

ONTARIO SPECIAL EDUCATION (ENGLISH) TRIBUNAL

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

BETWEEN

G. B. and M. S.: Appellants

and

OTTAWA-CARLETON DISTRICT SCHOOL BOARD: Respondent

Tribunal members:

Paula Barber, Chair
Ann Fudge, Member
Deborah Moskal, Member

Appearing for the parties:

G. B. and Mary Anne Kazmierski for the appellants

Roger Mills, Esq. Counsel for the respondent

The hearing was held at the Southway Inn of Ottawa, 2431 Bank Street, Ottawa, Ontario, October 15, 16, 17, 18, 2002.

INTRODUCTION

The Tribunal scheduled this hearing to determine the placement of the student. The hearing was guided by the *Education Act* RSO 1990, c.E.2, Section 57, the regulations made thereunder, and the *Statutory Powers Procedure Act*.

This hearing focussed on the student, who, at the time of the hearing was eleven years old. The student was diagnosed, as an infant, with Lennox-Gastaut Syndrome, a seizure disorder. As a result of extensive seizures, the student was non-verbal, had minimal eye contact, had low muscle tone, was extremely flexible and walked for the first time at age five. The student began school at age six in a regular community school and during that school year was placed at a segregated school for the following year. Beginning in the school year, 1999-2000, there were several attempts at integration at several schools, with the segregated school remaining as the primary school placement. The student has not attended school, full time, since November 2000. At the time of the hearing, the Tribunal heard that the student is reading, up to a 50 page story book, is skating, riding a scooter, and a two wheel bike, can bowl and play basketball. The student's language has progressed to speaking in six or seven word sentences.

The Appellants' Request

The appellants requested that the decision of the Ottawa-Carleton District School Board (OCDSB) Identification, Placement, and Review Committee (IPRC) in its decision of October 26, 2001, which directed that the student be placed at a [specified] special needs school with a segregated population, be set aside and they asked that the student be placed in a regular school, [a named public school], with a total communication package, a one-to-one educational assistant (EA), occupational therapy and behavioural management.

The parents are not appealing the student's designation as an exceptional pupil.

The Respondent's Reply

The respondent requests that the Tribunal find that the student's needs are not being met in an integrated setting and that the decision of the school board to remove the student from the integrated placement was correct. The respondent argued that the board had met the burden of proof in the Eaton v. Brant County Board of Education [1997], S.C.R. 241 (SCC)

Witnesses

The Tribunal heard 18 witnesses during the four days of hearings; seven for the appellants and eleven for the respondent.

For the appellants

Diane Stanton the student's in-home support worker
M.S..... parent
Charles Mathews President, Disabled and Proud
G. B..... parent

Nancy McLeod superintendent, OCDSB
Victoria Andrew public school principal, OCDSB
Dan Wisemanchief social worker and co-ordinator,
Safe Schools /Community Outreach, OCDSB

For the Respondent

Judy Makinpsychologist, OCDSB
Carol Hunter public school principal
Kelly French educational assistant, OCDSB
Pam Graydonteacher, OCDSB
Nancy Stevensonteacher, OCDSB
Lindie McDonaldprincipal, (retired) OCDSB
Linda Yanprincipal, OCDSB
Suzanne Lutchprincipal, OCDSB
Shareen Killanteacher, OCDSB
Christa Bauerteacher, OCDSB
Monica Biehneducational assistant, OCDSB

To accommodate witnesses and to expedite the hearing, witnesses for both parties were heard out of order. Both parties agreed to this procedure. Summaries of testimony are presented in the usual manner with the appellants' witnesses first, followed by the respondent's witnesses.

Preliminary Matters

There were several preliminary matters raised by the appellant.

1. The appellant requested that Ms. Mary Anne Kazmierski, his advocate, act as a co-presenter during the hearing. Ms. Kazmierski had acted as a co-presenter and assisted in questioning witnesses during the Special Education Appeal Board (SEAB) hearing. The respondent did not object to Ms. Kazmierski acting in this capacity during the hearing.

The Tribunal granted this request.

2. The appellant requested that a private space be provided for him and his colleagues to deliberate during recesses. He asked that the Tribunal request that the board provide a room for this purpose.

The request to have the board or the Tribunal provide for a room for the appellant and his colleagues was denied. The board and the Tribunal agreed to leave the hearing room during recesses, so that the appellants could have privacy during recesses.

3. The appellant requested that he have sole authority to decide when the hearing was "Off the Record." He argued that during a previous hearing much of his presentation was not included in the report, with numerous blank spaces in his presentation.

The Tribunal denied this request and stated that the entire hearing would be "On the Record", unless the Chair ruled otherwise.

4. The appellant requested that childcare be provided for his child so that his spouse, the child's mother, could attend the Hearing.

The request was denied. The Tribunal has no jurisdiction to provide or order childcare during a hearing.

5. The appellant raised as a preliminary matter the scope of the Tribunal's authority regarding the "remedy" that the appellant was seeking. He wanted to know if he could seek a remedy that would ensure that he would not be in the same situation next year after another IPRC, since this Tribunal, was dealing with an appeal of an IPRC dated October 16, 2001. The appellant wanted the Tribunal to fashion a remedy that had stability and included a transition plan that would take his child to the end of the child's education.

The Tribunal pointed out that, as part of the Education Act, an IPRC is required every year because the needs of children change. The nature of the Tribunal's decision would depend upon the evidence presented.

6. The appellants requested that there be an exclusion of witnesses prior to their testimony.

This request was granted.

7. The appellant questioned why superintendent McLeod and chief social worker Wiseman were not on the respondent's witness list. Mr. Mills, for the respondent, stated that the evidence of neither was relevant to these proceedings.

The Tribunal stated that the appellants could subpoena superintendent McLeod and chief social worker Wiseman as his witnesses if the appellants wanted them to appear at the hearing.

8. The appellant requested that the door be closed during the hearing because he became distracted when someone went by. Mr. Mills, for the respondent, indicated that he would be willing to make a motion to close the hearing.

The Tribunal clarified the difference between a closed door and a closed hearing. The decision was made to keep the hearing an open hearing with the door closed to avoid distractions for the appellant. There was a discussion regarding the possibility of closing parts of the hearing should sensitive matters be raised.

9. The appellant asked if a transcript would be available.

Mr. Wyman, Secretary to the Tribunal, at the Chair's request, provided information to the appellant on accessing the transcript through the court reporter.

Legal Framework

The following sections of the *Education Act* and the regulations made thereunder have been used in the arguments presented by the parties.

Education Act (R.S.O. 1990, c.E.2), as amended, Subsection 57 (3) Right of Appeal-Where a parent or a 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 8 (3) 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. ...

Regulation 181/98, Identification and placement of exceptional pupils governs the identification and placement of exceptional pupils, IPRC reviews, appeal procedures and the role of parents/guardians in these proceedings.

Education Act, Section 25: School Attendance Counsellor Provisions, Section 265 (1) (m) Access to school or class, -subject to an appeal to the board, to refuse to admit to the school or classroom a person whose presence in the school or classroom would in the principal's judgment be detrimental to the physical or mental well-being of the pupils; and ...

Other Sources Cited:

The *Ontario Human Rights Code*, Section 1, 10 (1)(3), 11, 17 The United Nations Convention on the Rights of the Child, Articles 23, 28, 29 The United Nations Declaration of the Rights of the Disabled Person, Section 3

The United Nations Educational, Scientific and Cultural Organization, 1994 World Conference on Special Needs Education and the Salamanca Statement

The Canadian Charter of Rights and Freedoms, Section 15 (1), 1982
The Brant County Board of Education and The Attorney General For Ontario v. Carol Eaton and Clayton Eaton, [1997], S.C.R. 241 (SCC)

The Ontarians with Disabilities Act, 2002

R. v. York Region District School Board, January 24, 1986(unreported decision)

L. v. Le Conseil Scolaire de District Catholique de Centre-Est de l'Ontario, November 2,2001 (unreported decision)

Y. v. XX District School Board, February 18, 2002 (unreported decision).

Violence Free Schools Policy

Safe Schools Act, Bill 81

Statutory Powers Procedures Act

Provision of Health Support Services in School Settings, Policy # 81, 1984

Student-Focused Funding, Intensive Support Amount (ISA), Guidelines for School Boards, 2001

Issues

1. The key issue to be decided is where the student should be placed, and whether the student's needs can be met in a regular classroom.
2. Other issues were:
 - a. adequacy of the resources in the integrated placements;
 - b. a behaviour management plan;
 - c. speech-language services;
 - d. staff with specific training.
 - e. a definition of integration.
 - f. the time that the student has spent out of school and how the board could "make up" for that time
3. The respondent wanted the Tribunal to deal with two additional issues:
 - a. the decision to place the student at a public school in an integrated classroom was made, despite the express dissent of the board's staff at that IPRC meeting;
 - b. a determination regarding the occurrence of certain behavioural incidents.

