



ONTARIO SPECIAL EDUCATION (ENGLISH) TRIBUNAL

File #2009-04

IN THE MATTER OF the *Education Act, R.S.O. 1990, c. E.2*, as amended, ss. 57(3),
IN THE MATTER OF *Ontario Regulation 181/98*,
AND IN THE MATTER OF the minor child born in 1993

BETWEEN

M. S., Appellant

-and-

Ottawa Catholic District School Board, Respondent

Tribunal Members:

Eva Nichols	Chair
Ross Caradonna	Member
Carlana Lindeman	Member

Appearances:

Cheryl Letourneau	Counsel for the appellant
M. S.	Parent
R. Paul Marshall	Counsel for Ottawa Catholic District School Board
Simone Oliver	Superintendent of Special Education for Ottawa Catholic District School Board
Louise Sibbald	Secretary

The hearing on the merits was held on March 30, 31 and April 1, 2011, in Ottawa, Ontario.

INTRODUCTION

[1] On January 26, 2010, the appellant appealed to the Ontario Special Education (English) Tribunal (Tribunal). The appellant did not agree with the Ottawa Catholic District School Board's (OCDSB or the respondent school board) decision regarding his child's special education placement.

[2] The student is 17-years old. The student has been identified with the exceptionality of Multiple: Communication – Autism and Intellectual – Developmental Disability. Both parties agreed on this identification. The student's special education placement is Special Education Systems Class: Senior Education for Community Living with Partial Integration (ECL).

[3] The student has not attended school since April 2009, in spite of being of compulsory school age. The student received home instruction for an average of five hours per week from the respondent school board during May and June 2009, and January and February 2010. Since then the student has not participated in any educational program that would excuse the student from attending school.

[4] The issue before the Tribunal is to decide on the most appropriate special education placement in the student's best interest.

BACKGROUND

[5] In September 2003, the student was enrolled at an elementary school within the OCDSB in a congregated special education program. The student had an Individual Education Plan (IEP) prior to the identification as an exceptional pupil by the Identification Placement and Review Committee (IPRC) of the OCDSB.

[6] On December 8, 2003, the IPRC identified the student as an exceptional student. The identification was Communication – Autism. The student's placement was in a Special Education Systems Class (ECL), with the purpose of providing the student with more intense support and resources to meet the identified needs. The student's father agreed with the IPRC decision.

[7] The 2004 and 2005 annual IPRC reviews confirmed this identification and placement for the student. The appellant agreed with these decisions.

[8] On June 19, 2006, the IPRC confirmed the student's identification, but changed the placement to regular class with indirect support. The appellant agreed with this decision.

[9] In September 2006, the respondent school board transferred the student to Grade 7 at a secondary school (School A) in a regular class with indirect support placement.

[10] On June 12, 2007, the IPRC confirmed the student's identification, but changed the placement to regular class with direct (resource) support. The appellant did not agree with this decision, but did not appeal.

[11] In January 2008, the student was diagnosed by Dr. Karen Ogston, a psychologist in private practice, as having a moderate intellectual delay, in addition to autism.

[12] In September 2008, the student was transferred to another secondary school (School B). The student's IEP described the placement as regular class with resource assistance. However, the IEP also described under human resources that the student would be in a small class placement for 100% of the day with a high needs co-ordinator and two Educational Assistants (EAs).

[13] On January 13, 2009, the IPRC identified the student as a student with Multiple Exceptionalities of Communication – Autism and Intellectual – Developmental Delay. The placement was special education class with partial integration (ECL). The appellant agreed with this decision.

[14] Between January 13, 2009 and April 23, 2009, the student was suspended several times. The student's report card, dated April 23, 2009, stated that the student had missed 32 out of 51 days. Since April 23, 2009, the student has not attended school.

[15] On June 19, 2009, the IPRC confirmed the previous identification and placement decisions. The appellant did not sign the IPRC statement of decision.

[16] On July 16, 2009, the appellant wrote to the principal of School B, appealing the IPRC decision of the June 19, 2009. The appellant received no response to this request. Therefore, on August 21, 2009, the appellant requested that the IPRC be reconvened.

[17] On October 5, 2009, the IPRC reconvened and confirmed the existing identification and placement. The appellant did not sign the IPRC statement of decision. On October 11, 2009, he wrote to the Director of Education, appealing the IPRC decision.

[18] On November 2, 2009, Ms. Simone Oliver, superintendent with the respondent school board, wrote to the appellant, denying his request for a Special Education Appeal Board (SEAB). She stated that the "request did not raise an issue that would require the establishment of the SEAB".

[19] On January 26, 2010, the appellant appealed to the Tribunal. The Tribunal accepted the appeal, but noted that there had been no SEAB hearing.

[20] On March 25, 2010, the parties participated in mediation.

[21] On February 4, 2011, the parties participated in a second mediation session. The parties were unable to resolve their dispute and the appeal proceeded to a hearing on the merits of the case.

POSITIONS OF THE PARTIES AND THE REMEDIES SOUGHT

[22] The appellant asks the Tribunal to order the OCDSB to place the student in an appropriate special education class, such as a Special Education Class with Partial Integration (Senior ECL) at a secondary school within the respondent school board, other than School B or School A.

[23] Further, the appellant asks for an order that the OCDSB implement this special education placement without a lengthy transition process and to ensure that the student's programming, services and supports within the placement are such that the student can participate in a full-time or "almost full-time" program immediately upon re-entry into school.

[24] The appellant also asks the Tribunal to order the respondent school board to provide appropriately trained and qualified staff to work with the student and assist in managing the student's behavioural issues.

[25] The respondent school board asks the Tribunal to dismiss the appeal on the grounds that the appeal is moot, because there is no issue taken with the special education placement and only with the specific location of that placement.

[26] Alternatively, the respondent school board wants the Tribunal to dismiss the appeal on the grounds that it lacks the jurisdiction to decide the location of the placement and the programming and services available within that placement.

