



# ONTARIO SPECIAL EDUCATION (ENGLISH) TRIBUNAL

File #2009-03 (a)

---

IN THE MATTER OF the *Education Act*, R.S.O. 1990, c. E.2, as amended, ss. 57(3),  
IN THE MATTER OF *Ontario Regulation 181/98*,  
AND IN THE MATTER OF the minor child born in 1994

BETWEEN

Mr. and Mrs. C. S., Appellants

-and-

The Halton Catholic District School Board, Respondent

Tribunal Members:

Eva Nichols	Chair
Ross Caradonna	Member
Julie Lindhout	Member

Appearances:

Mr. and Mrs. C. S.	Parents
Nadya Tymochenko	Counsel for the Halton Catholic District School Board (HCDSB)
Kate Waters	Keel Cottrelle LLP
Suzanne Rossini	Supervisory Officer, Special Education Services, HCDSB
Louise Sibbald	Secretary

The hearing on the merits was held on March 8, 2010 to March 12, 2010, in Oakville, Ontario.

## **INTRODUCTION**

[1] On November 30, 2009, the appellants appealed to the Ontario Special Education (English) Tribunal (the “Tribunal”). The appellants disagreed with the Halton Catholic District School Board’s (the “respondent”) decisions regarding the special education identification and placement of their child, and the implementation of that placement.

[2] The 15 year old student is enrolled in Grade 10 at a Catholic Secondary School in the Halton Catholic District School Board (HCDSB). The student has been identified by the HCDSB with a dual exceptionality of Intellectual – Giftedness and Communication – Learning Disability. The student’s current special education placement is Regular Classroom with Withdrawal Assistance.

[3] The issue before the Tribunal is to decide on the most appropriate special education identification and placement that are in the student’s best interests.

## **BACKGROUND**

[4] On April 15, 2004, an Identification Placement and Review Committee (IPRC) identified the student as an exceptional student. The identification that the parents agreed to was “Communication – Learning Disability diagnosis of Dyslexia” and the placement was “Regular Classroom with Withdrawal Assistance.”

[5] On November 11, 2005, the Tribunal heard the appeal of the student’s identification and placement. During the hearing, the parents and the HCDSB negotiated a settlement, resolving the matters in dispute. On November 15, 2005, the Tribunal issued a Consent Order including the Minutes of Settlement. The parties agreed that the terms of the settlement agreement would apply until June 30, 2008, unless both parties agreed to an earlier end date. The settlement agreement was in place until June 30, 2008, the end of the student’s Grade 8 year.

[6] On February 22, 2008, an IPRC was held. The IPRC statement of decision recorded the student’s identification as Intellectual – Giftedness and Communication – Learning Disability. The term ‘dyslexia’ was handwritten after Learning Disability. The student’s placement was recorded as Regular Classroom with Withdrawal Assistance. At that time, in Grade 8, the student was receiving 75 minutes of withdrawal programming per day, in accordance with the Minutes of Settlement of November 2005. Notes from the IPRC stated that an IPRC would be held in September 2008, at the beginning of the Grade 9 year, to discuss the student’s programming for the first semester.

[7] In October 2008, the appellants received a form letter from the Secondary School, regarding their option to waive the fall IPRC review, since “there was no change in the student’s Individual Education Plan (IEP)”. There were two versions of the September 29, 2008 IEP for the student’s first semester of Grade 9. The two IEPs identified the student as having Multiple Exceptionalities: Intellectual – Giftedness and Communication – Learning Disability. Both IEPs reported the placement as Regular Classroom with Withdrawal Assistance and the special education programming as ten minutes of monitoring a day with the special education resource teacher (SERT). The two documents differed in that one stated that the student was exempted from French, history and geography, as compulsory subjects, and the second stated that the student had no compulsory subject exemptions.

[8] There was no IPRC for the student during the first semester of the Grade 9 year.

[9] On February 2, 2009, the appellants received a letter regarding an IPRC review for the second semester of Grade 9. The letter offered a waiver of the IPRC process for the second semester.

[10] On March 23, 2009, the student's IEP for the second semester of Grade 9 was sent home. It recorded the student's exceptionality as Multiple Exceptionalities: Intellectual – Giftedness and Communication – Learning Disability. The placement was recorded as Regular Classroom with Withdrawal Assistance. During the second semester of Grade 9 the student continued to receive ten minutes of monitoring daily from the SERT.

