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February 24, 2010

VIA EMAIL & REGULAR MAIL

Mr. Al Cornes, Deputy General Secretary
**Ontario English Catholic
Teachers' Association**
65 St. Clair Avenue East
Toronto ON M4T 2Y8

Dear Mr. Cornes:

Re: Full Day Early Learning Statute Law Amendment Act, 2010

You have asked us to provide an analysis of the first reading version of Bill 242, the *Full Day Early Learning Statute Law Amendment Act, 2010* introduced in the legislature on February 17, 2010.

The Bill would amend the *Education Act* as well as other statutes in order to establish the framework for the government's Early Learning Program ("ELP"). In this letter, we provide a preliminary assessment of the Bill. We also outline concerns relating to its provisions that OECTA may wish to address as the Bill proceeds through the legislative process. However, we note that it is difficult to realistically assess the real impact of these proposed changes because most provisions are subject to regulations and Ministry policies and guidelines which have yet to be formulated. As always, the "devil is in the details". A more realistic picture may be given when these policies and guidelines are enacted.

I. Framework of ELP

The Bill contains several enabling provisions which provide the Minister and/or Lieutenant Governor General in Council (Cabinet) with the power to make regulations and/or issue policies and guidelines relating to the early learning program (both the junior kindergarten/ kindergarten and extended day components.) The government has given itself maximum flexibility by permitting both the Minister and Cabinet the power to make regulations/policies/guidelines rather than specifying the matters on which Cabinet has the power to make regulations versus the matters that may be dealt with simply through the issuance of Ministerial policies and guidelines.

For example, s. 1(2) of the Bill would amend s. 8(1) of the *Education Act* to provide the Minister with the power to issue policies and guidelines governing all aspects of the operation of junior kindergarten and kindergarten including the matters listed in that section. Section 4(1) of the Bill then proposes that the same matters may be dealt with through regulations made by the Minister and approved by Cabinet. Similarly s. 10 of the Bill, *inter alia*, would amend the *Education Act* to provide the Minister with the power to issue policies and guidelines respecting all aspects of the extended day program. The Bill would also provide Cabinet with the power to make regulations governing all aspects of the extended day program.

It appears from these provisions that the government has yet to determine precisely which aspects of the ELP will be implemented by regulation and which will be implemented by the simple issuance of Ministerial policies and guidelines. From a legal point of view, the primary difference between these two methods of implementation is that regulations must be approved by Cabinet. This method of implementation is also more formalized and arguably more transparent as regulations are subject to the *Legislation Act*. Among other things, Part II of the *Legislation Act* requires that regulations be filed with the Registrar of Regulations and published on the government's e-laws website and in the Ontario Gazette. Both regulations and policies/guidelines issued pursuant to Bill 242 likely would have the same binding force on Boards since Bill 242 explicitly provides the Minister with the power to require Boards to comply with any policies or guidelines issued by the Minister under Bill 242 (see new para. 3.0.0.1 of s. 8(1) and new s. 260.5 of the *Education Act*.)

II. Designated Early Childhood Educators

A. Mirroring of Teacher Provisions

Notwithstanding the lack of detail in most of Bill 242's provisions, it is striking how much the enabling provisions (i.e. relating to matters that may be dealt with by regulation, policy and/or guidelines in the future) mirror legislative provisions applicable to teachers. For example, the provisions governing the ECE's professional college, learning plans, induction programs and performance appraisals all substantively mirror the provisions applicable to teachers or, in the case of performance appraisals, a less detailed version thereof. The

extent to which the duties and working conditions of ECEs do ultimately mirror those of teachers will depend on the content of the regulations, policies and guidelines issued by the Ministry. Nevertheless, at this stage, the provisions of Bill 242 would suggest that the government intends to treat ECEs as a new professional occupational group working side by side (and in cooperation) with kindergarten teachers.

B. Appointment of ECEs: Junior Kindergarten and Kindergarten

Section 6(2) of the Bill would add paragraphs 12.01 and 12.0.2 to s. 170(1) of the *Education Act* which sets out the duties of Boards. These paragraphs would make it a duty of Boards to:

- (i) “designate at least one position in each junior kindergarten and kindergarten class in each school of the board as requiring an early childhood educator”; and
- (ii) appoint an early childhood educator to each of these positions.

We note two things regarding these provisions.