RELEVANT STATUTORY PROVISIONS

[27] The Tribunal's authority is set out in section 57 of the *Education Act*, R.S.O. 1990, c. E.2, (the *Act*) and its regulations. The Tribunal's procedures are governed by the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, (the *SPPA*), the Tribunal's *Rules of Procedure*, and the rules of natural justice and procedural fairness applicable to administrative tribunals.

***Education Act*, R.S.O. 1990, c. E.2:**

[28] Subsection 57(3) of the *Act* sets out a parent's right of appeal to the Tribunal:
Where a parent or guardian of a pupil has exhausted all rights of appeal under the regulations in respect of the identification or placement of the pupil as an exceptional pupil and is dissatisfied with the decision in respect of the identification or placement, the parent or guardian may appeal to a Special Education Tribunal for a hearing in respect of the identification or placement.

[29] Subsection 57(4) of the *Act* sets out the Tribunal's decision-making authority:
The Special Education Tribunal shall hear the appeal and may

- a) dismiss the appeal; or
- b) grant the appeal and make such order as it considers necessary with respect to the identification or placement.

[30] Subsection 57(5) of the *Act* states that the decision of the Tribunal is final and binding on the parties to an appeal.

[31] Subsection 8(3) of the *Act* sets out the requirements for identification programs and special education programs and services:

The Minister shall ensure that all exceptional children in Ontario have available to them, in accordance with this Act and the regulations, appropriate special education programs and special education services without payment of fees by parents or guardians resident in Ontario, and shall provide for the parents or guardians to appeal the appropriateness of the special education placement and for these purposes the Minister shall,...

(b) in respect of special education programs and services, define exceptionalities of pupils and prescribe classes, groups or categories of exceptional pupils, and require boards to employ such definitions or use such prescriptions as established under this clause.

[32] Section 21 of the *Act* sets out the criteria for compulsory attendance:

(1) Unless excused under this section,

(a) every person who attains the age of six years on or before the first school day in September in any year shall attend an elementary or secondary school on every school day from the first school day in September in that year until the person attains the age of 18 years;

(3) The fact that a person...has a developmental disability is not of itself an unavoidable cause [for non-attendance].

[33] Subsection 170(1) of the *Act* sets out the duties of boards:

Every board shall,

(7). Special education programs and services – provide or enter into an agreement with another board to provide in accordance with the regulations special education programs and special education services for its exceptional pupils.

[34] *Regulation 181/98: Identification and Placement of Exceptional Pupils* sets out in section 16 the following regarding special education services or special education programs:

(2) The committee may make recommendations regarding special education programs and special education services.

[35] *Regulation 181/98: Identification and Placement of Exceptional Pupils* sets out in section 17 the following regarding special education placement:

(1) When making a placement decision on a referral under section 14, the committee shall, before considering the option of placement in a special education class, consider whether placement in a regular class, with appropriate special education services,

- a) would meet the pupil's needs; and
- b) is consistent with parental preferences.

[36] *Regulation 181/98: Identification and Placement of Exceptional Pupils* sets out in sections 26 and 27 the process for a parent to appeal an IPRC decision and the expectation that if a parent files a notice of appeal, the school board will establish an appeal board in accordance with the *Regulation*:

(5) The special education appeal board shall not reject or refuse to deal with an appeal by reason of any actual or alleged deficiency in the statement referred to in

subsection (4) or by reason of the failure of the parent....to accurately indicate in the notice of appeal the subject of the disagreement.

[37] *Regulation 298: Operation of Schools – General* sets out in subsection 3 the following regarding the length of the school day:

(3) a board may reduce the length of the instructional program on each school day to less than five hours a day for an exceptional pupil in a special education program.

[38] *Regulation 298: Operation of Schools – General* sets out in subsection 31 the maximum enrolment in a special education class, depending upon the extent of the exceptionalities of the pupils in the class such that the enrolment shall not exceed:

(b) in a class for pupils who have developmental disabilities, ten pupils;

(f) in a class for autistic pupils, six pupils.

SUMMARY OF EVIDENCE ON THE MERITS OF THE CASE

Regarding the student's strengths and needs

[39] The appellant testified that the student has autism and developmental delays that contribute to severe communication delays. Nevertheless, according to the appellant's evidence, the student can read short phrases and short stories.

[40] The appellant said that the student has tactile sensitivities especially around the abdominal area and needs loose and comfortable clothing. He stated that the student has celiac disease and requires a special diet. Some food products can make the student sick and increase the student's autistic tendencies.

[41] The appellant stated that the student cannot express feelings and emotions in words, so the student gets frustrated. He testified that "all the student knows is that [the student] is in an uncomfortable situation and the only way to express feelings is through actions. The student does not know that [the student] is doing wrong".

[42] The appellant described that the best way to respond to the student is in a low, gentle, calm voice. He stated that the student needs to feel comfortable in a warm, welcoming environment. He explained that "once you build that bridge and get rapport going, the rest comes easily. Behaviour becomes non-existent. It worked at the elementary school".

[43] The appellant testified when the student was enrolled at the elementary school, the Director of Education gave the student an award of excellence for outstanding achievement. The appellant talked about the student's athletic skills and the student's ability to play baseball on a team. He said that the proudest moment of his life was when the student batted in the winning run and advanced the team to the finals.

[44] Dr. Ogston testified on behalf of the appellant. She stated that the student has anxieties and is uncomfortable when the father is not present. She testified that the student is nonverbal, but can understand certain ideas and concepts when they are spoken, but cannot formulate oral responses. She further described that in April 2009, the student was diagnosed with an elevated T3 thyroid level, which affects emotional reaction and behaviour. She noted that sometimes there is a health reason for the behaviour.

[45] The Tribunal heard from the principal of School B that the student is very athletic. She testified that the student had behavioural and academic exceptionalities, which did not lead to a safe environment for the student or for others.