[11] On April 28, 2009, an IPRC statement of decision identified the student as an exceptional student with Intellectual – Giftedness and Communication – Learning Disability as the exceptionalities. The placement was Regular Classroom with Withdrawal Assistance. The parents requested a second IPRC.

[12] On June 2, 2009, the IPRC was reconvened. As a result of this IPRC, the student's exceptionality designation was amended by having the term 'dyslexia' added by hand.

[13] On June 17, 2009, the appellants appealed the student's identification and placement to a Special Education Appeal Board (SEAB).

[14] The SEAB met on September 10, 2009. The SEAB disagreed with the IPRC decision regarding the student's identification and agreed with the IPRC regarding placement. The SEAB made a number of recommendations regarding placement and the programs and services available within the placement.

[15] On October 6, 2009, the HCDSB decided to accept the recommendations of the SEAB.

[16] During the months of September and October 2009, there were three IEPs prepared for the student, dated September 28, October 2 and October 14. All three recorded the student's exceptionality as Intellectual - Giftedness and Communication - Learning Disability (Dyslexia) and the student's placement as Regular Class with Withdrawal Assistance. The IEPs recorded the student's special education programming as 75 minutes daily work on a locally developed English language and communication development program (KEN) on a one-to-one basis with the SERT. The appellants did not sign any of these IEPs.

[17] On November 30, 2009, the appellants appealed the student's identification and placement to the Tribunal.

## **POSITIONS OF THE PARTIES**

### **Appellants**

[18] The appellants requested the Tribunal to order that the student's identification be "Intellectual - Giftedness and Communication - Learning Disability (Dyslexia)" and that the placement be "Regular Classroom with Withdrawal Assistance" with appropriate programming, in accordance with the Settlement Agreement signed by them and by the HCDSB on November 14, 2005. In their Notice of Appeal they set out a series of remedies that they wanted the Tribunal to order.

## Respondent

[19] In *Form B: Response to a Notice of Appeal*, the HCDSB requested that the Tribunal dismiss the appeal, because the identification and placement sought by the appellants were recommended by the SEAB on September 10, 2009 and were endorsed by the HCDSB on October 6, 2009.

[20] In response to the appellants' remedy requests in the materials disclosed prior to the hearing, the HCDSB changed its position and requested that the Tribunal order the student's identification to be "Intellectual – Giftedness and Communication – Learning Disability" and the placement to be "Regular Classroom with Resource Support".

[21] In addition, the HCDSB requested that the Tribunal determine what credit should be given for the one-to-one withdrawal programming in reading and writing remediation (the KEN program) that the student had received during the first semester of Grade 10.

## REMEDIES SOUGHT BY THE APPELLANTS

[22] The appellants requested the Tribunal to make the following four declarations:

1. That the HCDSB has not identified the student's exceptionalities correctly.
2. That the HCDSB has not placed the student in an appropriate special education program that is based on and modified by the results of continuous assessment and evaluation to address the student's needs regarding the two identified exceptionalities.
3. That the HCDSB changed the "status quo" of the student's identification and placement established by the Tribunal's Order of November 2005, without following the procedures set out in Regulation 181/98.
4. That the HCDSB has not provided the student with appropriate special education programs and services or entered into an agreement with another board to provide, in accordance with the regulations, special education programs and special education services to address the student's identified exceptionalities.

[23] The appellants requested that the Tribunal order the following:

1. The student's special education identification is to be recorded on the IPRC Statements of Decision and IEPs as "Intellectual – Giftedness and Communication – Learning Disability (Dyslexia)".
2. The student's special education placement is to be recorded on the IPRC Statements of Decision and IEPs as "Regular Classroom with Withdrawal Assistance".
3. The HCDSB is to provide the student with appropriate special education programs and appropriate special education services to address the student's identified intellectual giftedness.
4. The student is to be accommodated and provided with an appropriate special education program of Ontario curriculum credit-earning English courses and where necessary, the appropriate modifications to address the assessed needs [arising from] the student's identified severe specific Communication - Learning Disability (Dyslexia) exceptionality. The program should be intensive, systematic, and evidence-based direct instruction in reading fluency, vocabulary building and writing, and should incorporate the use of adaptive technology, as appropriate. The program would be for one semester in each of the 2010/11 and 2011/12 school years, delivered on a one-to-one basis by a SERT or English specialist for one 75 minute period each day.