The appellants' request:

- 1 That the decision of the OCDSB to place the student in a special school be set aside and that the student be placed full-time in a regular class at an alternative public school with accommodations for identified special needs, including a full-time educational assistant, with the resources necessary to allow the student to achieve full potential.
- 2 That a definition of integration be included in the Tribunal decision.
- 3 That the school consider some way of making up for the time that the student has not been in school.

At the time of the Tribunal, both parties had reached an agreement that the identification of the student shall be Multiple and Speech and Language.

According to the definitions in the Ministry of Education, A Guide for Educators, 2001,

Multiple Exceptionalities are defined as follows:

A combination of learning or other disorders, impairments, or physical disabilities, that is of such nature to require, for educational achievement, the services of one or more teachers holding qualifications in special education and the provision of support services appropriate for such disorders, impairments, or handicaps.

As well, the parties added the two following categories to the student's identification as multiple exceptionalities,

Language Impairment: Defined as follows:

Language Impairment: a learning disorder characterized by impairment in comprehension and/or use of verbal communication or the written or other system of communication, which may be associated with neurological, psychological, physical, or sensory factors, and which may:

- (a) involve one or more of the form, content, and function of language in communication and
- (b) involve one or more of the following:
 - language delay;
 - dysfluency; voice and articulation development, which may or may not be organically functionally based.

Speech Impairment: Defined as follows:

A disorder in language formulation that may be associated with neurological, psychological, physical, or sensory factors; that involves perceptual motor aspects of transmitting oral messages; and that may be characterized by impairment in articulation, rhythm, and stress.

The Tribunal believes that the evidence supports the above definitions and therefore, there is no issue as to the student's identification as an exceptional pupil.

Summary of Evidence

M. S.

The student's mother described the student's history including the medical issues from pre-natal to the date of the Tribunal.

Ms. S. testified that she had a "healthy, normal baby boy, eight and a half pounds" after a normal pregnancy". All progressed well until after the second DPT vaccine when the child started having seizures. Tests revealed that the child's brain was "seizing every four seconds". Ms S. stated that she and the appellant declined brain surgery as an option because all scans were normal and there was nothing wrong with the child's brain. The child was given a number of drugs to try to stop the seizures as well as ATCH injections, a bovine growth hormone which they injected every morning for about eight weeks. A nurse from the Victoria Order of Nurses' (VON) came in every morning to give the injections. The seizures continued at times over 100 a day that the parents could see. The child's parents placed the child on a ketogenic diet and the seizures lessened. When learning to crawl, the child needed to wear a leather helmet lined with plastic to protect the head during the forceful seizures, but, with no face guard, the child was still getting hurt. Later on, an orthotics specialist made a special full-face helmet for the child that cost over \$1000. The child adapted to the seizures by going into somersaults as [the child] got a littler older.

When the child got tonsillitis, at one point the child's fever was extremely high. The parents noticed that the seizure count had dramatically dropped. As they had always kept charts and notes of the seizures, they noticed that they went from "over 100 a day down to 15, three and then one and then nothing".

The Children's Hospital of Eastern Ontario (CHEO) did an EEG and the child's brain waves were normal. There was no sign of seizure activity. The parents convinced the doctors to take the child off all drugs because of was staggering.

It took another year and on November 11, 1992, the child had the first seizure-free day. As a result of the seizures, the child was non-verbal, had minimal eye contact, had low muscle tone and was also extremely flexible. The child walked for the first time in March 1996.

Ms. S. and the appellant started the child in a regular school shortly before the child's seventh birthday. At that time the child was "still basically non-verbal except for a few words". Ms. S. described the management of the child behaviour as follows: "If the child touched or reached out for attention, the child was removed from circle and placed at the computer with the headphones or a keyboard with the headphones ...positive reinforcement for negative behaviour at a very young age."

At the self-contained school, where the child was transferred during that Kindergarten year, Ms. S. didn't see any "normal kids ...chattering or playing together outside ...everything was by rote pretty well". She was bothered by the padded rooms, closed doors with only one small window. She witnessed a child being restrained in an apparatus ... "with padded mitts velcroed on to him like boxing gloves and wearing some kind of a helmet". She has also seen children locked away in these small rooms. The child came home with broken blood vessels on the chest as a result of being restrained in the classroom. She wrote a letter asking for an explanation and, in her opinion, the investigation that followed was whitewashed. Another incident occurred when the child was velcroed to a chair in the principal's office, but the child managed to escape the restraints because of low muscle tone. Ms. S. testified the principal complained that the child pushed her computer off the desk and overturned her bookcase. Ms. S. was horrified that any child would be left alone while restrained.

After the May 26, 1999 IPRC was signed, the student's parents decided that another public school would be a good school because it was: ... "a smaller school. .. actual carpeting that was quiet in the hallways ...a marvellous library ...a nice skating rink ...basketball...the yard was tree lined and it looked like a soothing environment". Ms. S. testified that she and her husband were under the impression that the student would be fully integrated, going to this public school at least four to five days a week by Christmas. That never happened and they became aware that the educational assistant assigned to the student was being used for integration for other students in other schools. She indicated that she felt this was the reason why further integration didn't take place for their child. When they inquired about further integration, she said that they were told that it was just going to be for two days only and she felt that the school administration and principal really didn't want to do it.

Ms. S. and the appellant started the student at the public school for an extra day to try and add an extra day of integration. One morning the police came to the school and the appellant was arrested and charged with trespassing. He was charged two more times and on the third time, he was charged with criminal mischief. Ms. S. believes that Mr. Dan Wiseman called the Children's Aid Society to report child abandonment while her husband was being arrested the third time. Although the Children's Aid Society did not find that there was child abandonment, the damage had been done, as there was now an open file on their family with Children's Aid Society. Also, during one of the appellant's arrests, Ms. S. was called to come and pick up the student. She assumed

that it was at the public school, but it turned out that the student had been taken back to the self-contained school without her or her husband's knowledge or permission. When she decided to leave with the student, the principal, Ms. Lindie McDonald tried very hard to discourage her from leaving until someone from the board administration arrived, but Ms. S. and the student left anyway.

Ms. S. testified that the same day her husband was cleared of the criminal mischief charge, the board offered to place the student at another public school with a one-to-one EA. She testified that she believed that the people around the student were not qualified to handle the student. She stated that acting out behaviours were now being cited and that the new teacher, Ms. Christa Bauer seemed extremely unfriendly and unwelcoming. She stated that one day she was called to the principal's office to come and get the student. The principal informed her that the student had viciously attacked her and had kicked Monica Bein's shins black and blue. Ms. S. could see marks on neither person. She feels that this did not really occur since the student has never behaved that way and to this day "does not know how to make a fist". She stated that, "If proper behaviour management is placed around the student and the student was given speech therapy, because they cut the speech therapy off." Ms. Saunders described the student as having low muscle tone. She went on to say that the student has always preferred to be verbal. .. and could never sign (sign language). At the time of the hearing, the student has about 600 or 900 words or more. She indicated "that the (main) problem is still speech therapy, but the main problem is language now".

She testified that the student is now starting to read. "The student has read a 50-page book, a story book, ...not solid paragraphs, but the student can read that." The student can in-line skate; ride a scooter and a two-wheel bike; can ice skate, bowl and play basketball. The student's hand/eye coordination is exceptional. She believes that the student's fine motor skills need work. "There is no lid on the student's potential." According to Ms. S., the student has far surpassed the original diagnosis, the prognosis or anything in the literature regarding Lennox-Gastaut Syndrome.

Mr. Charles Mathews

Mr. Charles Mathews, President of the Disabled and Proud Organization, referred to the Ontario Disabilities Act, in particular, Section 5 and its relation to school boards. He described a baseball game that he had attended with the student and how the student interacted with others without incident.

Mr. G. B.