[46] Ms. Pamela McCulloch, the OCDSB special education consultant, stated that the student is motivated by technology and has demonstrated that the student can use a computer in some situations in a very appropriate fashion.

[47] Dr. Elizabeth Paquette, chief psychologist for OCDSB, stated that the student is functioning below the first percentile cognitively and has significant delays in adaptive functioning skills. When in school, the student was working on functional academic skills at the primary level. The school's goal was and continues to be to provide programming to help the student improve the following skills: adaptive skills, social interactions as well as self-help and self-care skills.

Return to full-time education

[48] The principal of School B confirmed that the student had not attended school since April 23, 2009. There was no evidence submitted by either party to contradict this information.

[49] The appellant stated that he understood from the April 16, 2010, case conference that the goal was to get the student back to school. The home instruction teacher told him how well everything was going and that the home instruction would be the bridge to get the student into school full-time.

[50] The principal testified that school and board staff met in the fall of 2008 to prepare for the student's entry to School B. She noted that the appellant, the school and Dr. Ogston all wanted the student to attend school full-time. The decision was that when the student was comfortable in the school building, the student would be introduced to the special education classroom and its students. She said that their goal was that at the end of the nine-week transition period, the student would be fully integrated into the Senior Education for Community Living (ECL) classroom.

[51] Dr. Paquette stated that the student had been in the company of the father every day for four years. She testified that the student attended school full-time with success, when the student was in elementary school. However, there was a significant gap of time between when the student attended school full-time and when the student was placed in the ECL class. Due to the student's anxiety regarding school and separation from the father, she did not believe that the student could immediately begin a full day of schooling and be successful.

Placement options

[52] The appellant described the student's earlier successes at school. He stated that at the elementary school, the student was considered a child first and the disability came second.

[53] The appellant testified that in September 2006, the student started full-time at School A, integrated with other students in a regular class, supported by two EAs for the full year. In September 2007, the student was again in a regular class. The EA with whom the student felt more comfortable was reassigned. After that, the student apparently started exhibiting more

autistic tendencies and “was coming home sick with school related illnesses. The student became difficult for staff to redirect.”

[54] The appellant described the student’s success with home instruction. The home instruction teacher told the appellant that the student would benefit from being in a more social environment with other children as role models for behaviour and learning.

[55] The appellant stated that it was his understanding that partial integration meant that the student would be in the same place and doing essentially the same thing as other students. He stressed that the placement on paper is not the same as the actual placement in real life.

[56] Dr. Ogston confirmed that she usually recommended a small class placement for children with developmental delay and autism. Her goal was that the student be fully integrated into such a small class placement, which sometimes might include integration with other students for certain activities. She stated that the ECL placement is the correct placement, but that the student will continue to require additional intensive EA support in that placement.

[57] The principal said that the student was enrolled in the ECL program at School B, which, in accordance with section 31 of *Regulation 298*, has a maximum of ten students, with one full-time teacher and EAs.

[58] The appellant testified that at School B, the student was at all times in a separate room with three adults: the teacher and two EAs. Some of the time the father was also present in the classroom. There were no other students present at any time in that setting. There was no evidence to counter this statement.

[59] Ms. McCulloch testified that while the Ministry of Education specifies five special education placement options for exceptional students in its documentation, the OCDSB offers four of these five placements. It does not offer a “special education class full time”, which is described as a special education class, where the student-teacher ratio conforms to *Regulation 298, section 31*, for the entire school day.

[60] Ms. Oliver stated that the OCDSB offers primary, junior, intermediate and senior ECL classes, all of which include partial integration. Ms. Oliver stressed the importance of this inclusionary model to the OCDSB.

[61] An excerpt of OCDSB’s Special Education Report was entered into evidence to document the special education placements available within the board for exceptional students. The Tribunal noted that, in addition to the ECL classes cited in Ms. Oliver’s evidence, the respondent school board also offers full day programs for students between the ages of 4 and 21, who have Developmental Disabilities. Each is called a Program for Developmental Education (DE). According to this document, the OCDSB does not have any special education placements that are exceptionality-specific for students identified with autism.

Full-time special education placement

[62] The appellant stated that the student needs a full-time program in a structured learning environment with students whose behaviour and speech patterns the student can model and with whom the student can bond and develop friendships.

[63] The principal of School B said that the student is a very complex young man. The school and the respondent school board teams wanted to set the student up for success to ensure the student could slowly be integrated into other classes. The student's placement was changed to the Senior ECL class because this setting is for students with cognitive and behavioural exceptionalities similar to the student's. She said that the student's behavioural and academic exceptionalities create an unsafe environment for the student and for others.

[64] Dr. Paquette testified that a student with the student's profile typically would benefit from the programming available in a Senior ECL classroom, where a student can work on functional academic skills at the primary level. This class provides programming to help improve adaptive skills, social interactions, self-help and self-care skills, and to develop peer relationships.

[65] Ms. McCulloch stated that the school ensured that there was a small room just outside the ECL classroom that provided a safe place for students who need to access a location for calming and/or self-calming strategies. The classroom teacher, with support staff and student service staff, determines if a student needs to be in this location. However, it was not planned to have the student put into this area on a regular basis.

[66] In their testimony, both Dr. Paquette and Ms. McCulloch indicated that by April 2009, the student started to make some academic gains in terms of attention span. The school and the respondent school board teams discussed extending the student's day but the student did not continue to attend school.

Placement v. location

[67] The appellant testified that the student's special education placement should be provided in a secondary school operated by OCDSB, but that the location must not be School B or School A. He stated that the school where the program is located is "key to the student" and that "the student associates both these schools with pain".

[68] The appellant explained his reasons for opposing the student's return to School B. He said that he thought that at School B they would start the student out in a classroom with peers to model, similarly to how it was at the elementary school. He said that he wanted the student in an ECL class with other students. Instead, the student was placed in a "segregated, windowless room where the air quality was bad and with fluorescent lighting, which the student finds very difficult to tolerate". He described this placement as a "prescription for failure".