In their closing statement before the Tribunal, the appellants amended this request by asking the Tribunal to order that the student be provided with a modified version of the Writers' Craft EWC4C course in Grade 11 and EWC4U course in Grade 12. These are both Ontario curriculum English credit courses. The request was for this to be provided to the student on a one-to-one basis with the goal "of closing the gap between the student's reading and writing skills and those of students with similar intellectual abilities by June 2012".

5. The HCDSB is to provide the student with appropriate special education services, including instruction in the use of the recommended technologies such as Inspiration, Word Q and Kurzweil.
6. An exemption is to be guaranteed for the student from the French language compulsory credit required for the Ontario Secondary School Diploma (OSSD).
7. The HCDSB is to provide regular assessments to monitor the student's progress, including annual standardized testing by using the Grey Oral Reading Test (GORT) and the Wechsler Individual Achievement Test (WIAT) for word reading, reading comprehension, pseudo-word decoding, spelling and written expression.
8. The HCDSB is to arrange a full psycho-educational assessment in a timely manner to facilitate the student's transition to post-secondary education.
9. The HCDSB is to continue to provide assessment accommodations appropriate to accommodate the student's identified needs including, but not limited to, extra time, access to a quiet room and alternative formats for assessment.
10. The HCDSB is to arrange a mentor for the student, who is not directly involved in the provision of the student's special education programs and services. In their closing statement, the appellants expanded this remedy request stating that the mentor should not be appointed by the board but "should be appointed or addressed in conjunction with the student's parents and the student".
11. The Tribunal is to ensure that the student's best interests are addressed and that appropriate special education programs and services are provided to the student in a timely manner.

#### **THE RESPONDENT'S RESPONSE TO THESE REMEDIES**

[24] Regarding the appellants' requests for the Tribunal to make declarations, the respondent stated that the Tribunal is not in a position "to declare that a school board has not done something that the parents wished that it had done." It is the position of the HCDSB that such declarations as well as some of the remedies sought by the appellants are not within the Tribunal's mandate.

- [25]
1. The student's identification should be Communication – Learning Disability and Intellectual - Giftedness, without any reference to 'dyslexia', because "it is not a diagnosis".
  2. The student's special education placement should be Regular Class with Resource Support for addressing the student's giftedness. Should the student be in difficulties in any academic language-based courses (such as English in Grade 11), the HCDSB can assist the student through a GLE (General Learning Essentials) course.

3. The focus of the student's programming should be to support the student with accommodations for the learning disability and to ensure appropriate programming for the student's giftedness.
4. The HCDSB agrees that the student requires accommodations and the use of assistive technology and it will continue to provide that assistive technology.
5. The student is exempt from French language instruction and will continue to be. The student will not require a French language credit to graduate and receive the OSSD.
6. The HCDSB does not believe that there is any future benefit to testing the student annually by using the GORT or the WIAT. However, the HCDSB recognizes that for post-secondary purposes some universities require an updated assessment if a student is going to access accommodations. The HCDSB agrees to provide such an assessment within the time lines that a university would require, likely in the second semester of the student's Grade 11 year.
7. The HCDSB will continue to provide assessment accommodations for the student's literacy as well as for all other courses and subjects. The student will have access to technology, will have additional time and will have a quiet room to work in to complete any assessments.
8. The HCDSB is happy to provide a mentor, if that is the student's wish.

#### **RELEVANT STATUTORY PROVISIONS**

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

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

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

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

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

[29] Subsection 8 (3) of the *Education Act* sets out the requirements for identification programs and special education programs and services: The Minister shall ensure that all exceptional children in Ontario have available to them, in accordance with this *Act* and the regulations, appropriate special education programs and special education services without payment of fees by parents or guardians resident in Ontario, and shall provide for the parents or guardians to appeal the appropriateness of the special education placement and for those purposes the Minister shall,

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

- [30] Subsection 170 (1) of the Education Act sets out the duties of boards:  
Every board shall,  
7. Special education programs and services – provide or enter into an agreement with another board to provide in accordance with the regulations special education programs and special education services for its exceptional pupils.

