



ONTARIO SPECIAL EDUCATION (ENGLISH) TRIBUNAL File #58b

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 1991,

BETWEEN

Mr. S. and Mrs. S., Appellants

-and-

The Peel District School Board, Respondent

Tribunal Members:

Eva Nichols
Derryn Gill
Noel Williams

Chair
Member
Member

Appearances:

S. and S.

Parents

Nadya Tymochenko
Shirley Ann Teal

Counsel for the Peel District School Board (PDSB)
Superintendent, Special Education and Support Services
(PDSB)

Louise Sibbald

Secretary

The hearing on the merits of the appeal was held on December 5, 6, 7 and 8, 2006 in Mississauga, Ontario.

INTRODUCTION

On June 15, 2006, the Appellants appealed to the Ontario Special Education (English) Tribunal (the "Tribunal") regarding the special education identification and placement of their child. Their child is fifteen years old and attends a secondary school within the Peel District School Board (PDSB).

In June 2004, while attending school in the Dufferin Peel Catholic District School Board (DPCDSB), the child was identified as an exceptional student with Communication - Learning Disabilities. In September 2005, the child transferred to the PDSB for secondary education at the local secondary school. The October 2005 Identification Placement Review Committee (IPRC), the first IPRC held for the child within the PDSB, confirmed the child as an exceptional student with Communication - Learning Disabilities. The next IPRC was initially convened on March 21, 2006, and reconvened on April 11, 2006. This IPRC determined that the child should no longer be identified as an exceptional student. This decision was issued in a letter sent to the Appellants' legal counsel, dated April 19, 2006. This led to the launch of an appeal.

In May 2006, in response to the appeal, the PDSB agreed to identify the child as exceptional with a Behaviour designation. In June 2006, after the parents filed an appeal to the Tribunal, the board offered to further change the child's exceptionality designation to Behaviour and Communication - Learning Disabilities. This offer was withdrawn once the appeal commenced.

Ms. Nadya Tymochenko, counsel for the PDSB, filed a motion on June 23, 2006, asking the Tribunal to dismiss the appeal. This motion stated that there are no grounds for appeal in this case because the board, having received the notice of appeal, granted both the identification and the placement sought by the Appellants. The Tribunal met on September 15, 2006, to hear arguments to determine whether the Tribunal had the authority to hear the Appeal.

On October 11, 2006, the Tribunal issued its decision, confirming that it had jurisdiction to hear the merits of the appeal.

The Tribunal heard the merits of the appeal on December 5, 6, 7, and 8, 2006.

The Appellants requested that the Tribunal identify their child as exceptional with a dual identification of Behaviour and Communication - Learning Disabilities. The Respondent urged the Tribunal to state that the child is not an exceptional student.

RELEVANT STATUTORY PROVISIONS AND CASES CITED

The Tribunal's authority is set out in section 57 of the *Education Act, R.S.O. 1990, c.E.2*, and the regulations made there under. The Tribunal's procedures are governed by the *Statutory Powers Procedure Act*, the Tribunal's *Rules of Procedure*, and the general rules of "natural justice" and "procedural fairness" applicable to administrative tribunals.

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

Several specific sections of the *Education Act* concerning special education in whole or in part were used in the arguments presented by the parties.

Subsection 1: Definitions

“exceptional pupil” means a pupil whose behavioural, communicational, intellectual, physical or multiple exceptionalities are such that he or she is considered to need placement in a special education program by a committee,

“special education program” means, in respect of an exceptional pupil, an educational program that is based on and modified by the results of continuous assessment and evaluation and that includes a plan containing specific objectives and an outline of educational services that meets the needs of the exceptional pupil;

“special education services” means facilities and resources, including support personnel and equipment, necessary for developing and implementing a special education program.

Subsection 8 (3): 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,

(a) require school boards to implement procedures for early and ongoing identification of the learning abilities and needs of pupils, and shall prescribe standards in accordance with which such procedures be implemented; and

(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.

Subsection 57 (3): Right of appeal:

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.

Subsection 57 (4): Hearing by Special Education Tribunal:

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.

Regulation 181/98

Regulation 181/98: Identification and Placement of Exceptional Pupils, governs the identification and placement of exceptional pupils; Identification, Placement and Review Committee (IPRC)

reviews; appeal procedures; and the role of parents/guardians in these proceedings. This Regulation provides a mechanism for parents to appeal the identification and placement decisions of an IPRC to a Special Education Appeal Board (SEAB) and sets out the time lines that must be met for such an appeal. The following sections of the Regulation were cited by the parties as part of their arguments.

Subsection 6. (4) Where the pupil is 14 years of age or older, the individual education plan must also include a plan for transition to appropriate post-secondary school activities, such as work, further education and community living.

Subsection 6. (8) Within 30 school days after placement of the pupil in the program, the principal shall ensure that the plan is completed and a copy of it sent to a parent of the pupil and, where the pupil is 16 years of age or older, the pupil.

Subsection 7. (4) Where an individual education plan does not include a plan for transition to appropriate post-secondary school activities and the pupil has attained the age of 14 or will attain the age of 14 within the school year, the principal shall ensure that a transition plan is developed and included in the individual education plan.

Subsection 13. (1) Each board shall prepare a guide for the use and information of parents and pupils that,

- (h) explains that no committee placement decision can be implemented unless,
- (i) a parent has consented to the decision, or
- (ii) the time limit for filing a notice of appeal in respect of the decision has expired and no such notice has been filed.