[69] The appellant stated that the student was not returning to School B. This was based on his promise to the student "that the student would never have to go back to that school to face that again." The appellant said that there was no way that he could get the student back to School B. When questioned about their unannounced visit to School B on September 20, 2010, the appellant said that that this visit took him four tries, because the student kept running away.

[70] Dr. Ogston said that she and the appellant were worried whether the student could ever go back to School B without remembering all the difficult times the student had there. She testified that a placement at either School A or School B would unlikely to be successful. She said that this was based on the student's extreme emotional breakdown near the end of the time

spent at School A, and the student's similar "out of control behaviour at School B". If the same people were in those schools, the student might respond in the same way.

[71] Ms. Oliver testified that their senior ECL classes are located at four high schools including School A and School B. Since 2008, they have kept a spot available for the student in the Senior ECL class at School B, in case the appellant was willing to entertain that placement.

[72] Ms. Oliver stressed that it is important not to confuse placement with location in a particular school, where a special education placement is provided to a student. Placement is what is stated on the IPRC statement of decision.

[73] Ms. Oliver stated that the respondent school board and the school are still currently planning for the student to attend school full-time at School B. In this regard she explained "our plan is to have the student in the classroom. No one can predict; no one can guarantee. The student will tell us what is appropriate and where the student feels comfortable."

Transition to school

[74] Dr. Ogston testified, and the Tribunal agrees, that transitions are difficult for children with autism.

[75] Dr. Paquette addressed the need for the detailed transition plan for the student. She stated that due to the student's anxiety regarding school and separation from the father, she did not believe that the student could immediately begin a full day of schooling and be successful.

[76] Dr. Ogston testified that in the spring of 2010, Dr. Paquette showed her a very detailed transition plan for the student's return to school in September 2010. That plan was not implemented and there was no alternative plan.

[77] Dr. Ogston stated that her goal was to establish the student in a class as soon as possible and that the class would include partial integration into other activities within the school. She stated that "I just don't think it works to have the student totally isolated. It has not worked in the last 3 or 4 years."

[78] Ms. McCulloch said that at a meeting in April 2010, the school's transition plan was supported by Dr. Ogston and the appellant's advocate.

[79] Dr. Paquette testified the transition plan was based on Applied Behavioural Analysis (ABA) practices and the best evidence-based strategies. It was designed to help the student generalize in school behaviours and desensitize the student to the anxiety [the student] feels.

[80] The principal said she told the appellant that the first goal of the transition plan was to eliminate the need for the appellant's presence in the classroom with the student. The next goal was to increase the student's time at school.

[81] The principal testified that the appellant requested transportation for the student to school, as part of the transition plan. Since this was a new experience for the student, a staged taxi plan was developed as the first step of the transition plan. After three days, the appellant announced that the student was not going to school the next day. The taxi plan was discontinued.

[82] Ms. McCulloch explained that the transition plan included orderly and safe travel to and from school in a taxi and entering the school safely and calmly. Once the journey to school was accomplished appropriately, the student's transition into the school would begin on a staged basis. The student would have started with one hour a day in school. This time would have increased gradually, so that at the end of nine weeks, the student would have been integrated into the Senior ECL classroom.

[83] Ms. McCulloch further clarified that according to this plan, the student would remain at the level where the student achieved success. She stated that since the student did not complete the taxi phase of the plan successfully, i.e., did not travel in the taxi and did not enter the school without any incidents, there was no opportunity to implement the rest of the plan.

Programs, services and accommodation within the special education placement

[84] The appellant testified that he wanted to get the student into school on a regular basis so that the student could learn. He testified that it was his goal to integrate the student as much as possible, for example in such classes as gym, music or drama, at lunch, in the library, or on field trips.

[85] The appellant's evidence regarding programming within the ECL class primarily focused on the need for staff competency to manage the student's behaviours. He stated that all staff need to be skilled to meet the student's needs, to redirect any negative behaviours and to turn them into positive reinforcement.

[86] Ms. Oliver testified that the OCDSB has implemented Policy/Program Memorandum (P/PM) 140, issued in May 2007, by the Ministry of Education. There have been a number of provincial training initiatives that the respondent school board had participated in. She stated that the Ministry of Education has provided funding to hire a person specifically for the area of autism. Staff have co-facilitated training and even provided some training for the Geneva Centre. She said that although they do not call themselves experts, they try to gain as much knowledge as they can.

[87] Ms. Oliver stated that the respondent school board works closely with Algonquin College and also with a private provider of EA training. They look for EAs who are certified as child and youth workers or developmental service workers.

[88] Ms. McCulloch testified that, at the appellant's request, the respondent school board used the Ziggurat approach to enable input from: a multi-disciplinary team; people who are an important part of the student's life, and others who have information about the student in order to prioritize the student's needs. With that information and an inventory of the student's skills and strengths, the school and the respondent school board teams developed an IEP, which outlined appropriate expectations and the required accommodation. She worked with the school team to ensure the expectations were consistent with current assessments.

[89] Ms. McCulloch stated that there were concerns about allowing the student to work with a peer group, because of the student's aggressive behaviour.

[90] Dr. Paquette testified that, prior to the student entering School B in 2008, school staff received special training, provided by Dr. Paquette, a behaviour consultant, a special education

consultant and an itinerant resource teacher from the student services department. They reviewed the types of autistic behaviours that might be expected, how to manage these, how to respond in various situations, the teaching of specific strategies, and resource materials that they needed to create. The training reflected the principles of P/PM140 on Autism Services.

[91] Ms. McCulloch explained that the school team supporting the student at School B worked with a multi-disciplinary system team that included her, a behaviour consultant and the chief psychologist. An itinerant EA from the student services department also provided support to the resource staff, the ECL staff and EAs at the school.