**Regulation 181/98:**

*Regulation 181/98: Identification and Placement of Exceptional Pupils* governs the identification and placement of exceptional pupils; Identification, Placement and Review Committee (IPRC) reviews; appeal procedures; and the role of parents/guardians in these proceedings. This Regulation provides a mechanism for parents to appeal the identification and placement decisions of an IPRC to a Special Education Appeal Board (SEAB) and sets out the time lines that must be met for such an appeal.

- [31] Subsection 20 (3) of the *Regulation* states:  
A board that without the written consent of a parent of the pupil, implements a placement decision made by a committee shall give written notice of the implementation to a parent of the pupil.

**OTHER CASES AND TRIBUNAL DECISIONS CITED**

- [32] Capocci v. York Catholic District School Board, Ontario Human Rights Tribunal, File No. 2008-0047-1  
Judicial review of Mr. Justice Albert Roy of Jimmo v. Ontario (Minister of Education, Court File No. 02-CV-2208, dated 2002-11-29;  
B and A v. Upper Canada District School Board, 2003;  
CS v. Halton Catholic District School Board, 2005;  
LW v. Toronto District HCDSB, 2007.

**WITNESSES**

- [33] The appellant's witnesses were:

1. Ms. C. S. Parent
2. The student

- [34] The respondent's witnesses were:

1. Dr. Bruce Linder Psychologist in private practice, specializing in clinical and educational psychology
2. Dr. Maureen Lovett Expert witness, and Director, Learning Disabilities (LD) Research Program and Senior Scientist, Neurosciences and Mental Health Program, Hospital for Sick Children, Toronto  
Dr. Lovett was accepted by the Tribunal as an expert witness. Dr. Lovett is recognized as one of Canada's leading experts in LD research with particular expertise in reading disabilities.
3. Dr. Alan Edmunds Expert witness, Associate Professor, Faculty of Education, University of Western Ontario, London  
Dr. Edmunds was accepted by the Tribunal as an expert witness, with the requirement that his evidence would focus primarily on The student's needs for the future.
4. Ms. Kim Slomka, Secondary School Special Education Consultant, HCDSB

5. The Special Education Resource Teacher (SERT), HCDSB
6. The English Teacher at the Secondary School, HCDSB
7. The Principal at the Secondary School, HCDSB
8. Ms. Suzanne Rossini, Superintendent of Special Education, HCDSB

#### **PRELIMINARY MOTION FROM THE RESPONDENT**

[35] The respondent presented a preliminary motion to the Tribunal asking the Tribunal to exercise its discretion under the *Rules* regarding the timelines specified for disclosure and to allow the respondent to call Dr. Alan Edmunds and Dr. Maureen Lovett as expert witnesses and to file and rely on its Supplementary Brief of Documents (Volume IV) and Dr. Edmunds's written report.

[36] The respondent cited the Tribunal's *Rules*, the *SPPA*, a previous Tribunal case (B and A v. Upper Canada District School Board, 2003) and a recent decision from the Human Rights Tribunal of Ontario (Capocci v. York Catholic District School Board, Ontario Human Rights Tribunal, File No. 2008-0047-1) to support its motion. In addition, the respondent stated that the expert evidence will speak to the issue of the student's educational needs and the remediation of learning disabilities and, as such, it will inform the Tribunal's decision regarding the student's appropriate identification and placement.

[37] The appellants supported the respondent's motion regarding the acceptance of Dr. Lovett as an expert witness. The appellants introduced into evidence some of Dr. Lovett's work to support their appeal.

[38] The appellants raised concerns about Dr. Edmunds' status as an expert witness. This related to the HCDSB's proposal in January 2010 to involve Dr. Edmunds in reviewing the student's program in order to avert the current appeal. This did not happen.

[39] The Tribunal ordered that the timelines be waived and accepted the written materials for the two expert witnesses.

[40] The Tribunal accepted Dr. Maureen Lovett as an expert witness.