Subsection 15. (1) A committee that has received a referral under section 14 shall obtain and consider an educational assessment of the pupil.

(2) Subject to the *Health Care Consent Act, 1996*, the committee shall also obtain and consider a health assessment of the pupil by a qualified medical practitioner if the committee determines that the assessment is required to enable it to make the correct identification or placement decision.

(3) Subject to the *Health Care Consent Act, 1996*, the committee shall also obtain and consider a psychological assessment of the pupil if the committee determines that the assessment is required to enable it to make the correct identification or placement decision.

Subsection 17. (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.

Ministry of Education Documents Cited by the Respondent

Individual Education Plans: Standards for Development, Program Planning, and Implementation, 2000

Standards for School Boards' Special Education Plans, 2000

Special Education: A Guide for Educators, 2001 Categories and Definitions of Exceptionalities, pages A18 to A20

Transition Planning: A Resource Guide, 2002

“Special Education Transformation Initiatives”, a memorandum to Directors of Education from the Deputy Minister of Education, October 12, 2006.

Other Documents Cited by the Respondent

Canadian Charter of Rights and Freedoms, 1982

Ontario Human Rights Code, R.S.O. 1990, c. H-19

Guidelines on Accessible Education, Ontario Human Rights Commission, 2004

Peel District School Board’s Special Education Plan, 2005-06 and amendments dated 2006-07

A Parent’s Guide to IPRC, Peel District School Board document, undated

Learning Disabilities: A New Definition, Learning Disabilities Association of Ontario (LDAO) 2001

ISSUE

The issue before the Tribunal is:

1. determining whether the child is an exceptional student, and
2. if the child is an exceptional student, determining the most appropriate identification and placement to meet the child’s needs.

PRELIMINARY ISSUE RAISED

Ms. Tymochenko, on behalf of the PDSB, stated during the initial teleconference, that the board would like to call the child as a witness, but it “would prefer not to ask the Tribunal to issue a summons.” The Appellants stated that they had concerns about the child being called as a witness.

In a letter included with the disclosure materials sent to the Tribunal on November 17, 2006, the PDSB indicated that it would seek a summons from the Tribunal for the child to appear as a witness and would ask that the Tribunal order the child to appear.

The child is a minor child. The Appellants, who are appealing on the child’s behalf, declined to call the child as a witness and were concerned about the issuing of such a summons to the child. The Tribunal asked the PDSB to provide a written submission clarifying why it wanted the Tribunal to issue the summons and why there were no other ways to bring the required evidence forward.

On November 27, 2006, the PDSB presented its written arguments for issuing the summons. The Appellants continued to oppose this request.

At the commencement of the hearing, the Tribunal stated that the preliminary motion for the issuing of a summons for the child to appear was deferred until all other evidence had been presented. It was decided that, at that time, if the board still wanted to summons the child to give evidence and the Appellants were still opposed to this, the Tribunal would hear submissions and make a decision on this matter.

Appellants' Position

The Appellants confirmed that they did not want to present the child as their witness. They reiterated that the child did not want to appear to give evidence to the Tribunal. Therefore, they opposed the issuing of a summons compelling the child to appear.

Respondent's Position

Counsel for the PDSB reiterated that the board considered it very important for the child to understand that the child's views and opinions about [the child's] education are important to the Tribunal as it makes its determination about the matters under appeal. However, the board was prepared to drop its request for a summons, if there was an alternative way "to give the child a voice" before the Tribunal's decision was made.

Resolution of the Preliminary Issue

Both the Appellants and the board agreed that it was desirable for the members of the Tribunal to have the opportunity to meet the child. They agreed with the Tribunal that such a meeting would be more comfortable for the child if the child were offered the opportunity to meet the Tribunal in a familiar environment. Both parties agreed that the Tribunal would go to the school and meet with the child. The child's parents declined to be present at the meeting. Board counsel also agreed not to attend the meeting.

The meeting with the child took place at the secondary school toward the end of the school day on December 7, 2006. The child spoke with the three members of the Tribunal panel in the school's staff room. The vice principal of the school was present throughout the meeting, with the child's agreement. The discussion topics raised with the child by the Tribunal were agreed to by the parties in advance, and a summary of the child's comments to the Tribunal was subsequently read into the record, again with the full consent of the parties. The Tribunal considered that this unusual process for meeting the student, who is the subject of the hearing, was appropriate in the circumstances. The Tribunal notes that both parties gave full approval and consent to this manner of proceeding and also agreed to the inclusion of the summary of the discussion in the record. Once the parties reached agreement on the arrangements for the child to meet the Tribunal, the board's preliminary motion to compel the child's attendance was withdrawn.

POSITIONS OF THE PARTIES

Appellants

The Appellants stated that the education of their child is very important to them, knowing that it can have an impact on all aspects of the child's life. They said that they had exhausted all rights of appeal under *Regulation 181/98* and are still dissatisfied with the identification and placement of their child.

The Appellants stated that they want the child to be identified as having two exceptionalities: Communication - Learning Disabilities and Behaviour. This dual identification would best enable the education system to address the child's strengths and weaknesses.

In terms of placement, the appellants stated that they want the child to have “inclusion”, that is, be placed in a Regular Class and have access to all the special education supports, personnel, programs and services necessary to meet the child’s needs. The child’s program should be delivered in accordance with an Individual Education Plan (IEP) that is based on and modified by continuous assessments and evaluations. The IEP should also include a transition plan that is specific to the child. Furthermore, the child should be supported in using, on a daily basis, the equipment (a laptop computer) already purchased through an Intensive Support Amount - Level 1 (ISA 1) grant, in order to further the child’s opportunities to become an independent learner and develop to the maximum potential.

