A member has given an acknowledgment, an undertaking, a statement, an admission to, or enters into an agreement with, the College that the member sexually abused the student and/or the student was the subject of a prohibited act of child pornography.**
3. **A Discipline Committee panel has written in its decision that the member committed sexual abuse or a prohibited act of child**

- pornography against a student, other than the complainant who filed the initial complaint against the member.
4. There has been an allegation of sexual abuse or prohibited act of child pornography, which has been referred to the Discipline Committee, but there was no hearing because the member:
 - a. has died,
 - b. is incapacitated,
 - c. cannot be located,
 - d. is otherwise unable to testify, or
 - e. has been previously disciplined for the same conduct with another student or person.
 5. A civil court or another administrative tribunal has found that the member sexually abused the student or that the student was the subject of a prohibited act of child pornography. Again, this alternative is informed by a finding in a prior proceeding and was subject to evidentiary requirements in that proceeding. *The Statutory Powers Procedure Act*, legislation that applies to many administrative tribunals, including the Discipline Committee, allows tribunals to admit evidence previously admitted before another tribunal or a court.
 6. The member has been convicted of a criminal offence of a sexual nature under the Criminal Code. The Discipline Committee's rules of procedure explicitly allow a panel to admit into evidence proof of a prior conviction, as well as findings of fact in the prior proceedings.
 7. Conversely, a claimant who was otherwise eligible for funding for therapy and counselling would not receive funding if, in the opinion of the Registrar, any of the following occur:
 - a. The need for therapy or counselling no longer results directly from the sexual abuse or prohibited act of child pornography on which the original allegation was based;
 - b. The College's resources are insufficient to provide the funding reimbursement amount requested; or,
 - c. Having regard to the eligibility and cessation criteria as a whole, the granting of funding would not be just and equitable.

The College of Dental Hygienists of Ontario (CDHO) and the College of Physicians and Surgeons of Ontario (CPSO) each have a similar "notwithstanding" clause. Such provisions may, in part, may effectively address issues associated with retrospectivity for the program as discussed earlier.

Both the CDH and the CPSO regulations tie the notwithstanding provisions to historical sexual abuse. In other words, sexual abuse that occurred prior to the effective date of their founding legislation (December 31, 1993) would have additional restrictions imposed on eligibility.

Cessation Eligibility Criteria

Recommendation:

That the Council regulation should include the following cessation of eligibility requirements in the Council regulation:

1. The claimant has reached the maximum amount of funding. This criteria ensures that once the funding cap of \$16,060 has been reached, no further funding will be made available to the claimant.

The following cessation criteria would arise where the claimant has not exhausted the maximum amount of funding and recognizes that, while further funding would not continue, the College would not attempt to recover funding that had already been paid to the claimant.

2. The application is determined to be frivolous, vexatious or an abuse of process, and the claimant has not exhausted the maximum amount of funding. For instance, if an application was vexatious, further funding would cease. It would be within the College's right to recover funds dispensed on fraudulent grounds, but may not be to the College's financial or reputational advantage to do so.
3. A panel of the Discipline Committee or an appellate court has made no finding or a finding of not guilty with respect to the allegations of sexual abuse or prohibited acts of child pornography, and the claimant has not exhausted the maximum amount of funding.
4. Allegations of sexual abuse or prohibited acts of child

pornography are withdrawn and a Notice of Hearing proceeds with other allegations, and the claimant has not exhausted the maximum amount of funding. Thus, the basis on which the funding was made available no longer exists.

5. A Notice of Hearing has been withdrawn in its entirety and the member has not given an undertaking to retire or resign and not teach. The claimant has not exhausted the maximum amount of funding.
6. The claimant has recovered or received funding from public funding and/or case damage awards for the same head of damages. If, for instance, a claimant received funding from a damage awards flowing from their civil or criminal case against the member in connection with the same incident of sexual abuse or prohibited act of child pornography, the College will reduce a claimant's total payment potential to account for this other source of recovery.
7. The Investigation Committee does not refer a complaint of sexual abuse or prohibited act of child pornography to the Discipline Committee based on insufficient evidence to support the allegation.

Recommendation

That Council approve the policy direction proposed for alternative eligibility and cessation of eligibility criteria related to the establishment and administration of the sexual abuse therapy and counselling funding program for the development of a Council regulation to support the program.

Council Motion

That Council recommend to the Minister of Education the policy direction outlined in document GC20191205-131 for the development of a Council regulation relating to eligibility and cessation of eligibility criteria to support the establishment and administration of the sexual abuse therapy and counselling funding program.

Link to Strategic Initiatives

The development of a Council regulation to support the administration of the sexual abuse therapy and counselling funding program directly links to the College's mission of placing student's interest first. Further, Council regulatory provisions for the program support the College's strategic initiative to manage risk effectively.

Next Steps

Upon Council's approval of the proposed policy direction, College staff will proceed to work with Ministry staff to develop a Council regulation for Council's approval.

Staff will begin to develop supporting policies and communication materials to facilitate the program implementation.

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Date:

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