[41] The Tribunal accepted Dr. Alan Edmunds as an expert witness with the requirement that his evidence would focus on the student's identification and future programming and placement needs.

[42] The reasons for this decision were as follows:

1. The Tribunal and the appellants were notified in adequate time of the HCDSB's intent to call these two witnesses and their intent to qualify them as expert witnesses.

2. Both parties disclosed information related to Dr. Lovett's research in accordance with the *Rules* and both stated their intent to introduce these documents into evidence. The appearance of Dr. Lovett as a witness would allow the parties and the Tribunal to ask questions about her research and its relevance to the student's identification and placement.

3. The Tribunal accepted the HCDSB's arguments on the importance of hearing both experts.

#### **MOTION FROM THE APPELLANTS DURING THE HEARING**

[43] On March 11, 2010, the fourth day of the hearing, the appellants entered a motion to introduce the student as a witness.

[44] The appellants described the student's desire to speak directly to the Tribunal about the student's education and special education programming and the student's interest in answering the Tribunal's questions on the student's own behalf.

[45] The HCDSB initially expressed concern about the motion on the grounds that the presentation by the student would prejudice its case, because its expert witnesses had already concluded their evidence. After receiving further instructions from the HCDSB's Director of Education, the HCDSB's representative withdrew this objection. The HCDSB ultimately agreed to the student's appearance as a witness, but stipulated that it may wish to recall its earlier witnesses, if this was deemed necessary in the circumstances.

[46] The Tribunal decided to hear from the student as a witness. The Tribunal also decided to agree to the HCDSB's request to recall any earlier witnesses, should it see this as necessary to complete the case.

## **SUMMARY OF EVIDENCE**

### **Issue #1: Identification**

[47] Both parties entered into evidence numerous assessments, carried out by the HCDSB and by private practitioners between 2003 and 2009. All of these assessments confirmed that the student has a specific language based learning disability, typically referred to as 'dyslexia' and identified the student as intellectually gifted.

[48] The appellants entered into evidence the Tribunal's Consent Order and accompanying Minutes of Settlement, dated November 14, 2005, signed by both the parents and the HCDSB, stating that the parties agreed that the student's special education identification would be recorded on the IPRC statement of decision and IEP as "Intellectual - Giftedness and Communications - Learning Disability (Dyslexia)".

[49] The appellants entered into evidence a series of IPRC Statements of Decision and IEPs for the student for 2008 and 2009. Although these were not consistent in designating the student's specific exceptionality, all of them confirmed the HCDSB's acceptance of the dual exceptionality.

[50] The mother testified that inclusion of the term 'dyslexia' is essential to assist with programming to address the student's needs. She emphasized that "the purpose of a student's identification is not to label a child, but rather to inform the adults responsible for providing appropriate special education programs and appropriate special education services of the nature and content of the special education program and services that are required to address the student's specific needs and strengths."

[51] Dr. Bruce Linder, psychologist, reviewed the assessment data available from both the appellants and the HCDSB. He testified to the significant discrepancy between the student's verbal intelligence and non-verbal intelligence.

[52] Dr. Linder highlighted that in three of four non-verbal subtests the student's scores are between 131 and 146 and concluded that the student is "very bright". Dr. Linder testified that the student is obviously actively using intelligence to compensate for some of the weaknesses at the word level and that the student does this very successfully. However, Dr. Linder testified that there is still a substantial difference between what's predicted from the non-verbal IQ and what the student actually does.

[53] Dr. Linder testified that if he were using the *Diagnostic Statistical Manual of Mental Disorders* (DSM IV), the student's exceptionality would be "a learning disability in reading and written expression". He stated that 'dyslexia' is considered by some practitioners to be an older medical term and that these days psychologists do not usually diagnose 'dyslexia'.

[54] Dr. Maureen Lovett, expert witness, defined reading disability or 'dyslexia' as "an unexpected failure to learn a certain aspect of written language development" or "an unexpected under-achievement in learning to read and spell".

[55] Dr. Lovett testified that her review of the student's assessment data confirmed that the student has a learning disability, but is clearly very bright and uses aptitude to compensate for the disability. She particularly commented on the student's ability to "act strategically" and the significance of this as a way of compensating for the learning disability.