The Appellants stressed the importance of teachers, parents and therapists adopting a consistent approach to the child’s programs and services. In addition, the Appellants focused on the communication problems and barriers that they have faced since the child began secondary schooling with the PDSB.

Respondents

Ms. Tymochenko, counsel for the PDSB, stated that the Tribunal needed to focus on determining the child’s best interests in light of the *Canadian Charter of Rights and Freedoms*, the *Ontario Human Rights Code*, the *Peel District School Board’s Special Education Plan*, and the child’s own identified strengths and needs.

Ms. Tymochenko stated that the PDSB would provide evidence that the most recent assessments show that the child does not meet the criteria to be identified as an exceptional student with Learning Disabilities. Ms. Tymochenko further stated that the board uses the Behaviour identification for students with serious behaviour problems, usually those students who have become involved with the juvenile justice system. The child does not meet the criteria for the Behaviour identification and the board has concerns that such an identification would have a negative impact on the child’s self-esteem.

More importantly, the board counsel stated that the evidence would show that the child’s needs for special education programs, services, and accommodations can be and are being met without a special education identification. The child has an IEP that lists the programs and services that the child needs and the child is accessing those services now. The child is placed in a Regular Class with In-Class or Withdrawal Resources, as necessary. The board believes that the child needs to participate in the accommodation process and learn to become a self-advocate and an independent learner.

SUMMARY OF EVIDENCE

Appellant’s Arguments

The Appellant’s evidence was presented by the parents. They did not call any witnesses.

Identification

The child was formally identified as an exceptional student with Communication - Learning Disabilities in June 2004, while attending the Dufferin Peel Catholic District School Board (DPCDSB).

In Grade 6, the child was assessed by REACH Therapy Services, an occupational therapy service, because of difficulties with written work. It was recommended that the child receive direct instruction in cursive writing, have special accommodations in the classroom, and learn to use a computer for school.

While in Grade 6, the child was also assessed by the Oxford Learning Centre. The results of this assessment showed that the child was achieving below grade level in reading, listening comprehension and written language. The assessment report also noted that the child was restless and, at times, unfocused.

A psycho-educational assessment was administered between October and December 2003 by the psychology department of the DPCDSB. The psychologists indicated that the child demonstrated a significant weakness in written expression compared with the child's overall cognitive ability. Specifically, the child had difficulties in sentence formation and grammar, and made errors in capitalization and punctuation.

The results of this assessment, combined with the results of teacher and parent questionnaires, led the psychologists to identify the child as having Learning Disabilities. They stated that the child showed significant difficulties with sustained attention, restlessness, impulsivity, and executive functioning (behavioural regulation and metacognitive functioning). The report also recommended that a medical examination be completed to investigate the possibilities of Attention Deficit Hyperactivity Disorder (ADHD).

In January 2004, Dr. Batigelli, a psychiatrist at Credit Valley Hospital, assessed the child. He concluded that the child presented with problems that are typical of a child with ADHD. He recommended that the child undergo a trial of stimulant medication.

In June 2004, the IPRC identified the child as an exceptional student and recommended the implementation of specific learning strategies and accommodations. The Appellants stated that they fully agreed with this IPRC decision.

Also in June 2004, at the end of Grade 7, the child had a follow-up assessment with REACH Therapy Services. Results indicated that the child continued to have difficulties in organizing and writing longer passages of work. Although the child's printing and typing speeds were within the average range, the child's cursive writing speed was extremely slow. The report recommended that the child use technology, such as a laptop computer, to help at school.

In September 2005, the child transferred to the PDSB for secondary schooling. The Appellants stated that they provided information regarding the child's exceptionality designation and special education programming to the new school. The first IPRC held at the secondary school on October 18, 2005, maintained the child's exceptional designation with the identification of Communication - Learning Disabilities.

The Appellants said that they had expected the PDSB to re-assess the child, since they were asked to sign a consent form for the board's psychology department. When a reassessment had not happened by early 2006, the Appellants retained Dr. Berenice Mandelcorn, psychologist, to conduct a psycho-educational assessment and provide an update of the child's strengths and weaknesses for consideration at the March 21, 2006, IPRC. When the assessment was completed, the Appellants provided a copy of the report to the board.

The Appellants described how this assessment addressed several issues.

Dr. Mandelcorn's assessment report stated some concerns about the earlier diagnosis of a learning disability. She indicated that the child's scores on language and academic achievement fell within the average and high-average range. Although the child still demonstrated weaknesses in visual-motor functioning, which affect written language and organization skills, the assessment questioned whether the child met the criteria for being identified as a student with Learning Disabilities. The Appellants argued that the LD identification was not categorically ruled out and that, "as everyone is aware, learning disabilities do not fade away." Therefore, the Appellants stated that they wanted the child's identification as a student with Learning Disabilities to be maintained.

Further, Dr. Mandelcorn's report indicated that the child is struggling to achieve at the level of the child's potential in all areas because of a combination of behavioural and emotional problems. She identified the child as having ADHD, Oppositional Defiant Disorder (ODD) and as showing some of the features of Obsessive Compulsive Disorder (OCD). The Appellants stressed that they wanted to have the child identified with a Behaviour exceptionality to ensure that the child received the programming and accommodations to help the child overcome the impact of these identified conditions.

The Appellants went on to emphasize that the assessments that supported the child's identification had been performed by qualified professionals and that both exceptionalities should be recognized.