Mr. G. B., the student's father, reviewed the documents in Exhibit 2, the appellants' submission to the Tribunal. He described the student's development and how the student exceeded early expectations regarding [the student's] development. The appellant reviewed the assessment reports from the medical professionals, school report cards and examples of the student's work and accomplishments through photos. He described and made reference to IPRC meeting reports, SEAB decisions and the mediator's report. At the end of his testimony, the appellant described his role as caregiver for the student which has been full-time since the student has been out of school.

Ms. Diane Stanton

Ms. Diane Stanton, an in-home special needs support worker, worked with the student for five years. She described the progress the student has made in the five years. She described how the student's attention span, just seconds when she first began to work with the student, has increased to the point where now the student is able to read, "I Can Read" books. Ms. Stanton has also worked with the student on life skills.

Ms. Nancy McLeod

Ms. McLeod, superintendent and the chair of the October 26, 2001, IPRC which resulted in the student's placement at the segregated school for pupils with developmental disabilities, described that IPRC meeting. She described the behavioural incidents that led the committee to make the decision to remove the student from the other public school. In his examination of Ms. McLeod, the appellant pointed out the discrepancy between the incidents as described by Ms. McLeod and the reporting of the incidents about the student's behaviour that the appellant received. .

Ms. Victoria Andrew

Ms. Andrew has been the principal at another public school since September 1999. The student's IPRC, dated May 26/99, recommended that the student start the 1999 school year at the segregated school with the other public school to follow with a one-to-one EA. Summer school was also recommended. Ms. Andrew testified that the appellant was involved in the development of the student's Individual Education Plan, (IEP), but did not sign it. The IEP is derived from the identification and placement recommended in the IPRC. The appellant believed that the student's designated school was now the regular public school and all services that were available at the segregated school should and would be available to the student at the regular public school.

The student started at the regular public school at the end of Sept. 1999 and was placed in a one-two split class two mornings a week.

Ms. Andrew testified that meetings were held at the school with the family as she believed that integration for the student wasn't working. An EA was only available at the public school 2 days per week.

The appellant said he believed that integration wasn't working because the proper supports were not in place to help the student achieve success.

Mr. Dan Wiseman

Mr. Wiseman works for the OCDSB. During the 1999/2000 school year, he was an administrator within the Student Services Department and managed the Social Work Department. He performed the function of attendance counsellor and co-ordinator for the Safe Schools Program and, as well, was responsible for community outreach and coordinated linkages with the major agency systems in Ottawa-Carleton.

The appellant advised Mr. Wiseman (in his capacity as attendance counsellor) when the student was not attending the regular public school. The appellant believed that it was Mr. Wiseman's responsibility as well as duty to report the student's absence to the

Provincial Attendance Counsellor. The appellant indicated that he believed this (the student's absence) was not reported so that nothing would be done for the student.

Mr. Wiseman testified that he did not receive any incident reports about the student. While the principal has the authority to suspend or expel students when safety issues arise, the student was not suspended or expelled for any reported outbursts (shoving, throwing chairs, hitting other students and the EA). As well, these incidents were not documented in critical incident reports.

Dr. Makin

Dr. Makin, a psychologist with the school board, was declared an expert witness and was permitted to give expert opinion in two areas; the nature and extent of the student's exceptionalities and an opinion as to what would be the appropriate placement for the student in light of those exceptionalities.

The student started out in full-time Senior Kindergarten at the home public school in a fully integrated setting. The student was experiencing some behavioural and communication difficulties at this time. In the winter of 1996, the parents reluctantly agreed that the student would start at the segregated school. The appellant was very concerned about the student's continued placement at the segregated school, feeling that the student was not receiving sufficient academic instruction. The parents felt the program was too concerned about social skills and used the phrase "worried that time was running out for the student". The appellant wanted the student to reach [the student's] potential and felt that it was time to start to increase the level of academic instruction for the student at school. The student was referred to Dr. Makin at parental request in the spring of 1998 to better understand the student's current level of skills and abilities. An educational assessment had been conducted in February 1998 by a teacher diagnostician within the board. It wasn't satisfactory because the tests she was using weren't able to go down low enough so there weren't any definite results with statistical numbers. The appellant wanted a description of the student's skills at that time in order to use that for a later assessment and to look at progress over time.

In the fall of 1998, the student was being integrated part of one day into a special education class called a Language Learning Disability class at another public school. The EA was able to get the student to comply and cooperate very well by communicating in a way that was familiar to the student. The student was generally a happy child, who was comfortable in the class and smiled frequently. The student followed along carefully when the teacher was instructing the class as a group. This was a small class of eight or ten children at the segregated school, where the teacher used a variety of techniques to communicate with her class. When the student was asked or directed to do a task, this sometimes would require the intervention of the EA in order to bring the student back to task, to get started and to complete tasks. The student very much enjoyed working on the computer. Fine motor work wasn't as popular and the student really needed some redirection back to task to do those kinds of things. When the teacher would give directions, the student often looked away and covered [the student's] ears. The student needed hand-over-hand assistance to complete some tasks, and was able to work for probably five to ten minutes before there would have to be a break and have playtime. The student frequently asked to leave and go next door to use the computer. It was important to maintain eye contact with the student in order to communicate what you wanted the student to do.

During the student's illness, the student had regressed back to a very early level in terms of development and the student had to learn over again many of the skills that had been already mastered as a younger baby.

Compared to other children the same age, the student was functioning at the range of severe delay. At eight years, the student had relative strengths in logical sequencing and visual reasoning at a three and a half year level. The student was weaker on tasks that required classification and figure ground perception, at a two year level. The student's visual motor integration scored at an age equivalent of about two and a half years of age. The Peabody Picture Vocabulary Test didn't reach down quite far enough at that point, but receptive language was estimated to be below a two year level. The Wide Range Achievement Test indicated that the student's skills were well below Kindergarten level at that point and could not be accurately assessed using standardized tests. The student's motor skills were a relative strength, at a four year, eight month level. Gross motor skills far outstripped the student's fine motor skills, which were average for [the student's] age enabling the student to take part in various sports at an age appropriate level. However, the student's fine motor skills were a little weaker. The student's daily living skills domain overall, was at a four year level, or a moderate delay. The student's communication skills, both understanding and expression, showed a severe delay at a two year level. Socialization skills were the same at a two year delay. At almost eight years of age, the student had a significant delay in development across many domains, or a broad globally delayed range of development. The student had a severe level of delay intellectually, but was a little stronger in adaptive day-to-day skills with a relative strength in motor skills.

Dr Makin reviewed a psychological assessment prepared by Dr. Janet Olds of Children's Hospital of Eastern Ontario (CHEO). This assessment was two years more recent than Dr. Makin's assessment and was consistent with the findings that Dr. Makin would have expected from a child with a moderate developmental delay. She illustrated that although progress continues, as the child ages, the gap between that child and other children of the same age increases, a pattern she expected with the student. Dr. Old's recommendation was that the student would continue to need educational programming at the current levels of cognitive and academic functioning. She mentioned the safety needs as well as the learning and academic needs.

Generally, students with a moderate level of delay need a combination of modified curriculum and also alternative curriculum. They need direct teaching in areas such as daily living skills and social skills. They need academics focused on functional academics. Math programs should include not just a modification and a simplification of math skills but they need a focus of functional math such as telling time, counting money, making change, and understanding calendars. Dr. Makin felt that the student was well placed in the program for students with developmental disabilities. Dr. Makin recommended that over the longer term, she could see the student moving into a semi-integrated placement for students with developmental disabilities. Dr. Makin talked about behaviour management, feeling that the behaviour management program was working really well at school and she just encouraged them to continue. There was a clear understanding about rules and consequences and the EA at the time was handling this very well within the school setting. The only times behaviour was a problem was when the student was experiencing a high level of difficulty.

There was hope at this time that the student would start to bridge the large gap between the goals that the parents had, including their worries and fears and concerns versus the direction the school felt were needed in order to best meet the student's needs. The school felt strongly that the student continued to need specialized support, and to work with people who were knowledgeable about behaviour management, language, and speech-language issues. They felt the student needed a total communication approach, which they were delivering at that time. They felt the student needed direct teaching and systematic task analysis and that the student would not learn a new skill just by seeing another child do it. The student's parents wanted to start planning ahead for the following September, and they were very keen that the student enter a fully integrated placement. Every professional in the room advised the parents against a move to full integration, as teachers felt they needed more time with the student, and they felt the student would benefit from another year at the segregated school. Dr. Makin pointed out that the IPRC of February 4, 1999, said, "such a placement is against the recommendation of school administration and staff". She pointed out that all school board staff attending the IPRC signed that form.