[56] Dr. Alan Edmunds, expert witness, testified to his findings from his extensive review of the student's assessments. He stated that the assessment process appeared to have been properly conducted and that the findings and diagnosis appeared to be accurate. He stressed that "there is consistent and triangulated (confirmed) evidence of 'dyslexia'".

[57] Dr. Edmunds testified that "all of the mental processes that the student now has are going to stay with [the student] and they are going to be enhanced a little but not much. The student demonstrates all of the higher order mental processes that we would expect to see in any high functioning adolescent or adult."

[58] Dr. Edmunds endorsed the dual exceptionality identification for the student. In addition, he testified that the student's diagnosis of 'dyslexia' was appropriate, given the assessment material that he [Dr. Edmunds] was provided.

[59] Ms. Suzanne Rossini, HCDSB Superintendent, testified that a student with a learning disability with respect to reading would be identified by the HCDSB as "Communication - Learning Disability".

[60] Ms. Rossini stated that the HCDSB never used the descriptive terms found in the *Parent's Guide to Special Education Programs and Services* and referred to by the Ministry of Education as "associated with one or more conditions diagnosed as perceptual handicap, a brain injury, minimal brain dysfunction, 'dyslexia' and developmental aphasia".

[61] Ms. Rossini testified that the HCDSB uses the ministry's Trillium Student Information System, which gives a set number of choices for identification. She indicated that the HCDSB had no difficulty writing the word 'dyslexia' next to Communications – Learning Disability, but that it cannot be done electronically.

[62] Ms. Rossini stated that it's not her opinion that determines what is recorded as an identification. "It really is what is determined by the Ministry of Education."

[63] Ms. Rossini testified that the HCDSB uses a program called Base Point for their IEP engine. They can include the term 'dyslexia' when they develop IEPs on their own internally. However, she stated that she believed that high school staff would focus more on strengths and weaknesses, accommodations and modifications than a reference to the term 'dyslexia'.

[64] Ms. Rossini agreed that the student should be identified as intellectually gifted.

[65] Ms. Rossini described the errors and omissions on the past IEPs as "clerical errors". She testified that it was never the HCDSB's intent to change the student's identification.

## **Issue #2: Placement**

[66] The appellants entered into evidence the Tribunal's Consent Order together with the accompanying Minutes of Settlement, dated November 14, 2005, which stated that "the HCDSB agreed that commencing November 1, 2005 until June 30, 2008 or such earlier date as agreed to by the Parties, the student would receive special education withdrawal assistance for spelling, reading, writing and skill

development from a Special Education Resource Teacher or Itinerant Special Education Teacher for not less than 400 minutes per week.”

[67] The mother testified that in Grade 9 the student was not placed in a special education program. She said that she and the father were dissatisfied because the HCDSB substantially changed the nature and content of the student’s placement that had been agreed upon in the Minutes of Settlement of the Tribunal order (2005). She testified that they [the parents] had assumed that the program that the student had been receiving in the elementary panel would continue during Grade 9, unless an IPRC had changed it and they agreed to the change.

[68] In this assertion, the appellants relied on the decision in the judicial review by Mr. Justice Albert Roy of *Jimmo v. Ontario Minister of Education*, which stated that the status quo of a student’s placement must be maintained until all requirements of Regulation 181/98, including the right of appeal, are completed.

[69] The appellants entered into evidence the Statement of Decision from the IPRC of February 22, 2008, held in preparation for the student’s transition from elementary to secondary school. This stated that the student’s placement would be Regular Classroom with Withdrawal Assistance, but did not specify any programming. The accompanying notes from the IPRC stated that a further IPRC would be held in September 2008, once the student was in Grade 9 at the Secondary School.

[70] The mother testified that as of the beginning of Grade 9 the student no longer had the agreed upon 400 minutes of special education support and no longer had access to gifted programming. This was in spite of the fact that the appellants received a letter from the Head of Special Education at the Secondary School stating that “your child’s status as an exceptional student and the specifics of his/her IEP have not changed”.

[71] The mother testified that the various IPRC statements of decisions and IEPs throughout the student’s Grade 9 and 10 years have not changed the name of the placement. What had changed was the programming provided within the placement. This difference, in her opinion, effectively changed the placement. The mother stated that throughout Grade 9 the student had not received any withdrawal programming to meet the stated needs. The IEPs entered into evidence confirmed that the student was receiving 10 minutes of daily monitoring with the SERT throughout Grade 9.