Placement

The Appellants stated that they firmly believe that inclusion is the only option for the child's placement. They indicated that the supports that the child is receiving appear to be working. The Regular Class places the child with age-appropriate peers, which is a vital component of a child's social development. It also provides the child with special education accommodations (including technical support), based on assessment and instruction results, monitoring and counseling.

Assessments

The Appellants spoke at length about their concerns about what will happen after high school. They stated that the child wants to go on to post-secondary education and they fully support this endeavour. The Appellants requested the Tribunal to order that a suitable individualized transition plan be incorporated into the child's IEP while the child is at the secondary school. The Appellants stated that they believe that if the child is not identified as an exceptional student, there is no guarantee that [the child] will continue to have an individualized transition plan. As a result, the child's special education needs may not be met in the future. This is an additional reason for the child to be identified as an exceptional student.

The Appellants further requested the Tribunal to order that, when the child is in Grade 12, the child be provided with a full psycho-educational assessment, in order to enable the child to receive accommodations in a post-secondary institution, should the child want to proceed in that direction. They noted that Dr. Mandelcorn also recommended that such an assessment occur in the final year in secondary school.

Communication

The Appellants stated that they had had significant problems in communicating with the school. The Appellants described how they had been promised regular monthly progress reports regarding the child's work and yet had not received these reports for September or November 2006. They described how they were not made aware of class cancellations, meetings organized for students with special needs and other school-based activities that they should have known about. They said that the child is not a reliable courier. They stated that information sent home with the child usually does not reach them.

The Appellants want to be effective partners in their child's education. They said, "We cannot aid or assist in [the child's] education if we don't know what's going on." They stated that the school reported that the child often failed to complete assignments and failed to prepare for tests. This resulted in some poor marks during the Grade 9 year. The parents were and are unaware of the requirements, because the child does not record them in the agenda.

It has been the Appellants' experience that, at meetings with school personnel, they are presented with information and are expected to make decisions during the meeting. They find this very difficult and stressful. Their preference would be that, for future meetings, they receive agendas, reports and any other items that are to be presented and discussed, at least a week before the meeting. This approach would enable them to be adequately prepared and able to respond.

The parents have requested that future communications from the school be in writing, either by letter or by e-mail.

Respondent's Arguments

Ms. Tymochenko, counsel for the PDSB, presented the Respondent's case. Evidence was provided by four witnesses: Dr. Jack Kamrad, the board's chief psychologist; the principal of the secondary school; the department head for special education at the secondary school, and Ms. Shirley-Ann Teal, PDSB superintendent with responsibilities for special education.

Identification

The IPRC decision, issued in a letter addressed to the Appellants' legal counsel dated April 19, 2006 stated, that "the child should no longer be identified as an exceptional pupil".

Dr. Kamrad, the board's chief psychologist, stated that the assessment from the DPCDSB had been reviewed by the psycho-educational consultant for the secondary school, after the child transferred to the PDSB. The assessment results had been summarized and were included in the child's student profile. Dr. Kamrad stated that the assessment results would continue to be valid until there were indicators that the "assessment is not reflective of what the student is like now."

Dr. Kamrad stated that the assessment showed that the child is at the high-average range of intellectual ability. There is no indication that the child has difficulties with short- or long-term memory. The child's academic skills fall into the average to high-average range, with the exception of written expression. The child's weaknesses lie primarily in the areas of planning, time management and organization (referred to collectively as "executive functions"). The DPCDSB

assessment summary concluded that the child has a learning disability. Dr. Kamrad stated that the child's weaknesses in written expression and executive functioning are "relative weaknesses", not "normative weaknesses" and that "typically, the kids that we will categorize as learning disabled will show a normative weakness." Dr Kamrad continued by saying "I would have had trouble saying that this is a learning disability with a lot of confidence."

Dr. Kamrad referred to the March 2006 assessment administered by Dr. Berenice S. Mandelcorn. He agreed with the following statement from Dr. Mandelcorn's report: "Although [the child] demonstrated a weakness in this processing area [visual-motor functioning] in a previous assessment and was diagnosed with a Learning Disability (LD) at that time, we do not believe that [the child's] profile of scores meets the criteria for a diagnosis of LD at this time."

Dr. Kamrad stated that part B of the Ministry of Education's definition of a learning disability which states that "there must be a significant difference between academic achievement and assessed intellectual ability" is problematic both from a scientific and practical point of view because "academic achievement" and "significant difference" are difficult to define. He agreed that one measure of significant difference that has been used to define a learning disability is a two-grade discrepancy between functional grade level and actual grade level, but he went on to say that this measure is not a recognized standard in the PDSB. He spoke about the definition and application of a normative weakness, which requires that a student demonstrate at least one area of function below the sixteenth percentile, in order to be identified as learning disabled. Dr. Kamrad agreed that this approach is more closely related to the application of the Americans With Disabilities Act, which views learning disabilities very differently from the way human rights legislation does in this province [Ontario]. He continued by saying that it is the practice of the PDSB to try to have the definition of learning disability apply only to those students who demonstrate such a normative weakness. Dr. Kamrad concluded this issue by saying that, based on the diagnostic evidence that he had reviewed, he would not recommend that the child be identified as learning disabled.