The Superintendent of Special Education, Ms. Barbara Stollery, gave the parents a short list of schools to investigate, and since the parents chose a specific school as their first choice, that was the decision of the IPRC in May. It was noted on the form that this was at the parents' wish, that the student be moved into a fully integrated placement as of September 1999. The Committee did recommend, given that there were strong concerns, that the transition be a gradual one. Integration would be a gradual process that would be increased in time over the year. Dr. Makin felt concerned that it was too soon, and she felt that there was still work to be done in terms of the student's behaviour in particular; the student wasn't ready to be integrated into large group settings. She felt the student would probably find the exposure to large group instruction too difficult and they would likely have some serious difficulties meeting the student's needs. She suggested that they slow down and instead, move towards a semi-integrated placement, with a re-entry plan. Dr. Makin wouldn't want to see the student spending the day doing busy work with an EA at the back of the class or outside the class. She thought the student was a very social, friendly child who likes people, and would enjoy working with a group. Dr. Makin suggested that the student would need lots of structure, with very clear routines and would need to get used to learning in a group again as opposed to one-to-one. She would not suggest that the student meet the criteria for placement in a dual diagnosis class of students at a mild level of intellectual disability through to borderline levels with severe behavioural problems. She felt that integration should be with one's age peers. She stated that she would fully concur with the SEAB recommendation of a semi-integrated placement with grade 5 as a compromise. Physical Education is a logical first choice for integration because of strong gross motor skills. She's stated that she is not sure about music, and felt that the student might find Art difficult given the noted fine motor difficulties. She also suggested computer lab with modifications. She recommends that a teacher use whatever visual aids are helpful in order to communicate with the student, but not use the term, total communication. Dr. Makin stated that she feels that although the student is medically unique, educationally, the student's needs are not unique.

Pam Graydon, Nancy Stevenson, Lindie MacDonald, Suzanne Lutsch, Shareen Killan, Christa Bauer, Monica Bien, Kelly French,

Other employees of the OCDSB spoke of their experiences with the student in the classroom. They reported that the student had a short attention span and found it difficult to sit for extended periods of time. They commented that the student behaved in undesirable ways when [the student] had to sit for longer than the student was able. Some of these behaviours included bolting from the room, screaming, kicking and hitting. They said that the student started out hitting the EA that was working with the student and then the student started hitting and kicking students as well. There were also reports of picking up chairs and throwing them with one narrowly missing a student. Although no formal reports were made regarding the incidents, the evidence of various events was consistent amongst these witnesses.

The retired principal of the segregated school, Lindie MacDonald, refuted Ms. S.'s testimony that she (Ms. MacDonald) left the student alone, unsupervised in her office and restrained. She also disputed Ms. S.'s testimony that the student trashed her office or that she had threatened to sue the parents for costs. Ms. MacDonald also described the time-out rooms that were seldom used. The student was only taken to the time-out room when the student was very noisy and was disrupting the class. The above witnesses also stated that the student seemed to have difficulty comprehending the academic work being taught in the larger classroom. They reported that during transition times, if a different staff member was in the classroom, or when expectations of the student were greater than the student's ability, then the student became frustrated and the aforementioned behaviours would occur.

The student was integrated into a Grade One-Two and a Grade Two class, and was much larger physically than the other students in these classes. Each of the classrooms was large with a number of children who were identified with special needs and behaviour problems, but there was no extra support in the classrooms until the student came with a full-time EA. The segregated and semi-integrated classrooms were smaller with more adult support.

The student spent the majority of the time in the integrated setting sitting at the back of the room with the EA doing individualized work and when the student behaved inappropriately, the student would be removed from the classroom and taken to a small room as a time-out and/or to do individual work in a quieter, less busy environment. The witnesses reported that as the student was integrated more, the behaviours increased and the student was withdrawn from the regular classroom more frequently. Most said that they felt that the student was being segregated because the student was either working alone with the EA at the back of the room or was withdrawn into a smaller room.

The student was transitioned slowly from the segregated school setting to an integrated setting and did not start in the regular classroom at the same time as the other students. The student went to the segregated school some days and then to the regular public school. On other days, it was reported that this was confusing for the student who would take some settling either at the regular school or the segregated school, whichever the student was attending that day. One of the teachers, Pam Graydon, had been the student's teacher both in a small setting and a large setting and she discussed the student's confusion over the different teacher role and the similar behaviours that this seemingly caused.

Monica Biehn

Monica Biehn, the EA, reported that she had worked with the Special Education Resource Teacher (SERT) to develop an IEP, consulting with the teacher and principal. She also reported that Derek Fallon, a behavioural consultant, [employed by a community agency] had come to the school and talked on the phone with them several times, and that a behaviour modification plan was in place ready for the student's full-time attendance at another public school. Ms. Biehn said they were going to make sure that if anything escalated, the student would be taken out of the classroom right away into the small room. She said they felt that when the student was integrated for the entire day, it would be difficult for the student.

Witnesses reported that the student did well in gym, music, lunch and in the smaller classroom setting. They also said that the student loved computers and in fact, when the student bolted, often the student was leaving the classroom to go to work on the computer.

Although Christa Bauer said that there was not much interaction with other students, Monica Biehn said that the student liked to be around the children in a peripheral kind of role and parallel play. She also said that in the first year interactions were limited, but that the student did have certain children to whom the student liked to say hello. She reported that the student interacted well with the staff and was well received by classmates who enjoyed having the student there.

The student's teachers reported being uncomfortable assessing the student according to the Grade 2 standards rather than by the IEP. This was something that the appellant had insisted on, and the teachers reported the difficulty they had in doing this as The student was not able to meet the requirements of the standard Grade 2 curriculum and therefore, the teachers were forced to give the student an unfavourable report.

Lindie MacDonald reported that the student was moved to the segregated school in December 2001, because of safety concerns at the regular public school.

Ms. Nancy McLeod

Superintendent McLeod spoke of the December 18, 2001, meeting where Principal Lutsch indicated her determination that the student should not be allowed back on the premises of the regular public school because of concerns for safety of the other children at the school and the safety of the student. The student was no longer allowed to go back to her school, so she said they took advantage of their authority to place a child at another school. The segregated school was chosen because it offered the complete package for the student.

Linda Yan

Principal Yan from another public school talked about a semi-integrated class for students with developmental disabilities in her school. She reported that it presently had seven students with a teacher and an educational assistant. She is holding a spot in this class for the student with the expectation that the student would come to this class with a full-time educational assistant.

Carol Hunter

Principal Hunter from another public school told us of the dual diagnosis class that is in her school. Students attending this class have the two diagnoses, of an intellectual delay and behavioural exceptionality. She stated that there were presently six students with a teacher and two educational assistants. She, too, is holding a spot for the student and has already created a transitional plan for the student.

Appellants' arguments

The appellants argued that the segregated school is not a suitable placement to allow the student to meet [the student's] potential. M.S., the student's mother, stated that the segregated school was not a suitable placement due to the behaviour management strategies that were used at the school, the nature of the program that focussed on life skills that no longer met the student's needs, and the lack of appropriate peer role models for the student.

The appellants believe that a placement in a regular class in a regular school with appropriate accommodations and full resources to meet the student's special needs would allow the student to achieve [the student's] full potential. The appellants want all of the resources that are available at the segregated school to be made available at the regular school placement and believe that if these resources were made available at the regular school, that the student would be able to reach full potential.

The appellants argue that the student's progress at the segregated school was due to the resources available and the skills of the personnel working at that school.

Respondent's arguments

Mr. Mills argued on behalf of the OCDSB that the board has met the burden in the Eaton v. Brant County Board of Education [1997], S.C.R. 241(SCC) and that the board acted correctly in relocating the student from an integrated placement to a segregated placement and that that is the placement that will best meet the student's academic and educational needs. Mr. Mills argued that although the board still believes that the segregated school is the best placement for the student, the board agrees that it is not practical to insist on the segregated school, given the parents' animosity towards the school, and that a self-contained class within a community school would be a compromise setting. When the student returns to school, however, in that self-contained placement, the amount of integration should be severely limited until the staff determines how the student would perform once back at school.

Mr. Mills, through the witnesses, argued that the integrated placements had not worked for the student and that the student's escalating aggressive behaviour was as a result of frustration over the academic demands of a regular classroom. Mr. Mills outlined the advantages of a smaller special class placement for the student and how a smaller class setting would be a better placement for the student. The board is of the opinion that a self-contained class within a community school would be an appropriate setting and through mediation, offered a choice of two different self-contained classrooms.