First, it should be noted that this requirement is made subject to the power of the Minister to make regulations and issue policies and guidelines relating to the operation of junior kindergarten and kindergarten. Due to this qualification, it is unclear whether Boards would have a duty to designate at least one ECE position in each junior kindergarten and kindergarten class in each school and appoint an ECE to each of these positions immediately upon the coming into force of Bill 242. Instead, it is possible that section 6(2) is intended to make it a duty of Boards to designate and staff these ECE positions only once a school has been designated by regulation or Ministerial policy or guidelines as one that will operate a full day ELP. OECTA should seek clarification from the government on this issue.

Second, these new provisions permit Boards to designate and staff more than one ECE position in a junior kindergarten or kindergarten class. This would permit Boards to staff junior kindergarten and kindergarten classes at an ECE/teacher ratio that is greater than 1:1. A ratio that is greater than 1:1 could risk undermining the teacher’s central instructional role in the kindergarten program. It could also exacerbate the concerns set out below relating to the duty to cooperate contained in Bill 242 as teachers would have a duty to cooperate with more than one ECE.

Finally, it should be noted that Section 6(2) of the Bill does specify that an ECE appointed under the provisions described above shall be in addition to the teacher assigned or appointed to teach the junior kindergarten or kindergarten class. This provides a measure of protection for junior kindergarten and kindergarten teachers that they will not be completely displaced by ECEs in the future. The provision contemplates that a teacher will be assigned or appointed to teach each junior kindergarten and kindergarten class and that

in addition at least one ECE will be appointed to each class. We note, however, that OECTA may want to seek more explicit protections which require Boards to appoint a teacher for every junior kindergarten and kindergarten class. The only current requirement in this regard is para. 12 of s. 170(1) which requires a Board to appoint an adequate number of teachers for every school it operates. This paragraph does not require Boards to appoint teachers to any particular grades such as junior kindergarten and kindergarten.

B. Appointment of ECEs: Extended Day Program

Section 10 of the Bill would add s. 260 to the *Education Act*, which would require Boards to designate at least one position in each extended day program class as requiring an ECE. Unlike the amendments to s. 170(1), s. 260 adds that, during the extended day program, the designated ECE will “lead the class”. This accords with the government’s stated intention that the extended day program would be led by ECEs, whereas teachers and ECEs would cooperate to deliver the junior kindergarten and kindergarten programs. We note that this scenario could lead to a confusion of roles and responsibilities during the transition from the ECE-led before-school program to the “core” junior kindergarten/ kindergarten program in the morning and from the core program to the after-school program in the afternoon. This risk of a confusion of roles/responsibilities is only exacerbated by the broad duty to cooperate discussed in the next section.

III. Duty of Teachers and ECEs to Cooperate

One of the few substantive provisions in Bill 242 is the proposed new s. 264.1 of the *Education Act* which would require teachers and ECEs to cooperate with each other with respect to a number of matters listed in 264.1(2). Specifically, the new provision would require teachers, temporary teachers, designated ECEs and persons under a letter of permission to cooperate with respect to:

1. Planning for and providing education to pupils in junior kindergarten and kindergarten.
2. Observing, monitoring and assessing the development of pupils in junior kindergarten, kindergarten and extended day programs.
3. Maintaining a healthy physical, emotional and social learning environment.
4. Communicating with families.
5. Performing all duties assigned to them by the principal with respect to junior kindergarten, kindergarten and extended day programs.

The new s. 264.1 implements the model of ELP educator responsibilities contained in the Pascal Report as the matters listed above are substantially those included in the

intersection of the venn diagram on p. 34 of the Report that are to be the shared responsibility of teachers and ECEs. Perhaps significantly, paragraph 5 was not included in the diagram of shared responsibilities in the Pascal Report.

This proposed provision gives rise to at least five concerns:

First, as presently drafted, the duty to cooperate would appear to apply not only to the junior kindergarten and kindergarten programs but also to the extended day program (see paras. 2 and 5). This is a significant concern since teachers have no formal role in the extended day program.

Second, such overlapping responsibilities have the potential to lead to an ambiguity in the division of roles/responsibilities as between teachers and ECEs in practice. We note that Bill 242 does not set out any duties of ECEs other than the matters listed above on which teachers and ECEs must co-operate. It appears that any specific duties of ECEs would be prescribed by the Minister by regulation pursuant to her power to do so under s. 11(1). As a result, it appears that any actual clarification or delineation of roles would be left to regulation, or Ministerial policies or guidelines (if provided at all). This ambiguity surrounding the delineation of roles and responsibilities is of significant concern due to the very broad duty contained in para. 5 to “perform all duties assigned... by the principal” in respect of both the junior kindergarten/kindergarten programs and the extended day program. This paragraph would appear to provide a principal with a very wide latitude to require cooperation and to delineate the duties of teachers and ECEs in the absence of any specific direction in the statute, future regulations, or Ministerial policies or guidelines.