Dr. Kamrad said that the Behaviour exceptionality identification may be used for students with ADHD, ODD, OCD, and Conduct Disorder. Dr. Kamrad contended that ADHD can be treated with drugs. He stated that OCD is usually a symptom of frustration arising from a learning, attention or mood disorder and can be alleviated by treating the underlying cause. The board usually uses the Behaviour identification for students with conduct disorders, particularly those students who have been involved with the juvenile justice system. Generally, the PDSB chooses not to identify students with ADHD, ODD or mood disorders, such as OCD, with the Behaviour designation because:

- a) their needs can be accommodated without the identification,
- b) the identification can be stigmatizing,
- c) there are alternative programs that better suit the needs of students with ADHD, ODD, OCD or mood or anxiety disorders, without having to have these students mix with students with conduct disorders, and
- d) the identification can be detrimental to a student by leading him or her to emulate inappropriate behaviours.

Dr. Kamrad stated that based on a review of the available information, he would be very reluctant to endorse a Behaviour identification for the child. He further said that, in his opinion, schools have enough degrees of freedom under the [Education] Act to be able to provide accommodations to students without formal identifications.

The principal of the secondary school, agreed with counsel that the PDSB's *Special Education Plan* includes the following statement: "non-exceptional students can be provided with services from the learning support program, special programs, itinerant teachers and teaching assistants." That is the basis on which the school approaches the provision of special education service provision for non-identified students. The principal reviewed the child's latest IEP in great detail and explained the programs and services that are being used to meet the child's needs. She reviewed for the Tribunal the child's latest report card and pointed out that the child is becoming successful in all courses and [the child's] marks are improving. The principal stressed that the child is taking academic or open-level courses and that the curriculum is not modified for the child. The principal also pointed out that in many classes the child's learning skills are described as excellent.

The principal stated that the child does not present behaviour difficulties in many classes. She described how, although the child can be resistant or defiant if feeling unfairly treated, the child is generally polite and cooperative. The child works well with other students in most classes, and appears to have a group of friends in the school.

The principal said that "the evidence for me doesn't indicate that the child meets the threshold for an identification of learning disabled or behaviour." She went on to say that "whether or not the identification is there, I will do for the child, as I do for any student in the school, I will give them the support that they need."

The head of special education at the secondary school, described that she presently has a half-time guidance position, monitors students in the Learning Support Level 2 (LS 2) program and does in-school support, in accordance with the mandated requirements of special education. She said that she now meets the child formally three times a year and informally in the contact room and hallways.

The head of special education said that she first met the child last year when the child was in the Grade 9 GLE (learning strategies) program. The GLE program includes programming on transitions, time management, reading strategies, concept-mapping, literacy, numeracy and study skills. The head of special education stated that the child was resistant to the activities in the GLE classroom and didn't apply the skills that were taught. She commented that "[the child] did not buy into Special Education, the label, the stuff that was going on inside GLE. My impression is that [the child] just didn't want to have anything to do with that Spec. Ed. stuff."

The head of special education said that this year, in the LS 2 program, the staff monitor the child's attendance, check progress reports and report cards, review the OSR and, in consultation with the teachers and psycho-educational consultant, create the child's IEP. She said that she met with the child and "shared the IEP, the accommodations [the child] would have. I ensured that [the child] understood and knew what to say to request those accommodations."

The head of special education then discussed the child's use of technology. The child has a laptop computer, funded through an ISA 1 grant, and a special locker in which it is kept. The computer has a variety of software, including Inspiration, Microsoft Word, Powerpoint, word prediction, grammar and spell checks, and Premier, which has text-reading, e-reading, and talking word processor capacity. The child is aware that these programs can be accessed from home, but chooses not to take advantage of them. The head of special education commented that she thinks that the child's contention that [I] will "never" put those programs on the home computer has to do with the special education label. When asked if the child's reluctance to use the

computer might be because the child is unfamiliar with the programs, the head of special education said that the child could ask for further training at any time. In response to a question, the head of special education confirmed that there are some strict rules about the use of ISA -1 funded technology, which may affect the child's use of the laptop. She stated that she is planning to discuss with the child how other students use technology more effectively.

In answer to a question regarding identification, the head of special education said that "based on [the child's] unwillingness to be connected with Special Ed. or anything that requires any special attention, I think that it would be to [the child's] benefit not to be identified. I think it would be detrimental to [the child's] continued well-being." The head of special education stated that the child is striving to find an identity and does not want to be defined by disabilities. The child doesn't want to be identified. The child doesn't want to be seen as different. She continued by saying that her recommendation would be not to identify the child, but to continue the instructional and environmental accommodations, provided that the child uses these. The head of special education said that if the child was not identified now, the child could be identified before transition to post-secondary education. Further, she said that the identification would not be necessary, as students only need a diagnosis, not an IPRC-generated identification, to receive accommodations in the post-secondary sector.

Ms. Shirley-Ann Teal, superintendent with responsibilities for special education, testified about the board's earlier decision to demit the child from the identification at the IPRC, followed by the offer to identify the child as Communication - Learning Disabilities, to avoid going through the appeal process. Ms. Teal stated that she reviewed the two psychological assessments and she found that there were inconsistencies between the verbal and non-verbal scores. As a result of these inconsistent scores, one psychologist diagnosed the child with a learning disability, and the other did not. Because of this dichotomy as well as the existing learning disability identification, the board decided to offer to identify the child as Communication - Learning Disabilities, with a view to maintaining a good home/school relationship. The board withdrew that offer at the beginning of the tribunal hearing. Ms. Teal stated, "when you put a label on a child, you have to know why you are doing it, what is the purpose of the label and what is the program that is going to follow the identification." She continued, "right now, knowing the child's profile, knowing the results of the reports and knowing what's happening for the child at the school and what is our mandate to continue to do and what we have the opportunity to do now, that we might not have had to do a few years ago when the laws and regulations were written, I don't believe that it would be in the child's best interests to place a label on [the child] at this time. I do, however, believe there is enough evidence to show that as a school board we have a responsibility to do accommodations."