Reasons and Analysis

(1) Background

There is no substantial dispute concerning many of the facts in this case and the Tribunal relied on the following background information in reaching its decision:

1. Due to seizures that began at nine months of age, the student had consequent delays in learning and development. The student has been seizure free since March 1992.
2. As of January 2001, Dr. Olds from the Children's Hospital of Eastern Ontario reported that the student's general cognitive abilities are estimated at the .01 percentile. Also, the student's adaptive abilities were (January 2001) consistent with age estimates of three to four years.
3. The student began [the student's] education in a Kindergarten class at the home school in the 96/97 school year.
4. During the third term at the home school, the student was transferred to the segregated school for students with a variety of special needs. The student was six years old.
5. The student remained at the segregated school for the school year 97/98 and the IPRC recommended that the student remain there for the 1998/99 school year.
6. In November 1998, the parents requested an IPRC meeting asking that the student be moved into a Grade 1 environment at an alternative public school.
7. At a December 29, 1998, meeting, there was an agreement that the parents would visit several schools to explore the options of integrated or semi-integrated options for the student.
8. In February 1999, an IPRC was held which resulted in the recommendation to have the student continue at the segregated school in September 1999, with a gradual move towards an integrated placement to be discussed with the personnel at a regular public school.
9. This decision was appealed by the parents in a letter of April 1999.
10. On May 26, 1999, another IPRC was held with a decision to have the student begin school at the segregated school with the regular school to follow. At this meeting, there was an agreement of one-to-one EA support and summer school. The needs statement on the IPRC form stated that the student needed:
 - a) To develop expressive and receptive communication skills - total communication approach;
 - b) To develop basic academic skills in language arts and mathematics;
 - c) To develop social and communication skills with peers;
 - d) To develop fine motor skills. The student's exceptionality was described as "Exceptional".
11. In January 2000, the parents requested a case conference to discuss difficulties with the student's integration at the regular public school.
12. On April 6, 2000, an IPRC was held which identified the student with 1. Developmental Disability and 2. Speech and Language Impairment. The recommended placement decision was: Full integration with the Special Education Learning Centre Support. Other supports consistent with Intensive Support Amount (ISA) 2, at the regular public school for integration for two days per week from April to June 30, 2000 and three days per week at the segregated

- school. In September 2000: full integration at the student's neighbourhood school.
13. In May 2000, the parents appealed the decision of the IPRC.
 14. In September 2000, the SEAB upheld the identification decision of the IPRC. (This was a split decision.) The SEAB agreed that placement in a regular class with appropriate special education services best met the student's needs.
 15. In October 2000, the parents appealed the SEAB decision regarding identification as Developmental Disability and as well appealed the placement decision because it was ambiguously expressed. The parent requested a Special Education Tribunal be established to address these two issues.
 16. Subsequent to this request, a Tribunal was established, but did not complete a hearing. There was an agreement reached between the two parties.
 17. From November 2000, to June 2001, and again in September 2001, to December 2001, the student was placed in regular classes, Grade 1 and then Grade 2 at a regular public school. The student began by attending mornings only and in Grade 2, attempts were made to integrate the student on a full day basis. An EA was provided to help the student for both school years.
 18. On October 26, 2001, an IPRC determined that the student would attend the segregated school.
 19. The parents appealed this decision for placement and, since the identification box was not checked, the parents appealed the fact that identification was not checked.
 20. The SEAB submitted its report on December 11, 2001. Both parties consented to an identification of Multiple and Speech and Language.
 21. The SEAB disagreed with the placement and recommended a semi-integrated placement at the Grade 5 level with students with multiple exceptionalities and an additional integrated placement into regular classes such as physical education, music, and art and computer lab. The SEAB recommended that the student receive additional integration in regular classes as appropriate. The SEAB recommended that the placements have appropriate services to meet the student's needs including speech and language and occupational therapy.
 22. As well, the SEAB recommended the following:
 - a) A one-to-one full time EA in all settings;
 - b) Adequate behavioural management services provided by the OCDSB;
 - c) A comprehensive Individual Education Plan (IEP);
 - d) A transition plan for proper and smooth transition to the new placement.
 23. The parents requested a Tribunal to address the placement decision of the SEAB, rejecting the recommended school with the semi-integrated class for students with Developmental Disabilities at the specified public school.
 24. On July 25 2002, the parents requested the establishment of a Special Educational Tribunal.
 25. Mediation was attempted in September 2002 and was not successful in resolving the placement issue.
 27. The Tribunal was convened on October 15, 2002 to hear the case.

Basis for the Decision

The principal issue in this hearing is whether the student's needs can be met in a regular classroom where the student should be placed.

The Tribunal heard evidence from several witnesses regarding the student's intellectual, social, emotional and physical needs. From Dr. Makin, the board psychologist, the Tribunal heard several medical and psychological tests described. As a nine month old baby, the student had numerous seizures that resulted in significant global delays. From the time that the student began school in a regular Kindergarten class at the local public school, the student has progressed to the present level of development. In January 2001, the student was performing at a preschool level in language development, (3-4 years old), and at a four year old social level. The student is now five feet five inches and 110 pounds with significantly low muscle tone. The student's report cards which assessed progress against the provincial standards for the provincial curriculum in Grades 1 and 2 showed that the student did not meet grade level expectations in any academic or social area. Witnesses stated that the student's father insisted that the teachers assess the student against the provincial standard which was contrary to staff recommendations because the appellant wanted the student to graduate from secondary school. The appellant believed that if the student was assessed on the achievement of the Individual Education Plan (IEP) goals that the student could not graduate from high school. The Tribunal heard evidence from board witnesses that the student's behaviour: vocalizations, hitting, kicking, throwing chairs, increased the longer that the student remained in the classroom and as expectations increased beyond the student's capabilities. The Tribunal heard that the student was removed to a small room by the EA when these behaviours occurred. As well, the Tribunal heard that the student was removed from the classroom for most of the time that the student was in school, in some cases for 90% of the time. The Tribunal heard that the student's father came to the school to take the student home when the school staff couldn't settle the student. The Tribunal heard that in 1996, the student began Kindergarten in the home school, the student was six years old. At that time, the student showed a keen interest in the computer and during the second term participated in singing games and gym activities. The student was not able to focus on any activity for any length of time even with one-to-one assistance, other than computers. The student's expressive vocabulary increased from one word to phrases. In this Kindergarten setting, there were times when the student left the room, kicked at others and hit for no obvious reason.

During the Kindergarten school year, in the third term, the student was transferred to the segregated school. At this school, the student's report card showed that the student enjoyed the computer, gym and circle songs. The student also enjoyed swimming and began to enjoy functional academics. The student communicated with sign and picture with some verbal speech. During the 1997-98 school year at the segregated school, the student continued to make progress in all areas with a continued special interest and enjoyment in music, computers and swimming. Expressive language was still the main area of need and the student began the Bridge Reading program. There were fewer behavioural episodes and the student occasionally joined in spontaneous play with other children. During the 1998-99 school year, the student continued at the segregated school with significant gains in receptive and expressive language skills. The student's vocabulary was described as quite extensive and gains were made in all areas. There was a note on a report card that when there were new and unfamiliar expectations, the student had a few episodes of inappropriate behaviour with screaming, hitting and kicking. Strengths continued to be in the area of gross motor skills, swimming, biking and basketball. As well, the student enjoyed the computer and music. The May 1998, IPRC form indicated that integration would begin at the student's home school. The student was integrated into a special class, a Language Learning Disability class with a teacher

who had taught the student at the segregated school. The teacher who had observed the student at both schools noticed that the student did not comprehend the academic program and that the student had a number of behavioural incidents including throwing a chair at another child. The teacher noted that the student was segregated within the special Language Learning Disability class. In 1999-2000, the student began the school year at the segregated school with a gradual move to an integrated placement at another public school, the parents' school of choice for the integration. As evidenced from testimony and the February 1999, IPRC form, the school administration and staff did not recommend this integrated placement. At this time, the student spent most of the time at the segregated school and two mornings a week at a regular public school in a one-two split grade. During this time the student's behaviours escalated and the student was withdrawn to a time out room with the EA. Although the appellant never disputed the fact that the student had behaviour issues, the appellant believed that the behaviour issues were related to the lack of proper resources being in place. In particular, the appellant believes that the student needs a teacher who can provide a "total communication" program in the regular classroom at the regular public school.