OECTA should consider seeking a clearer delineation of responsibilities between teachers and ECEs in Bill 242. OECTA may want to question the necessity enacting any statutory duty of cooperation at all. At a minimum, OECTA should consider seeking to limit any statutory duty to cooperate to the junior kindergarten and kindergarten programs. While cooperation between ECEs in the extended day program and teachers will likely occur in practice, it would seem unnecessary to statutorily require cooperation between teachers and ECEs regarding the extended day program.

Third, the new s. 264.1(3) explicitly provides that the section would not limit the duties of teachers under the *Education Act* including duties related to the preparation and completion of report cards. Therefore, read in combination, ss. 264.1(1), (2), and (3) could be seen as imposing additional duties on teachers. Teachers would be responsible for carrying out all of their previous duties as well as the new duty to cooperate with ECEs over the matters listed in the Bill.

Fourth, the duty to cooperate may increase the potential that professional misconduct complaints will be made against teachers at the OCoT. Teachers may have complaints made against them for a perceived failure to cooperate adequately with an ECE. It is also possible that any professional misconduct complaint against an ECE will lead to a corresponding complaint against the teacher assigned to “cooperate” with that ECE in a

kindergarten class.

Fifth, s. 264.1 does not address circumstances where teachers are engaged in a lawful strike. OECTA should seek explicit recognition that the duty to cooperate would not be applicable during a lawful strike or lock-out.

As a final point, we note that this duty to cooperate and these overlapping responsibilities could be used by OECTA to emphasize the community of interest between teachers and ECEs if it seeks to certify a bargaining unit which includes both teachers and ECEs.

IV. Class Sizes

The only provision dealing with class sizes in Bill 242 is the proposed new s. 260.5 (j) which would provide the Minister with the power to issue policies and guidelines governing the class sizes for the extended day program classes. Although the government has stated in public pronouncements and in memoranda to Directors of Education that the class size standard for the ELP will be an average of 26 students on a board-wide basis, Bill 242 does not address the issue of class sizes for junior kindergarten and kindergarten classes. As a result, it is possible that this "class size standard" will remain a non-binding standard that is not formally imposed by means of regulation or Ministerial policy or guidelines. It is also possible that any class sizes will be introduced either as an amendment to O. Reg. 399/00, the *Education Act's* Class Size regulation, or as part of a Ministerial policy or guideline.

Questions may arise as to the interaction between this class size standard and any maximum class size provisions contained in collective agreements that are set below the 26 student class size standard. In our view, class size provisions contained in binding collective agreements would take precedence over any standard that is not set out in a regulation or formal Ministerial policy or guidelines. In the event that the government does enact the class size standard in a regulation, policy or guideline, it would be necessary to examine the precise wording of the regulation, policy or guideline to express an opinion as to how it relates to class size provisions contained in particular collective agreements.

V. ECE Induction Program and Performance Appraisals

Bill 242 would add the new Part X.3 to the *Education Act*. This Part would provide that, "subject to regulations", a Board "may" establish and implement induction programs and/or programs for conducting ECE performance appraisals. Part X.3 would also provide that, if required to do so by regulation, a Board "shall" establish and implement an induction program and/or a program for conducting performance appraisals of ECEs.

It is clear from these provisions that, if required to do so by regulation, a Board must establish and implement an induction program and/or a program for conducting ECE performance appraisals. It must be noted that, as presently drafted, these provisions likely

would provide Boards with the power to establish and implement induction and performance appraisal programs even if the Minister does not issue regulations/ policies or guidelines requiring such programs. The provisions state that a Board's power to establish such programs is "subject to regulation". In the absence of any regulations, the power to establish the programs would appear to be largely unfettered. Almost all aspects of ECE induction programs and performance appraisals are left to regulations that may (or may not) be made by Cabinet. The few substantive aspects of the induction program set out in Bill 242 largely mirror aspects of the induction program for teachers set out in ss. 267 and 268 of the *Education Act*. Bill 242 provides no substantive provisions relating to ECE performance appraisals. Instead, it sets out broad powers for Cabinet to make regulations governing these performance appraisals. In the absence of any regulations being made, Boards would appear to have an unfettered power to establish and implement programs for conducting ECE performance appraisals.