Ms. Teal stated that there are many things to be considered before deciding to identify a student with the Behaviour identification. She said, "the central part of the diagnosis of ODD has been made, but there is no evidence that the child exhibits the other pieces that would be needed for the identification." Ms. Teal said that, unfortunately, the Behaviour identification is invariably interpreted as a negative label. She continued that she would do anything in her power to meet a child's need in another way to avoid the Behaviour label.

Ms. Teal said that if the child were identified, the child would be made aware of the identification because children need to be engaged in a program to benefit from it. Staff would never divulge that information to anyone who didn't need to know. Ms. Teal reiterated that the child will get the same supports whether identified or not. However, the child does not want to be identified and

would prefer to receive the supports without the label. She said that the child has to learn to identify the supports that [the child] needs and to learn to advocate for them.

Placement

The IPRC decision, issued in a letter addressed to the Appellants' legal counsel dated April 19, 2006, stated, that the child should no longer be in a special education placement.

The principal stated in her evidence that during Grade 9 the child had been enrolled in the GLE course, which is part of the LS 1 program. In that course, the child was given assistance and support every day by the special education teacher in the areas identified in the child's IEP. It was the recommendation of the school that the child remain in the LS 1 program in Grade 10. However, the child decided not to enroll in the GLE course for Grade 10.

The principal stated that in Grade 10, the child is in a Regular Class and is monitored as part of the LS 2 program. The child can use the contact room (the PDSB's designation for a special education resource room) for support either at the child's own request or at the request of the teacher. In the contact room the child has access to a computer, receives assistance or clarification from the resource teacher and has a quiet place to work or write exams. In the regular classroom the child has access to a laptop computer. The principal said that the teachers use a number of techniques to assist the child in focusing on school work, including strategic seating, probing questions and prompts. The child is given photocopied notes and handouts, additional time for assignments and exams, graph paper for math, and assistance in breaking assignments into manageable pieces. The child's classes, where appropriate, receive written instructions for seatwork and homework from the teacher. The principal stated that last year the special education teacher worked with the child on organizational strategies and that the application of those organizational strategies continues to be monitored. The child is offered individual assistance at lunch and after school and has the opportunity to join group programs after school.

The principal noted that "every new teacher who comes into the school, whether or not they are experienced teachers, attend sessions about special education and special education supports that we have within the school." She continued that the teachers are capable of delivering the special education supports in the regular classroom.

Ms. Teal testified about the alternative programs available within the board. The board has a series of programs available for students with specific needs, such as those with habitual absenteeism or students who have been suspended or expelled. Ms. Teal stated that she does not believe that any of these programs would be appropriate for the child. Similarly, the child would not benefit from being placed in any of the board's self-contained special education classrooms. Ms. Teal said that the Trillium School is a provincial school for students with severe learning disabilities. At this time, given that the child is succeeding in academic courses in an age-appropriate class, there is no need to take the child out of the home school environment.

Assessments

Board staff stated that they used the assessments and documents provided to them by the Appellants, as part of the body of information that was used to make the decisions regarding the child's identification and placement and the programs and services listed in the child's IEP.

Dr. Kamrad clarified that the “Parental Consent for Psychological Consultation” form that the mother signed on June 9, 2005, is a “standard consent form to authorize the psycho-educational consultant to review an OSR, review any clinical assessments [and] attend case conferences involving the student”. He stated that the form gave permission for indirect service and not for testing or lengthy interviewing of the student. The psycho-educational assessment report from the DPCDSB was reviewed and summarized by Ms. Ruth Gilliland, the psycho-educational consultant for the secondary school, and the summary was added to the child’s student profile dated September 8, 2005. Dr. Kamrad confirmed that the PDSB has not assessed the child since enrolment with the board.

The head of special education for the school stated that the board is using new IEP software and it took time to incorporate the assessment summaries onto the IEP. She stated that the information in the assessments was used as soon as it became available. She described how the supports that the child receives flow from the various psychological and occupational therapy assessments and she explained the process for accumulating and combining the assessment information with the child’s academic function levels to develop the appropriate strategies and accommodations.

Communication

The principal stated that she and the school staff have tried to meet the Appellants’ communication needs. She stated that she has answered their many letters and requests for information. She has sent all information for the parents to their home by mail or registered mail as well as with the child and the child’s older sibling. She has arranged meetings at their convenience and has, where possible, supplied them with the relevant information ten days before the meeting. The teachers have returned phone calls about the child’s progress.

The principal spoke about the parents’ concerns about the child’s homework. She stated that the school had tried agenda monitoring, but the child refused to cooperate. She said that the child has [the child’s] own method of keeping track of homework and that the child needs to be encouraged to assume responsibility for organizing homework. To assist the child without “centering [the child] out”, the teachers usually give written notice of homework assignments and one teacher publishes the upcoming assignments on the school’s website.

The principal stated that students are given a copy of the school agenda, which lists all the pertinent dates throughout the school year. The school, in co-operation with the school council, created a brochure for parents that lists all the important school dates. The brochure is sent home with all students and was specifically sent with an accompanying letter to the Appellants. The school also sends home letters explaining upcoming events. These and all other information are available from the school office. In addition, parents can always phone the school or visit the school website.