A number of behavioural incidents resulted in the student spending time back at the segregated school or at home with the father.

From November 2000 to June 2001, the student was placed in a regular class at another public school. The student attended halftime (mornings only) in a grade 2 class at the father's request. During that year there were a number of more serious behavioural incidents with the educational assistant and children being hit or kicked. During this time, the student was withdrawn to a small room with the educational assistant who calmed the student and provided one-on-one instruction. For most days, the student could only stay in the regular classroom for ten minutes before being withdrawn. On October 26, 2001, an IPRC recommended that the student be placed at the segregated school for the remainder of the school year, 2001-02, a placement that the student's parents appealed to a SEAB and subsequently to this Tribunal. The original form of October 12, 2001, did not have an exceptionality included. The form was revised as of November 12, 2002 with the exceptionality of Developmental Disability and Behaviour included. In December 2001, the board informed the student's parents that the student was no longer entitled to attend the regular public school. An administrative transfer took place at that time.

The student's needs:

From the evidence presented by both parties, the student has a short attention span, and is functioning intellectually at a pre-school level. The student needs direct instruction and learns best when in a small group setting or in a one-to-one situation as opposed to a large group setting where the student is unable to comprehend the expectations of the setting. The testimony of witnesses suggested that the student's behaviours escalated to a point where the student posed a safety risk to [the student] and others when the academic demands were too great. It was clear that the student had made significant gains that had not been expected due to the unfortunate circumstances in infancy which resulted in the student's diagnosis of Lennox-Gastaut Syndrome, a severe form of epilepsy, and resulted in the situation where the student needed to begin developmental processes after the seizures stopped when the student was two years old. At the writing of this report, Dr. Humphreys, a physician at the Children's Hospital of Eastern Ontario

(CHEO), indicated that the student would benefit from intensive support in a school setting.

Social Needs:

Adults who worked with the student relayed through testimony or through the reports submitted that the student was a friendly child who liked to be around adults and was comfortable in social settings with adults. The student did participate in activities with other children at the segregated school and in adult activities. When the student was in the integrated Kindergarten setting, the student participated in parallel play and demonstrated enjoyment by smiling at other children.

In the integrated settings, the student, at age ten, was in a Grade 1 classroom with children aged six, and when the student was in Grade two at age eleven, the other children were aged six and seven. The student, at the time of the hearing at age eleven, was five foot five inches and 110 pounds. The student was considerably taller and heavier than [the student's] grade peers. Tables and chairs, sinks and other equipment would be geared to smaller children. The Tribunal is of the opinion that, given the differences in size and age, the parents' insistence that the student be placed in an integrated setting where the student was so much larger than other children was not helpful to the student's social development and this, along with the student's frustration at not being able to comprehend the academic expectations, led to the incidents of escalating behaviours.

In summary, there was ample evidence from witnesses for the board, the report cards and from the amount of time that the student was removed from the integrated classrooms and sent home, that the integrated setting, as designed, was not meeting the student's needs.

Emotional Needs:

The Tribunal found a number of issues regarding the student's emotional behavioural needs. As a primary concern, it was evident that the student was not able to comprehend the regular academic curriculum of the integrated setting. •School staff was aware of this concern and yet acceded to the parental demands that the student receive the regular program and be assessed against grade level expectations using the provincial report card. When the student was frustrated by the academic demands, the student gave notice of this frustration by screaming, with escalations to hitting and kicking. At this point, the student was removed from the classroom. It was clear to the Tribunal that the student's program in the integrated setting was primarily a behaviour management program that was carried out by educational assistants who removed the student from the classroom when the behaviours began to escalate. This resulted in the student's removal from the classroom after approximately ten minutes. With information that was beyond the student's comprehension, and with limited verbal skills to express [the student's] frustrations, it is expected that the student would demonstrate frustration in an acting out manner.

It is the opinion of the Tribunal that the behaviour management plan as implemented by the board was inadequate. When the newly designed behaviour management plan (under the recommendations section) is put into effect, with particular emphasis on preventing behaviours from beginning, and carried out by all staff that comes in contact with the student with modifications to the plan as the year progresses, that the behaviours will become less frequent and less severe.

Communication Needs:

We heard from the parents that the student needs a "total communication package" in an integrated setting. From our understanding of the testimony of witnesses, a "total communication program" involves a number of ways to assist children to communicate: oral language; written language; sign language; and the use of picture symbols, etc. The purpose of the program is to assist children to acquire as many useful means as possible to communicate and to develop language. This approach was helpful to the student at the segregated school when the student had a limited vocabulary and fewer means of communicating. At the present time, it may not be helpful to use sign language given that the student has progressed to using many more words and has computer programs at [the student's] disposal. The Tribunal is of the opinion that with computerized programming to develop literacy, adaptive technology to assist in language development and literacy, particularly combined with the student's skill with computers and electronics, there are current programs that are likely to be more useful to the student than the "total communication" package that the parents believe that the student needs. The Tribunal believes that the student needs teachers who can develop language skills at every opportunity in group settings where children have the opportunity to practise their language skills. These teachers do not need to be able to sign or to use a "total communication program" in order to provide rich opportunities for the student to develop language skills. From the evidence presented, we understood that some computerized and adaptive programs are being used. For example, the Bridges program with oral, adaptive, writing and reading components and the Board Book program, are programs that can develop language from a variety of perspectives. As technology advances, there will be continued opportunities to search out appropriate programs that will assist the student in developing communication skills. The only component of the "total communication package" that is not available in the above description is sign language. The Tribunal believes the student no longer needs sign language and therefore, the "total communication program" is not recommended for the student.

The parents repeatedly have insisted that the student receive speech-language therapy from the board personnel. The appellant cited Program Policy #81, The Provision of Health Support Services in School Settings in the presentation of his case. [A copy of the policy is included on page 1 of the Appendix.] From the model included within the Policy Program numbered memoranda, under Support Service-Speech, the memorandum states that Speech Pathology (treatment) is to be administered by Speech Pathologists Therapists who are provided by the Ministry of Health. In most school boards, this means that the school personnel request that this service be provided by the Community Care Access Centres, the arm of the Ministry of Health that provides Speech Therapy to school-age students. Although there has been a guideline developed and many school boards have agreements with different community agencies, this memorandum, #81 is still in effect and this is the policy under which Speech Therapy is offered in the school system. The Tribunal heard school staff says that school personnel apply to the Community Care Access Centres for speech services.

Memorandum (#81) outlines the responsibilities for speech correction and remediation. It outlines that speech and language teachers provided by the school board provide this aspect of programming for students with speech and language needs.

The Tribunal expects that the appellant will respect the legislative authority of the Ministries that developed this agreement for the delivery of Speech and Language Services in school systems and co-operate with board personnel in accessing any Speech Services that the student may need through the Community Care Access Centres. Throughout the hearing, the Tribunal heard both parties say that the student's present needs are in the area of language development which is a school board responsibility, delivered by teachers. (See attached chart in Policy Program #81.) We believe that a small group setting with a teacher and several educational assistants and students working with a small pupil/ teacher ratio will provide specialized and intensive language instruction that will be of benefit to the student in developing language skills. While in such integrated classes, the student will be exposed to other informal language opportunities of a social nature to balance language acquisition.

Physical and Safety Needs:

The witnesses spoke about the student's size at age ten and eleven compared to the size of children in the grade one and two classrooms where the student was placed in the integrated settings. The student's size posed some problems when the student was in the circle and stretched out taking up space. In the testimony of the witness, this intimidated the children. Classroom equipment was not the appropriate size for the student. Tables and chairs are smaller to accommodate the size of six and seven year old children. When the student hit someone, the student used the force of a ten or eleven year old child, causing justifiable concern for the staff over the safety of the students in the student's classes. In a classroom of grade seven, 13 year old children, the student will have furniture that fits and will be with peers of the student's own size, a factor which will reduce the safety concerns of the staff. The Dual Diagnosis class will have one teacher and three educational assistants for eight children who have behavioural issues. In this Dual Diagnosis class, the student will have, in addition to an academic program, a program that is carried out by people who have had experience and training in changing challenging behaviours and who can follow the behaviour management plan developed by board personnel. The opportunity to have behavioural experts on site will assist in dealing with behavioural issues immediately, rather than leaving an educational assistant to calm the student before returning to an integrated class or home. The Tribunal believes that the safety issues will be addressed through the Behaviour Management Plan as written under "Recommendations" which should be initiated and monitored by professional staff of the board. The Tribunal is of the opinion that an academic program geared to the student's intellectual needs will reduce much of the frustration that led to escalating behaviours when expectations became too demanding for the student.