[92] The principal testified that the EAs and the ECL teacher received crisis prevention and intervention training. The ECL teacher attended resource network meetings for training from central student staff. Some staff had also attended Geneva Centre training, but she did not know which particular ones had been trained.

[93] Ms. McCulloch stated that, while it is not a legal requirement for the staff who worked with the student to have training in autism, board-level resource networking sessions had been conducted three times a year by the Children's Hospital of Eastern Ontario (CHEO) and others for resource teachers and system class teachers. Many of the workshops focused on best practices and strategies for dealing with students with autism.

[94] Ms. McCulloch testified said that in anticipation of the student's return to school in the 2010-2011 school year, the respondent school board purchased computer equipment and provided training to staff on the use of this equipment. The purpose of this was to accommodate the student's needs.

Behaviour Intervention and Safety Plan

[95] Dr. Paquette testified that OCDSB develops safety plans for all students who require one.

[96] The appellant stated that, following the student's November 28, 2008, suspension, he had to sign a school re-entry plan, allowing staff to restrain the student if needed. He stated that he believed that staff members were afraid to place the student with other students, in case the student might aggress. The appellant stated that the school is taking a hard line approach and "punishing the child for the disability – expelling and suspending the student for [having] known autistic tendencies."

[97] The appellant explained that the nine-week transition plan was developed to try to get the student back into an ECL class with other students. The appellant was concerned that if any part of the plan failed, it was up to the discretion of the principal to decide the consequences. He understood "fail" to mean that the student is seen to display autistic behaviours.

[98] The appellant described the difficulties resulting from the implementation of this plan, especially when he was expected to take the student home from school at the first sign of behavioural problems or when he was expected to remain in the room with the student and school staff, throughout the school day.

[99] Dr. Ogston testified that the proposed safety plan seemed reasonable, but that it needed to be extended to ensure that the student is not sent home at the first sign of a problem.

She spoke about the importance of positive behaviour modifications and reinforcement to achieve a change in behaviour. She commented on the student's success in community activities and suggested applying a similar model in school by including the student with a group of volunteer students at times when the student was not in the classroom.

[100] The principal explained that the student's safety plan, which addressed behaviours that were either self-injurious or injurious to others, spelled out the detailed prescriptive steps that were to be followed by staff. Formal crisis prevention intervention steps were only to be considered, if the student was engaging in medically harmful or self-injurious behaviours. She stated that school staff members are trained to use verbal cues and redirection. The safety plan described the circumstances when the staff members were to contact the appellant or call for outside help. The principal noted that at the beginning the appellant was very co-operative, as the school implemented this process. She stated that over time, he became less co-operative.

[101] Dr. Paquette testified that if a staff member was injured or was upset by the student's behaviour, the school team would meet to discuss what happened, the strategies used, if the incident could have been prevented and what could have been done differently.

Transition to post-secondary and community living options

[102] The appellant stated that in spite of all the challenges, he is looking forward to a more positive future for the student. He said that he registered the student with a community-based service that offers a respite program. He is exploring long-term accommodation options for the student to live either independently or semi-independently in the community at some future date. He is hoping that the student will be able to hold down a part-time or full-time job and be able to contribute to society, feel good about things and have a real sense of dignity and self-respect.

[103] Dr. Paquette testified that, although she consulted Dr. Ogston regularly about the student's needs, the OCDSB had not reached out to the community for specific programming assistance. Dr. Paquette had asked Dr. Ogston about exploring different community options for support including respite care. Dr. Ogston told Dr. Paquette that she would follow-up with the appellant. Dr. Paquette stated she was not aware of any community schooling services for adolescents with similar autistic tendencies to the student's.

WRITTEN SUBMISSIONS OF THE PARTIES

[104] Due to unforeseen circumstances, the hearing was adjourned before the parties had presented their closing statements and legal arguments. Therefore, the Tribunal agreed that the parties could submit their closing statements in writing.

[105] Appellant's counsel submitted her written closing statement on April 15, 2011. Respondent's counsel responded on April 29, 2011. The appellant's reply was received on May 6, 2011.

[106] The appellant's submission stated that the focus of this appeal related to programs and services, which determine the implementation of the particular special education program. The programs and services proposed by the respondent school board are not sufficient to

ensure that this placement is successful. The appellant seeks an order containing specific program and service details for implementing the student's IPRC decision and to meet the student's needs.

[107] On behalf of the appellant, counsel reiterated the request for a full-time or almost full-time placement in a Senior ECL class, immediately upon re-entry. Proper staff training and a detailed Comprehensive Autism Plan (CAP) must be an integral part of the placement. Counsel submitted that the appellant has no confidence in a placement based on a gradual step-by-step transition plan.

[108] Appellant's counsel submitted that the jurisdiction of the Tribunal to order a placement with specific directions for services and /or programs within the placement is derived from section 16 of *Regulation 181/98*, which states that the IPRC may make recommendations about special education programs and special education services.

[109] In support of her jurisdictional argument, counsel relied on the following Tribunal decisions:

- *D. v. Windsor-Essex Catholic District School Board*, (2003), SET 38, in which the Tribunal recognized that "the issue of appropriate programming was intertwined with the issue of placement such that if the special education programs provided to the student were inappropriate, then the placement would also be inappropriate".
- *C. v. Toronto District School Board*, (2006), SET 55, in which the Tribunal ordered the placement of the child in a special education class which would include "integration to further develop the child's social skills. These opportunities should occur during the non-academic activities to the greatest extent possible, so that that the child can interact with other children." The Tribunal also ordered the school board to include the parents in selecting the most appropriate placement from between the two schools described at the hearing.
- *T. v. Peterborough Victoria Northumberland and Clarington Catholic District School Board*, (2006), SET 56, in which the Tribunal ordered the board "to transition the student back into the autism program at the secondary school beginning the first day of school in September 2006 or as soon as possible thereafter and to increase the student's hours of attendance to a full day autism program as quickly as the student is able to manage."