The head of special education described agenda monitoring and the homework log that was developed for the child. In both cases, the process was intended to help the child and the parents keep track of work that needed to be completed. These techniques work best in the short term and are intended to assist the student in becoming independent in homework completion. The child became resistant to agenda monitoring when it was tried. The child dismissed e-mailing or leaving a phone message at home. The head of special education at the school said that during the discussion of the new IEP with the parents, she addressed their concerns regarding

homework completion and compliance. Together they discussed possible solutions and ways to engage the child to promote the child's educational success.

Meeting With The Child

The meeting between the child and the members of the Tribunal took place in the staff room of the secondary school. One of the school's vice-principals was present for the interview, with the child's agreement. The summary of the information that the child shared with the members of the Tribunal was read into evidence by the chair at the beginning of the following day's proceedings. The child was told that this would happen and expressed no concerns about the process.

Most of the discussion focused on the child's educational experiences in Grade 9 and in the current Grade 10 year. The child spoke about plans for post-secondary education. The panel heard the child's opinions about the ability to use the available accommodations at school, about the difficulties with the arrangements related to the use of the laptop computer, about having a learning disability identification and about the relationship between the family and the school. The panel found the child to be open, courteous and responsive to the questions raised. Meeting the child and hearing the child's opinions about [the child's] education was beneficial for the Tribunal in arriving at its decisions.

REASONS

The Tribunal's authority is set out in Section 57 of the *Education Act*. Subsection 57 (4) states that:

“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.”

1. Identification

Both parties presented the assessment history without any dispute. The parents relied on the results of the psychological assessments completed by the DPCDSB in 2003, which, in conjunction with the results of the teacher and parent questionnaires, identified the child as having Learning Disabilities. The parents accepted this identification.

The PDSB, on the other hand, accepted the results of the 2006 assessment by Dr. Mandelcorn, which did not recommend that the child be identified as a student with Learning Disabilities.

The assessments entered into evidence included those carried out by:

- REACH Therapy Services, (occupational therapy assessment),
- COTA Comprehensive Rehabilitation and Mental Health Services,
- the Oxford Learning Centre,
- the Dufferin-Peel Catholic District School Board,
- Dr. Batigelli, a psychiatrist, and
- Dr. Berenice Mandelcorn, a psychologist.

Each of these assessment reports identified specific discrepancies in the child's learning and also reinforced the need for the child to receive specialized programming and accommodations to assist the child with learning.

The occupational therapy assessments primarily focused on the child's difficulties with writing and the inability to use cursive writing. The psychological assessments done by the Oxford Learning Centre and the DPCDSB identified the child as a student who has Learning Disabilities, particularly in the areas of written expression and executive functions. Dr. Batigelli diagnosed the child as a student who has ADHD and has prescribed medication for the condition. Dr. Mandelcorn's assessment focused primarily on the behaviour areas and diagnosed the child as having ADHD, OCD, and ODD.

The Tribunal considered the Ministry of Education's categories and definitions of exceptionalities, as set out in the *Special Education Guide: A Guide for Educators* (2001).

The Tribunal first considered the Behaviour designation. Behaviour is defined as follows:

"A learning disorder characterized by specific behaviour problems over such a period of time, and to such a marked degree, and of such nature, as to adversely affect educational performance, and that may be accompanied by one or more of the following:

- a) an inability to build or to maintain interpersonal relationships;
- b) excessive fears and anxieties;
- c) a tendency to compulsive reaction;
- d) an inability to learn that cannot be traced to intellectual, sensory, or other health factors, or any combination thereof."

The PDSB staff indicated that the Behaviour designation is usually reserved for students with Conduct Disorder, a much more serious behavioural condition and for students who are involved with the juvenile justice system. Throughout the testimony there was no evidence that the behaviours described in this definition were behaviours exhibited by the child. There was no suggestion from any of the witnesses, nor was it the Tribunal's observation at its meeting with the child that such a designation reflects the child's needs or would be in the child's best interests. Although the most recent assessment cited ADHD, OCD, and ODD, as the conditions that affect the child's behaviour, the Tribunal is convinced that a Behaviour designation would not be in the child's best interest.

As a result, the Tribunal determined that the identification of Behaviour should not be applied to the child.

The Tribunal next considered the Communication - Learning Disabilities designation. This exceptionality is defined as follows:

"A learning disorder evident in both academic and social situations that involves one or more of the processes necessary for the proper use of spoken language or the symbols of communication, and that is characterized by a condition that:

- a) is not primarily the result of:
 - impairment of vision;
 - impairment of hearing;

- physical disability;
- developmental disability;
- primary emotional disturbance;
- cultural difference;

b) results in a significant discrepancy between academic achievement and assessed intellectual ability, with deficits in one or more of the following:

- receptive language (listening, reading);
- language processing (thinking, conceptualizing, integrating);
- expressive language (talking, spelling, writing);
- mathematical computations; and

c) may be associated with one or more conditions diagnosed as:

- a perceptual handicap;
- a brain injury;
- minimal brain dysfunction;
- dyslexia;
- developmental aphasia.”

The Tribunal noted that all the assessment reports entered into evidence, even those that did not offer a formal identification of Learning Disabilities, commented on the child's academic difficulties, and all assessments, as well as much of the evidence given by witnesses for both parties, stated that the child requires access to accommodations and supports. The Tribunal considered the opinions of the PDSB staff, who stated that the child did not need to be identified to receive the services, supports and accommodations that are set out in the IEP and that the child needs to be successful. Yet the child was described by the Respondent's witnesses as “a complex child with unique needs” (said by Dr. Kamrad), as a student who needs what “other students with Learning Disabilities benefit from” (said by the principal), as an at-risk student (said by the principal), and as “learning disabled” (said by the head of special education). The Tribunal heard a great deal of evidence about the importance of the child's IEP and the child's need for accommodations.