The Wishes of the Parents

Throughout the hearing the Tribunal heard that the parents wanted the student to be integrated full-time into a regular school at a grade level where the student would be able to achieve grade level expectations. The parents believed that a modified or alternative (life skills) program would not prepare the student for future schooling that would lead to a graduation diploma, their initial goal for the student. The parents want the student to have every advantage to reach [the student's] potential. Over the years, the student's medical progress had astonished the medical professional, which, in the reports that the Tribunal received, initially had given the student a limited prognosis for independent living. The parents believed that holding high expectations for the student

would better assist the student in reaching [the student's] potential. The parents wanted all the services that were at the segregated school, where the student had made progress, to be in a regular school. In addition to a more rigorous curriculum based on provincial standards that is easy for parents to follow, a regular school had students who modeled grade level social skills and behaviour.

The Board's Requests

The board requested that the Tribunal find that the student's needs are not being met in the integrated placement and that the decision to remove the student from an integrated placement was correct and that the board met the burden imposed on it in the "Eaton v. Brant County Board of Education", SCC, February, 1997.

The board, through the mediation process, offered a placement in two semi-integrated classes, a Developmental Disability class and a Dual Diagnosis class although it remains the professional opinion of the board that the segregated school is the appropriate placement for the student. The board has stated that the student will have an educational assistant in either of the two special class placements. The position of the board at this point is that there should be no provision for integration out of either of those semi-integrated classes until the board finds out how the student is going to do once the student is back at school.

Mr. Mills asked the Tribunal to make a finding regarding the May 26, 2001, IPRC that that placement was made over the express dissent of the board's staff. Mr. Mills also asked the Tribunal to find that there is a significant behavioural issue that was established at the hearing in spite of the fact that there were neither records nor reports of significant behavioural incidents.

Analysis

The board and the parents are to be commended for arriving at a definition of Multiple Exceptionalities with a broader scope rather than a narrower definition that might limit the student's potential. The Tribunal believes that the parents do not want to use a definition which would reduce teachers' expectations for the student resulting in limiting the student's potential for achievement. Labels can stigmatize children and could mislead about potential. Children can be seen as their "label", rather than as a unique human being. As school personnel in Ontario have worked with the requirements over the years, the intent to focus on an individual child's needs is more prevalent in decision making rather than only using definitions that are required by the legislation. The recent classifications of Multiple and Speech and Language that the board and parents have agreed upon will make it easier in the years to come, to set aside labels and concentrate on the student's changing needs.

Significant controversy exists over the definition of integration in the education world and this Tribunal heard a number of issues related to interpretations of integration. The Tribunal is aware that in 1994, the Ministry of Education through a memorandum from the Assistant Deputy Minister of Education outlined the Ministry's commitment to the integration of exceptional pupils and reiterated that the integration of exceptional pupils should be the norm in the province, when the integrated placement meets the needs of the pupil and is in accordance with parental wishes. A range of placement options will continue to be available for pupils whose needs cannot be met within the regular

classroom. As a result of a consultation on integration, changes were made to Regulation 181, Section 17(1), which now states:

(1) When making a placement decision on 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.

(2) If, after considering all of the information obtained by it or submitted to it under Section 15 that it considers relevant, the committee is satisfied that the placement in a regular class would meet the pupil's needs and is consistent with parental preferences, the committee shall decide in favour of placement in a regular class.

The memorandum also stated that "integration will not be the best option for every student".

The Ministry of Education has not defined integration, and school boards make decisions on a case-by-case basis rather than on a policy basis. The Tribunal in Eaton v. Brant County Board of Education, November 19, 1993, made several statements regarding integration that can lead to a definition:

"...that the desired outcome for integration for an exceptional child, namely fulfillment of intellectual and especially social and emotional needs through regular and natural interaction ..." (Page 65)

and went on to say:

"...for integration of an "exceptional child to be meaningful and fulfilling, the child must not be just physically placed in a regular classroom, but must be intellectually, socially and emotionally involved. He or she must be accepted as a regular member of the class despite a need for support and consideration.

Integration can be given momentum by adult intervention, but at some point over a reasonable amount of time, it must of itself, grow past artifice and manipulation. There must be regular, natural, spontaneous interaction between the exceptional child and the class." (Page 66)

In another Tribunal decision, R. v. York Region Board of Education, January 24, 1986, the Tribunal stated,

" It is the firm opinion of this Tribunal that the wholesale integration of exceptional pupils into regular classes, solely on the basis of philosophical principle, untempered by due and informed consideration of each individual situation, is directly counter to the best interests of all pupils. Further it is the conviction of the Tribunal that the assumption of rigid, doctrinaire positions on the issue, not only threatens the very future of integration as a desirable practice, but specifically, in the cases such

as J., serves only to erode the good will and reason that must obtain if all parties are to act in her best interests." (Page 46)

In a Supreme Court decision in Eaton v. Brant County Board of Education, [1997], S.C.R. 241 (SCC), the Supreme Court, in discussing "integration" stated:

"Integration can be either a benefit or a burden depending on whether the individual can profit from the advantages that integration provides." (Page 29)

Given the above discussion on "integration" by other decision making bodies, the Tribunal believes that it cannot make a definition of integration that would be better than the synthesis of the earlier discussion that an integrated setting must meet the needs of the child. The Tribunal believes that in arriving at whether a placement is appropriate to meet the needs of a child, the people making decisions need to take into account the child's academic, social, emotional and physical and safety needs.

The appellants requested that the decision reflect the need for stability for the student so that there could be a plan that would "take the student until the end of [the student's] schooling". The appellants wanted the board to "make up for the time lost" when the student was not in school.

The Tribunal recommends that the student be placed in a Grade seven classroom, at an age-appropriate level where the student immediately has access to the planning processes: the Annual Education Plan and The Transition Plan (at age 14) that the Ministry requires for students in the school system. An example of a plan that will help address the parent's request for a long-range plan for the student is the Annual Educational Plan that begins in Grade seven and is completed yearly by parents and their child. This Annual Education Plan, which contains student educational goals, will assist the parents in working with the school system in planning for the student's schooling over the long term, until the student completes secondary school. This Annual Education Plan, combined with the Transition Plan, a requirement of the Individual Education Plan once a student becomes fourteen, will allow the parents' to see how the student's educational program can be planned over the time that the student remains in school, which can extend beyond that age of 21, if an IPRC believes that this is in the student's best interests. The Tribunal believes that in the spirit of the best interests of the student, the Transition Plan and Annual Education Plan will allow all involved with the student to plan a secondary program and transition to life beyond secondary school. Remaining in a secondary school setting, with the broad range of courses and options, for seven years or more, will allow the student to "make up" for the time that the student was out of school.

The Tribunal agrees that the student's needs were not being met in the regular grade one and grade two program as implemented at the elementary school placement. There were similarities in the Eaton v. Brant County Board of Education [1997], S.C.R. 241(SCC) that Mr. Mills outlined in his closing statement and that were put forward as evidence in the hearing.

There are some differences between Eaton v. Brant County Board of Education, November 19, 1993, and this case. The student was integrated with children who were at least three years younger and in Eaton, 1993, the child was integrated with age appropriate peers. The student is a verbal child with a number of means of

communication, oral language, some written language, receptive language, emerging reading skills and proficiency with computer-based adaptive equipment and programs whereas the other child was non-verbal and had very limited means of communicating. The school staff was attempting to include the student in a regular Grade 1 or Grade 2 curriculum while the other child had an alternative curriculum while she was in class. The student was developing social skills with staff and other children whereas the other child was not doing this at the time. The student showed that when integrated in the Kindergarten class where the student was with children closer to [the student's] age, that the student was enjoying some of the activities, such as music, and physical education. As well, when the student was in the lunch room at the elementary school, the student enjoyed lunch activities, without incident. In Eaton, 1993, the Tribunal found that there was little, if any, meaningful interaction between the child and classmates.

The board demonstrated that the student's needs were not met in the integrated settings as designed by the board, but there were significant differences in the integrated settings for the student compared to Eaton, 1993.