[110] Appellant's counsel concluded by stating that "the Tribunal clearly has the necessary jurisdiction to make orders regarding programming for the implementation of a particular placement. These orders are especially important when the programming is intertwined with the success of the placement. The student's success and/or failure depend entirely on the programming provided within the special education placement and specifically [on] the transition plan into the placement".

[111] The respondent school board's closing submission identified four issues:

- the ECL placement at School B;
- the transition plan;
- other placements within OCDSB; and
- the Tribunal's jurisdiction.

[112] Respondent's counsel submitted that the evidence of the respondent school board's witnesses shows that, given the nature of the programming and class size, the most appropriate placement for the student was a Special Education Class with partial integration or ECL at School B.

[113] Counsel stated that, since no evidence was rendered by the appellant himself or any witnesses that the programs and services within the ECL placement were deficient in any way, the appellant's submissions in this regard should be "disregarded".

[114] Counsel stressed that a detailed transition plan is necessary to assist the student's entry into the ECL class and to enable the student to be successfully transported by taxi to the school. The importance of this plan was supported by the respondent's witnesses as well as by Dr. Ogston, who was the appellant's witness.

[115] Counsel stated that other placements within the respondent school board had been explored, including Section 23 placements, i.e., care and treatment facilities. The ECL placement was deemed to be the most appropriate of the available placements.

[116] Respondent's counsel summed up by stating that the Tribunal does not have the statutory authority to determine the location of a placement or order specific programming and services within a placement. He cited two Tribunal decisions to support this statement:

- *Les Parents v. Le Conseil des écoles catholiques de langue française du Centre-Est de l'Ontario*, (2004), SET 42; and
- *W.F. v. Ottawa Catholic District School Board*, (2008) SET 2008-02

On that basis, the respondent school board requested that the Tribunal find that it does not have jurisdiction to determine this appeal or in the alternative, dismiss the appeal and confirm the student's placement in an ECL class.

REASONS

[117] In *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, the Supreme Court of Canada held that a placement should always be in the child's best interest.

The Tribunal's jurisdiction

[118] The Tribunal noted that the respondent school board's counsel addressed the Tribunal's jurisdiction to hear this appeal in both his opening and closing statements. He did not, however, introduce a motion regarding the Tribunal's jurisdiction.

[119] Notwithstanding the absence of a formal motion, the Tribunal must independently consider whether it has the jurisdiction to consider this appeal in the absence of a SEAB decision.

[120] On October 11, 2009, the appellant submitted a letter to the respondent school board, seeking to appeal the IPRC decision. This letter was included with the appellant's original Form A: Notice of Appeal to the Tribunal.

[121] The OCDSB responded on November 2, 2009, stating that there were no grounds to proceed to an SEAB. Ms. Oliver's evidence was that the respondent school board did not establish a SEAB because "everyone was in agreement with the placement, so it was more about programming".

[122] Section 57(3) of the *Act* requires a parent to exhaust the appeal process set out in *Regulation 181/98* before commencing an appeal to the Tribunal. However, the Tribunal determined that the appeal process was effectively exhausted, when the OCDSB failed to take the necessary steps to set up a SEAB in response to the appellant's letter of October 11, 2009, as directed by section 26 of *Regulation 181/98*.

[123] The facts of this case are the same as those in *D. v. Toronto District School Board*, (2002), SET 30, where the Tribunal found the appeal process exhausted when the school board failed to take the necessary steps to set up a SEAB after receiving the parent's timely notice of appeal. To find otherwise would permit the respondent school board to effectively frustrate the parent's attempt to appeal the IPRC decision, to rectify its own failure to follow the regulatory scheme and thereby delay the appeal process as well as provide a prompt and appropriate redress for the student.

[124] See also *S. v. Halton Catholic District School Board*, (2005), SET 47 and Bowlby, Peters and Mackinnon, *An Educator's Guide to Special Education Law*, Toronto: Canada Law Book (2010) at pp. 159-160.

Regarding whether the appeal is moot

[125] The Tribunal considered the respondent school board's counsel's contention that where the parties agree on the special education placement of an exceptional pupil, the appeal must be declared moot and be dismissed. He stated that this appeal, just like *W.F. v. Ottawa Catholic District School Board*, (2008), SET 2008-02, does not meet the threshold set out in section 57(3) of the *Act*. He urged the Tribunal to confirm its lack of jurisdiction over the matter or in the alternative, dismiss the appeal on the grounds that it is moot. The Tribunal determined that the decision that he cited, *W.F. v. Ottawa Catholic District School Board*, (2008), SET 2008-02, is not directly comparable to this appeal.

[126] Both parties stated that the ECL class placement is appropriate to meet the student's needs. However, the Tribunal heard no evidence from either party about the actual or potential benefits of the "partial integration component" of this placement for the student. In fact, the Tribunal noted from the appellant's evidence that he believed that the integration referred to related to the student's participation in the ECL classroom. Neither party submitted evidence to show how the programming and services within the ECL with partial integration placement will meet and accommodate the student's complex needs, as a student with Developmental Disabilities and Autism.

[127] The Tribunal does not accept the respondent school board's counsel's statement that both parties support the provision of the same special education programming, services and accommodation to meet the student's needs or the evidence that placement in an ECL class with partial integration is in the student's best interest at this time. The fact that the appellant pursued this appeal indicates that there was a live dispute about placement. Therefore, the Tribunal determined that it had jurisdiction to hear the appeal and that the appeal is not moot.

Return to full-time education

[128] The Tribunal is concerned that the student has not attended school since April 23, 2009, even though the student is of compulsory school age.

[129] The Tribunal observed that neither party submitted any evidence to demonstrate that the student was excused from attendance during this period or that the student's non-attendance was considered or addressed by an attendance counsellor during the past two years.

[130] The Tribunal notes that, in accordance with section 21 of the *Act*, the identification of developmental disabilities does not excuse a student from regular school attendance.