As a result, if OECTA has particular concerns regarding ECE induction and performance appraisal programs (e.g. ensuring that teachers will not be required to carry out performance appraisals of ECEs), it should seek specific safeguards in the Bill rather than leaving these issues either to Cabinet's determination or a Board's discretion.

VI. Miscellaneous Other Provisions

A. Terms and Conditions of Employment of ECEs

Bill 242 does not address the process by which the terms and conditions of ECEs are to be determined. Bill 242 does not amend Part X.1 of the *Education Act*, nor does it amend the statutorily-defined teacher bargaining units contained in Part X.1. Accordingly, the Bill does not assist, nor does it impair, OECTA's prospect of representing ECEs either in a separate unit or in a single accreted unit.

B. Qualifications of Teachers and ECEs

We note that Bill 242 would amend para. 29 of s. 11(1) of the *Education Act* to provide the Minister with the power to prescribe "specific qualifications and experience required for the purpose of qualifying a person to teach in specified areas or positions". The underlined portion would be added to para. 29. Paragraph 29.1 of s. 11(1) would provide the same power to prescribe qualifications for ECEs to work in specified areas or positions. At this stage, it is unclear why this change in wording has been proposed. However, we flag this issue for OECTA to be aware of for the future. In particular, these changes may signal the government's intention to require specific qualifications for junior kindergarten and kindergarten teachers.

C. Supervision

As well, we wish to highlight a proposed change in wording relating to the power of Boards to appoint supervisors in para. 5 of s. 171(1). Although the paragraph would continue to be titled “appointment of supervisors”, the wording would be changed from a power to appoint “supervisors” of the teaching staff to a power to appoint “persons to supervise” teaching staff and ECEs. Again, it is unclear why the government has proposed this change in wording. However, we flag the issue for OECTA to be aware of for the future.

D. Appointment of Principals and Teachers

A final proposed change in wording we wish to highlight is the change in wording to para. 12 of s. 170(1) of the *Education Act*. Currently, para. 12 provides that it is a duty of Boards to “appoint for each school that it operates a principal and an adequate number of teachers, all of whom shall be members of the Ontario College of Teachers.” The proposed wording would delete the underlined portion relating to membership in the Ontario College of Teachers (“OCO^T”). The reason for this change in wording is unclear. In the past, some commentators have suggested that s. 287.1(3) of the *Education Act* (which provides that “different requirements for different classes of principals or vice-principals” may be established by regulation) would permit the government to make regulations allowing schools to appoint administrators who are not teachers.¹ Such a position is difficult to defend in the face of the current wording of para. 12 of s. 170(1) which expressly requires that principals be members of the OCO^T. It is not clear whether the proposed amendment is aimed at permitting Boards to appoint principals who are not teachers. We note that even if the proposed new wording of para. 12 is enacted, the definition of principal in the *Education Act* still provides that a principal is a “teacher” which is defined in the Act as a member of the OCO^T. Therefore, in our view, even with the new proposed wording of para. 12 of s. 170(1), it is likely that a principal still would have to be a teacher and a member of the OCO^T. Nevertheless, we flag this change in wording so that OECTA may seek clarification of the government’s intentions in relation to it.

¹ See J.W.T. Judson and K. Tranquillo, “The Changing Role of the Principal: Life After Bill 160” in W.F. Foster and W.J. Smith, eds., CAPSLE ‘99, *Focusing on the Future: Seeking Legal and Policy Solutions in Education* (Georgetown, ON: CAPSLE, 2000), pp. 257 and 265. See also discussion in Faraday *et al*, *Education Labour and Employment Law in Ontario*, 2nd ed. (Aurora, ON: Canada Law Book) , p. 10-18.

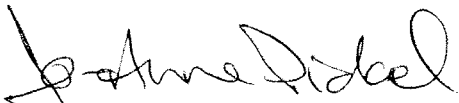
VII. Conclusion

As noted above, it is difficult to provide an assessment of the likely practical effects of Bill 242 since many issues have been left to regulation or Ministerial policies or guidelines that have yet to be drafted. However, we have set out above an analysis of the substantive provisions of the Bill, including concerns that OECTA should consider addressing as the Bill proceeds through the legislative process.

We hope this letter will be of assistance. If you have any questions or comments, please do not hesitate to contact me, or Paul once he returns from vacation.

Yours truly,

CAVALLUZZO HAYES SHILTON
McINTYRE & CORNISH LLP

A handwritten signature in black ink, appearing to read "Jo Anne Pickel". The signature is fluid and cursive, with a large initial "J" and "A".

Jo Anne Pickel
JR/fd