[72] The mother testified that since the IPRC had not changed the placement for the beginning of Grade 9, she believed that the student would receive an intensive special education program. She said that “whether it would be 400 minutes/week I couldn’t say, but [I thought that] the nature of the program would be an intensive special education program.”

[73] This statement was countered by the Principal who testified that it was his understanding that both parents were in agreement with having the student attempt a full academic load in Grade 9 and this would be reviewed at the end of Grade 9 to see how successful the student had been.

[74] The Principal testified that he only became aware of the appellants’ concerns about the student’s placement and identification in the spring of Grade 9, around the time of the April 2009 IPRC.

[75] During cross-examination, the mother testified that she didn’t want the student in a GLE class, but wanted the student to “be bridging the gap”. She clarified that what she meant by that was that she wanted the student to read as well as other students of the same age and intellectual ability. She disagreed that the refusal to enrol the student in GLE meant that they did not want the student to be withdrawn for anything and wanted the student to be in the regular class full time.

[76] To support her opinion for the student to have withdrawal for gifted programming along with support for the student’s dyslexia, the mother cited Dr. Ed Blackstock’s psychological assessment report of September 29, 2005. This report stated that “failure to adequately address core deficits in gifted students is a primary reason for their dropping out of high school or university”. It noted the importance of

gifted students having an opportunity to learn with and interact with students of a similar level of cognitive ability.

[77] Dr. Edmunds testified that he believes that special education would include the philosophy of inclusion and that educators should first investigate the best possible support options for the child within the regular classroom. However, he believes that withdrawal for special services is different than being in a separate class. He stressed that the student is a good candidate for compensatory strategies.

[78] Dr. Edmunds testified that “the student could benefit from that type of help [withdrawal] but I don’t think that the student needs 75 minutes every day.” He stated that many of the things that he could see as being problematic for the student, “could be solved in 15 to 20 minutes or less”, although he did not think that the student has the ability to optimize [the student’s] reading deficit areas any further. Dr. Edmunds stated that the student is beyond the developmental period in which closing the gap is a realistic expectation.

[79] Ms. Kim Slomka, special education consultant, gave evidence about the various placement options that the HCDSB has available for exceptional students. She stated that students may come to the resource room during lunch, before or after school, if they need additional support. They do not need to have this formally included in their timetable.

[80] Ms. Slomka testified that based on the demands of the Ontario Curriculum and the student’s results, the school had no evidence that the student had “huge gaps that required 400 minutes per week of special education programming”. This, combined with the parents’ refusal to enrol the student in the GLE course, led to the type of support that the student was receiving in Grade 9.

[81] Ms. Slomka stated that a typical method of delivering a gifted program would be to compact the curriculum within the regular class.

[82] The student testified that [the student] did not mind being withdrawn for special help. The student said that there were gains from the withdrawal, especially in the student’s ability to write essays and do other written assignments.

[83] The SERT testified that she provided the student with one-to-one intensive support during the first semester of Grade 10. She stated that she would have liked to have been able to deliver the program to the student in a “more normalized fashion”, meaning that some of the student’s needs in writing could have been addressed in the GLE class or there could have been an indirect service model with the classroom teacher.

[84] The SERT said that the student spent a lot of time in the Resource Room after school, working on assignments and homework. She testified that the student had made excellent progress in the withdrawal programming and had achieved major gains.

[85] The English teacher testified that the student had significant success in the Grade 9 and 10 academic English courses. The student’s final mark in Grade 10 academic English was 83 percent with a class average of 70 percent. In the teacher’s opinion, the student has no particular need for intensive daily special education programming in reading and writing.

[86] Ms. Rossini testified that in her opinion the student would not benefit from the continuation of one-to-one intensive withdrawal programming in Grade 11 and 12. She supported Dr. Lovett’s opinion that learning is a social experience and that there are many cognitive and social benefits to learning in a group.

[87] Regarding the possible placement options for meeting the student’s gifted strengths, Ms. Rossini testified that the HCDSB could look at telescoping the Grade 10/11 math course. She stated that she believed that there could be an opportunity created for the student to work during the school day with peers who are interested in and advanced or gifted in math.