The Tribunal reviewed the material from the Supreme Court ruling on the Eaton v. Brant County Board of Education [1997], S.C.R. 241 (SCC) presented at the hearing regarding the burden of proof that the respondent bore in this case. The Tribunal believes that the burden is on the board to show why the segregated setting was a better placement for the student than an integrated placement and the Tribunal was not convinced, from the evidence presented by the board, that a segregated setting was a better setting for this child. Based on the Tribunal's analysis of the student's needs, the Tribunal believes that the best possible placement for the student is in an integrated setting with age-appropriate peers for those subject and informal areas where the student has demonstrated success and strength, supported by the opportunity for a small group class setting where the student may learn academic subjects at the student's intellectual level. The Dual Diagnosis class, where the student will have part of the school program, has teachers and educational assistants with expertise in behaviour management to support a behaviour management plan, addressing one of the student's needs. This placement was not considered when the decision was made to place the student at the segregated school, yet the student's needs as outlined by the board showed that the student met the criteria for the Dual Diagnosis Program:

Admission Criteria:

- significantly below-average intellectual potential as measured on a psychological assessment
- serious delays in the acquisition of fundamental academic skills exacerbated by behaviour problems
- impaired adaptive functioning (e.g. coping with life demands, personal independence) history of requiring frequent discipline due to disruption, non-compliance, physical/verbal aggression, impulsivity, etc.
- history of socially unacceptable behaviour.

Exhibit 10

The Tribunal believes that the student's best interests and special needs were not taken into account when the student, in accordance with parental wishes, was placed in Grade 1 and grade 2 classrooms, following the regular grade curriculum, with children aged six and seven when the student was the age of ten and eleven and much larger and heavier

than the other children in those classrooms. The Tribunal heard that the board staff placed the student in those classrooms over the expressed dissent of school board staff; however, the Tribunal did not hear evidence that the staff objected to the primary grade placement or to an integrated placement. The Tribunal believes that placing the student in those grades with much younger and smaller children was not in the student's best interests and that the way that the student expressed distress in these classrooms was to act in an aggressive manner.

The Tribunal believes that it was not possible to get an accurate assessment of the student's needs because we heard evidence of the student's confusion in placements when the student attended both the segregated school and another public school at the same time as a way to ease into the integration process. It was noted in the transcript from several of the board's witnesses that when the student was at the segregated school, the student spoke of the integrated placement and when the student was at one of the integrated settings that the student spoke of the segregated school. Trying to become accustomed to two sets of routines, two sets of children, two sets of adults as well as different curricula in these settings was too challenging for the student and the student was not able to demonstrate [the student's] best effort." It was therefore not possible for school staff to accurately assess the student's current needs due to the instability in this placement which shifted between two schools.

As the Eaton v. Brant County Board of Education, [1997], S.C.R. 241(SCC) demonstrated, decisions must be made from a child-centred perspective, from the child's point of view rather than the point of view of the adults in the child's life. As stated in that Supreme Court decision:

"The decision-making body, therefore, must further ensure that its determination of the appropriate accommodation for an exceptional child be from a subjective, child-centred perspective -one which attempts to make equality meaningful from the child's point of view as opposed to that of the adults in his or her life. As a means of achieving this aim, it must also determine that the form of accommodation chosen is in the child's best interests. A decision-making body must determine whether the integrated setting can be adapted to meet the needs of an exceptional child." (Page 5)

The board asked the Tribunal to make a finding that the February 4, 1999, IPRC placement was made over the express dissent of the board's staff. The Tribunal accepts the signatures on the IPRC form that was presented in evidence and accepts the written comment, "Decision to have the student attend an integrated setting for the 1999-2000 academic year. Such a placement is against the recommendation of school administration and staff." (Principal and staff of the segregated school and Speech/Language Pathologist), signed by K. Gibson, Eileen May, Alena Greggeria and Kelly French, as expressions of dissent.

As well, the board requested that the Tribunal find that there were significant behavioural issues in spite of the fact that there were no written records or reports. The Tribunal, from the testimony of witnesses, accepts that there were behavioural issues that occurred. The Tribunal, in the absence of any behavioural incident reports, suspension records, behavioural logs, telephone logs when the appellant was called, or logs when the student went home with the father, did not make a determination of "significant" behavioural issues. Should significant behavioural issues occur, the Tribunal believes that there should be written records kept and that those records should be shared with the parents. In the absence of written documentation of behavioural incidents, the

Tribunal is of the opinion that the behaviours would not be described as significant. Within the board's documents, there are references in report cards and IEPs of the need to manage the student's behaviour, with the explanation that these behaviours occurred when the expectations were new and unfamiliar or beyond the student's understanding. The Tribunal believes, as stated in this document, that by addressing these needs through a stable placement that is balanced with integrated opportunities where the student can achieve success and within the small class setting where an academic program geared to the student's needs can be delivered, the behaviours described during the hearing will be reduced or eliminated.

We do not, with respect, agree with the submission of the school board that the test in Eaton v. Brant County Board of Education [1997], S.C.R. (SCC) is that the school board must demonstrate that an integrated placement is not in the child's best interest. In our view, the test in Eaton, 1997 is that the placement must be in the best interests of the child, considering all of the needs of the child. Even if the test were as Mr. Mills articulated, which we do not believe to be true, the school board has not met that test. As a result of the above reasons, the Tribunal does not believe that the argument regarding the "burden" as in Eaton, 1997 is relevant to this hearing.

Decision

The Tribunal's decision was unanimous and supports, in part, the request of the appellant in that the decision to place the student in the segregated school be set aside.

The Tribunal orders that the Ottawa-Carleton District School Board place the student forthwith in a Grade 7 regular class in a community school where there is also a class for children with a Dual Diagnosis. Within the regular class setting, the student will participate in opening exercises, lunch, physical education, music, and if a computer lab is available, a computer program. The remainder of the student's school day will be spent in the Dual Diagnosis classroom where the student will receive an academic program.

The Tribunal offers several recommendations that we hope will be helpful in carrying out the decision that we have rendered, recognizing that the parties are not bound by our recommendations.

Recommendations

1. That a behaviour management program be created by the board's professional staff prior to the student's entry into the regular class and the Dual Diagnosis class. The Tribunal is of the opinion that this plan could be created within a two-week period. The Tribunal believes that the student needs the professional staff, psychology and social work staff, to work with the teachers of the school where the student will attend to develop a behaviour management program that will identify antecedents to acting-out behaviours and to train any and all staff to those antecedents so that prior to acting out, the student is removed from a group setting. Consultants from outside the school system may provide valuable insight and assistance to strategies that work outside the school, but the primary responsibility for the student's behaviour rests with the professional staff of the school board. The parents should be asked to provide strategies that work at home or in the community. When the behaviour management program is

- developed, all staff who will come in contact with the student during the school day need to be made aware of the plan and how the entire school staff can assist in preventing the student's behaviours from escalating to the point where the student disturbs others and may escalate to the point where the student needs to be removed or restrained. Prior to the student's re-entry to school, this behaviour management plan needs to be in place with all staff informed and ready to implement the plan. Tracking forms to monitor behaviours need to be kept so that staff and parents can be aware of the progress that the student is making in this area.
2. The Tribunal recommends that the board and the appellants begin a long term planning process, using the Ministry of Education planning instruments of the Annual Education Plan and the Transition Plan (when the student turns 14) to develop a life plan for the student, following the suggestions in the planning guides. The Transition Planning Resource Guide, 2002 should be a useful document in this process.
 3. Given the significant evidence about the student's language development needs (the board's responsibility), and no significant evidence regarding the student's speech needs (the responsibility of the Ministry of Health through the Community Care Access Centres) the parties should concentrate on addressing the student's language needs in such a way that they can be met immediately without accessing the personnel funded .by an agency of another Ministry.

Commentary

The Tribunal cannot order the resources of any agency nor can the board require another agency outside its jurisdiction to provide resources within the school system. The Tribunal is aware of the lack of clarity over the provision of health support services in school systems and will suggest to the Ministry of Education that this issue be addressed. The Tribunal is aware of Section 8 in the Education Act which states that ... "The Minister shall ensure that services and programs....are provided for each exceptional child ..."

Subsection 8 (3)

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. ...

The Tribunal encourages the parties, in the student's best interests, to work together in a spirit of co-operation to get the student back to school and to provide stability so that the student is able to reach [the student's] potential.

Tribunal Members

Paula Barber, Chair

Ann Fudge, Member .

Deborah Moskal, Member

Date: January 14, 2003