The evidence presented indicated that the child has very high to superior abilities in several areas of function, while the child's performance in some areas, such as written expression and executive functions, is two to three grade levels below the current grade level. This demonstrates a significant discrepancy between ability and performance.

Therefore, it is the Tribunal's opinion that the child will benefit from the identification of Communication - Learning Disabilities, and the accommodations that will result from this identification.

2. Placement

The Appellants want the child to be in a Regular Class, where the child can be with age-appropriate peers and at the same time have access to all the services, supports and accommodations that the child needs to achieve [the child's] significant academic potential. The Respondent agreed with the placement request and the provision of supports, in accordance with the child's IEP and the board's LS 2 programming designation for special education programming for students with special needs in a regular classroom setting.

It is the Tribunal's opinion that the child has been provided with a very satisfactory program at the secondary school and therefore, endorses the current special education placement, Regular Class with LS 2 support, as described in the child's very comprehensive IEP and the documentation provided to the Tribunal by the PDSB.

3. Transition Planning

The Tribunal noted that the one part of the child's IEP that did not reflect the child's strengths and needs accurately and adequately was the transition plan component. The child needs a more appropriate and comprehensive individualized transition plan.

The PDSB has not assessed the child since transferring from the DPCSB. Evidence was given that in order to access requisite accommodations when the child enters post-secondary education (university or college), the child may not require an IPRC identification or exceptional designation, but will require an up-to-date diagnosis of Learning Disabilities. For this reason, the PDSB offered to commit to providing the child with an up-to-date assessment during the Grade 12 year. The Tribunal believes that this commitment to re-assess the child should be included and maintained in the child's transition plan.

The PDSB gave evidence about the school's concerns about the child's self-advocacy skills and involvement in the child's own learning process. The Tribunal supports these concerns and recommends that positive steps be taken to address these issues. These should also be included in the transition plan.

4. Communication

Throughout the hearing, much had been said about the issue of communication between the school and the home and the parties' desire for a more satisfactory home/school relationship. The Tribunal acknowledges that the school has made valiant efforts to communicate with the parents, having sent more than 112 notes and letters to the parents since the child enrolled at the secondary school. At the same time, the Tribunal also heard that the parents did not feel that they were made aware of all that they needed to know in order to support the child in [the child's] education. The child also commented to the Tribunal that [the child] wished that there was much less communication between the school and the parents about [the child].

The Tribunal recommends that once the parties have received the Tribunal's decision, they discuss, face to face and with the child present, how much communication is required and how this should be done. The child's needs and wishes in this regard must also be taken into consideration given that the child is a secondary school student. Further, because the child's marks on the latest report card reflect significant improvement in school performance, once the Tribunal's orders are implemented, there may be less need for such frequent contact between the home and the school. Effective communication and collaboration can only benefit the child and allow all concerned to focus on the child's educational progress and ongoing success.

DECISION

The Tribunal grants the appeal.

1. The Tribunal orders the Peel District School Board to identify the child as an exceptional student with Communication - Learning Disabilities.
2. The Tribunal orders the Peel District School Board to maintain the child's current placement in a Regular Class with Learning Strategy - LS 2 supports, in accordance with the child's IEP and the *Peel District School Board's Special Education Plan*, and to maintain the special education services, supports and accommodations, that are currently provided to meet the child's identified strengths and needs. As part of the supports provided, the child should be assisted to make more regular and effective ongoing use of the laptop computer. In consultation with the child, the school should consider amending its procedures for the use of a laptop computer in school and at home.
3. The Tribunal orders the PDSB to include in the child's IEP an appropriate individualized transition plan. This plan should include and maintain for the balance of the child's secondary education the PDSB's commitment to provide the child with an updated full psycho-educational assessment during the Grade 12 year to facilitate a successful transition to post-secondary school activities.

The Tribunal will remain seized of this matter for the 2006-07 school year to decide any dispute that might arise in respect to the implementation of order 1 above.

OBITER

On April 19, 2006, the IPRC decided that the child should no longer be identified as an exceptional student. The PDSB indicated its willingness to change the decision of the IPRC in order to avoid the appeal process. The Tribunal is concerned that a school board would agree to an identification for a student when it has "strong reservations" about its appropriateness, even when this is done in order to improve home/school relationships and avert an appeal. IPRC decisions must always be made with a focus on the strengths, needs, and best interests of the student.

The Tribunal was encouraged to hear about the school's efforts to accommodate the child's strengths and needs and the references to the Ontario Human Rights Commission's *Guidelines on Accessible Education*. It is important that in ensuring that their actions comply with the law, school boards hold themselves to the standards established by legislation in Ontario and not to those of other jurisdictions, which may take a different approach to the identification and accommodation of Learning Disabilities.

The Tribunal commends the child on [the child's] improved performance in Grade 10, as reflected by marks on the most recent report card. We also want to extend our appreciation to the child for meeting with the panel. We encourage the child to continue to strive to self-advocate and to use all available and needed accommodations. We wish the child every success for the balance of the child's secondary education and in the future.

Date February 12, 2007

Eva Nichols, Chair

Derryn Gill, Member

Noel Williams, Member