[131] The Tribunal accepted the respondent school board's evidence that throughout this period of non-attendance, a place had been reserved for the student at School B in the Senior ECL class.

Placement options

[132] The Tribunal noted that both parties stated that they believed that the Senior ECL class with partial integration was the most appropriate placement for the student. The appellant wanted this placement to be at a school other than School A or School B, but the respondent did not offer a placement at another school.

[133] The Tribunal accepted the evidence that, in spite of the fact that the OCDSB has a waiting list for its ECL placements, it has kept a place available for the student at School B. However, this fact does not mean that the ECL placement, whether at School B or at another school, is the most appropriate special education placement for the student.

[134] The Tribunal accepted the evidence describing the range of special education placement options that the respondent school board provides. The Tribunal noted that the OCDSB does not provide special education class full-time placements, because, as Ms. Oliver stated, it is an "inclusionary board".

[135] The Tribunal accepted the respondent's evidence that the respondent school board's Special Education Report setting out the range of placement options was supported by the respondent school board's Special Education Advisory Committee (SEAC). The Tribunal notes, however, that the Ministry of Education reviews board plans, but does not formally approve them.

[136] The Tribunal does not accept that the respondent school board's commitment to inclusion alters its obligation to provide, in accordance with the regulations, special education programs and special education services for its exceptional students. In accordance with subsection 170(1)(7) of the *Act*, the respondent school board has an obligation to provide a full-time special education placement for any exceptional student whose needs require such a placement.

[137] The Tribunal considered the placement options available within OCDSB that might meet the student's strengths and needs.

[138] The Tribunal noted that OCDSB does not have any exceptionality-specific special education classes for students who are identified as autistic.

[139] The Tribunal noted that OCDSB provides two types of senior special education class placements for students with developmental disabilities. The description of the programming provided in both the ECL and DE classes includes components that appear to match the

student's strengths and needs. Neither program description includes explicit references to supporting students who are identified with autism, although board personnel gave evidence about their experiences with autistic students.

[140] The Tribunal accepted Dr. Ogston's and the appellant's evidence regarding their concerns about the student's return to School A or School B. In spite of this, the Tribunal is not prepared to order a specific school location.

[141] There are two reasons for this.

[142] First, the Tribunal's mandate does not extend to ordering the specific school location where the special education programs and services that it orders are to be delivered to an exceptional student. The Tribunal's mandate is to determine the most appropriate special education placement for identified exceptional students. Placement in this context means the type of class **and** the special education programs, services and accommodation provided to the student in the specified class, in the student's best interest.

[143] Second, the first decision that must be made by the two parties is which of the two special education placements, ECL or DE, is a better match for the student's strengths and needs. Once that decision is made in accordance with the Tribunal's decision, then the parties should determine in co-operation with one another the most appropriate school location for delivering that program to the student.

[144] The Tribunal determined that since it did not receive any evidence regarding the potential appropriateness of the DE program and received only very limited evidence about the student's academic functional levels, it was not able to determine which of these two special education class placements (ECL or DE) is the most appropriate and enabling for the student for the 2011-2012 school year. That is the reason for ordering the respondent school board to place the student in one or other of these programs on a full-time basis.

[145] The Tribunal determined that the evidence showed that the proposed partial integration placement, as described by the respondent school board's witnesses, is not, in fact, in the student's best interest at this point in time. The student's identified exceptionalities, strengths and needs call for a full-time special education program, delivered to the student in a small class placement by appropriately qualified staff on a full-time basis.

The need for full-time special education placement

[146] The Tribunal accepted the evidence of both parties that when the student was in attendance at School B, between September 2008 and April 2009, the student's educational program was not provided in the ECL classroom by the designated ECL teacher. The student spent all the time in a conference room with a teacher and two EAs, who were providing the student's educational program on a one-to-one basis. That means that the student has not participated in an education program where there were other students in the class for more than three years. The student's integration into a congregated class of up to ten students may be quite difficult initially. Thus, integration into a regular sized class with non-exceptional students and regular programming cannot be contemplated at this time.

[147] The Tribunal accepted Dr. Ogston's evidence that she had recommended a small class placement for the student, where there would be other students with developmental

disabilities and autism. The Tribunal noted that she had also stated that the student works best when the student has access to individualized support.

[148] The Tribunal accepted Dr. Paquette's evidence that the student will benefit from the programming that is provided in an ECL-type classroom, where functional academic skills are taught at the primary level.

[149] The Tribunal noted that both parties' witnesses testified to the benefits of a small class placement for the student. The Tribunal accepts and supports the appropriateness of such a placement.

[150] The Tribunal noted that the references made to partial integration were not specific to the student or the student's strengths and needs. When describing the programming for partial integration, there was no evidence provided to the Tribunal about how this would benefit the student, when the student returns to school. The Tribunal accepts that inclusion is the ultimate life goal for the student. However, it would be inappropriate at this time in the student's education to set the student up for failure and potential suspensions or even exclusion, because of a systemic commitment to inclusion.

[151] The Tribunal accepted Ms. McCulloch's evidence that students like the student need access to a comfortable and safe location within the school. The Tribunal believes that insisting on integration, even if it is part-time, would probably not be either comfortable or safe for the student, until such time that the student is well-established in a routine, is used to being away from the father and has experienced some success, as a regularly attending student.

[152] The Tribunal accepted the appellant's evidence that the student typically functions well outside school and participates with and models the behaviour of non-exceptional students in recreational activities. However, the evidence regarding the student's behaviour within the school setting and in the taxi taking the student to school indicates that it would be premature to mandate integration at this time. It is important that the student first succeed with integration into a full-time special education class with other exceptional students. It is possible that at some future date, the student may be ready for the challenges of an integrated program where the student works and interacts with a larger group of students, who do not require special education programs and services.

Transition to school

[153] The Tribunal accepted the respondent school board's evidence that significant efforts had been made over an extended period of time to assist the student to return to school. The Tribunal was impressed with the attention to detail in the various transition plans entered into evidence. Unfortunately, these plans did not result in the student's successful re-entry to school.

[154] The Tribunal accepted both Dr. Paquette's and Dr. Ogston's evidence that, regardless of the specific placement or the location of the placement for the student, a transition plan is a prerequisite to the student's successful re-entry to school. However, the implementation of the transition plan must not become a continuing barrier to the student's return to school. It may be necessary to set alternative thresholds for success than has been the case in the past.

[155] This is why the Tribunal is ordering the parties to collaborate with one another on developing an expedited transition process, so that the student can integrate into the

congregated classroom, as soon after the start of the school year as is feasible. It is important that in developing the transition plan, staff consider the recommendations of P/PM 140, as it contemplates transition for students with autism.

Programs, services, accommodation, behaviour intervention and safety plan

[156] The Tribunal accepts that, in accordance with the OCDSB Special Education Report, both the ECL and DE classes have an established program and offer specific academic, communication, adaptive and behavioural components to the students. Each exceptional student has an IEP, which includes the required supports, services and accommodation that meet his/her strengths and needs. The Tribunal has included in its orders the provision of such supports to the student, without specifying the detail. However, it is important that staff utilise ABA principles, as they develop and implement the student's program.

[157] The Tribunal accepts the evidence that autistic students typically need to have a safety plan. Such a plan is particularly important for the student, given the student's evident aggressive tendencies and the fact that these behaviours pose a safety concern for other students, staff members as well as the student. Implementing a safety plan within a small class placement without having to consider the problems potentially inherent in partial integration with other non-exceptional students may make this easier.

[158] The Tribunal accepted the appellant's concerns about the way the safety plan was expected to respond to the student's behaviour. By allowing the student to leave school and go home every time the student behaved inappropriately, the plan did not provide any positive reinforcement or motivation to encourage the student to remain in school. This is contradictory to accepted ABA principles and methods. The Tribunal urges school staff to find more appropriate motivators to promote and support positive behavioural changes for the student, rather than resorting to suspending the student from school because of these aggressive tendencies. The student's identification and autistic behaviours must be recognized and accepted as mitigating factors and the student's programming must include explicit plans for addressing these behaviours.

[159] The Tribunal noted Dr. Paquette's statement that EAs are trained to respond to inappropriate behaviours and are aware of ABA principles, as set out in P/PM 140. However, the panel was concerned about the statement that staff members generally are not able or expected to cope with extreme behaviours for more than five minutes at a time and needed to resort to sending the student home. Staff members, working with students who have needs similar to the student's and demonstrate similar behaviours, should be encouraged to participate in ongoing professional development and specialized training programs to enable them to respond as effectively as possible to the needs of these students.

Transition to post-secondary options

[160] The Tribunal noted that the student's IEP did not include any post-secondary transition plans. *Regulation 181/98* mandates the inclusion of such a component in every exceptional student's IEP, where the student is 14 years of age or older and whose exceptionality is anything other than gifted. The student is eligible to remain in secondary school until June 2014, because the student will turn 21 in November 2014. The Tribunal noted the appellant's hopes that the student will be gainfully employed at some future date, either full-time or part-time, to contribute to society and to acquire that sense of dignity and self-respect that

everyone needs. A suitable transition plan is the first key step towards achieving these goals for the student.

DECISION

[161] In accordance with Subsection 57(4) of the *Act*, the Tribunal grants the appeal of the student's special education placement.

[162] The Tribunal will remain seized of this matter until December 31, 2011, to decide any disputes that may arise in respect of the implementation of its orders.

ORDERS

[163] The Tribunal orders that the parties plan for and facilitate the student's return to school for the start of the 2011-2012 school year on September 6, 2011. The student is of compulsory school age and therefore, in accordance with subsection 21(1) of the *Act*, the student must be in full-time attendance in an educational program, as soon after the start of the school year as possible.

[164] The Tribunal orders the OCDSB to place the student in a full-time congregated special education class following an expedited transition process.

[165] The Tribunal orders that the student's special education placement for September 2011 be **one** of the following two special education class placement options:

- full-time Special Education Class: Senior Education for Community Living (ECL); **or**
- full-time Special Education Class: Program for Developmental Education (DE).

[166] The Tribunal orders that the parties determine and agree upon the details of the expedited transition process for the student's return to school prior to the start of the school year.

[167] The Tribunal orders that:

- the special education programming, including transition and safety plans, academic, communication, adaptive and behavioural components;
- the special education services, including intensive EA support and other autism-specific supports; and
- the accommodation provided to the student in the full-time congregated placement and included in the IEP, match the student's strengths and needs and reflect the student's Multiple Exceptionalities: Developmental Disabilities and Autism, as well as take into consideration the other documented needs, including Tourette's Syndrome, tactile sensitivities, and medical issues.

[168] The Tribunal orders that, in addition to the transition plan for the student's return to school, the student's IEP include a detailed post-secondary transition plan, focusing on work, post-secondary education and community living options. In developing this plan, the principal of the school where the student is in attendance should consult appropriate board staff and, in co-operation with the appellant, involve such community agencies and post-secondary educational institutions, as are deemed appropriate.

[169] The Tribunal orders that the student's placement remain full-time within a congregated special education class, until such time that it is determined that it is in the student's best interest to explore opportunities for integration with age appropriate non-exceptional peers.

COMMENTARY

[170] The Tribunal is encouraged by both parties' dedication and commitment to ensuring that the student's best interests are met. This same commitment is necessary to ensure that the student will experience a smooth transition back to school where the student can gain the skills, knowledge and experiences appropriate to [the student's] needs and where the student can achieve [the student's] potential.

July 15, 2011

Eva Nichols, Chair

Ross Caradonna, Member

Carlana Lindeman, Member