### **Issue #3: Programming and Services within the Placement**

#### **Remediation of the Student's Learning Disability (Dyslexia)**

[88] The mother testified that the programs that the student had been offered in elementary school "much improved [the student's] ability in terms of the accuracy of reading. The student was definitely still behind in [reading] fluency."

[89] The mother testified that "the student's needs are reading fluency, vocabulary building, writing in terms of organization, language usage and editing skills, and a need for more assistance with the integration of IT [technology] into the process of writing in the regular classrooms, and the student needed programming that would support and develop the student's giftedness as identified in the IPRC". She stressed that to succeed in the remediation of those areas requires lots of opportunities for review and practice of the learned skills.

[90] The assessment administered by Carol Jepson, Occupational Therapist, in 2008, noted the importance of computer technology to assist with lengthy and challenging reading assignments, and also with written work. She recommended continued direct instruction in writing and reading on an ongoing basis to further develop the student's word recognition skills. She also recommended the support of a teacher, tutor, or stronger student to work with the student on school writing assignments. The mother expressed her preference for a teacher.

[91] The mother testified that the student was clearly benefiting from the programming that the student had received in the first semester of Grade 10 from the SERT on a one-to-one basis. There was direct instruction. It was very explicit, step-by-step and systematic. It was delivered in an intensive manner over a long duration.

[92] The mother quoted extensively from Dr. Sally Shaywitz's book, *Overcoming Dyslexia*, to support the importance of and the need for fluency training.

[93] The mother stated that the recommendations flowing from the Gray Oral Reading Test (GORT), carried out in October 2009, "were for explicit instruction or teaching of vocabulary to enhance comprehension, and repeated readings of text selections to increase fluency and to evaluate progress towards a pre-determined fluency level as defined by rate and accuracy."

[94] The mother stressed that although the HCDSB had suggested that the student would no longer benefit from reading remediation, expert opinion, including the material from Dr. Shaywitz, suggests otherwise.

[95] The mother acknowledged that the marks on the report card indicate that the student has good learning skills and work habits, but she stated that this does not create a good rationale for discontinuing the intensive one-to-one remedial program that, in the parents' opinion, the student still needs.

[96] The mother testified that, while she agreed with some of the suggestions made for accommodations in Dr. Shaywitz's book, she did not agree that these should be the focus "as opposed to remediating the student's deficiency, as the core priority of the student's special education programme." She said that "accommodations are important but they are not instead of remediation and the student should not be dependent on them [accommodations]".

[97] The mother summed up the appellants' position by saying that "we should remediate during the high school years to address what we can, we should be providing the accommodations so that the student is accessing and performing at the highest capacity during the high school years, and so that the student is in a position to incorporate that technology to whatever degree it turns out that it is required post secondary".

[98] Dr. Lovett testified that looking at the student's scores, the student would have qualified for her program in Grade 3 or 4, but by Grade 5 would have been borderline, and by Grade 6, the student's achievement would have been considered too high to get into their (reading) program. Dr. Lovett also commented on the fact that there was documentation of good remediation and good growth in the student's skill levels.

[99] Dr. Lovett commented on the issue of providing remedial help for the student's weakness in writing. She testified that she "would want to keep [the student's] written language skills developing, but I might shift my focus to doing that within the context of the curriculum - relevant academic and university bound -in terms of the reading and the writing materials."

[100] Dr. Lovett stressed that learning is a social activity and that her own bias is that she really likes working with groups. She wants to build young people who are independent and resourceful, but who like to collaborate and work together. Therefore, in her opinion, withdrawal into groups is the most beneficial for students who need support.

[101] Dr. Edmunds gave testimony about the available assessment data, the interventions that had been provided to the student and the educational progress that the student had made in response to these interventions. Dr. Edmunds' stated that children go through developmental phases. What is done in earlier years does not need to be repeated in later years, while some of the things done in later years would not be useful or beneficial earlier. Interventions have to be suitable for the child's age and grade.

[102] He testified that "there comes a time when, for example, in language, there are certain skills that will not be learned with the same type of facility and the child's abilities with those skills will not be as proficient. So in language-related issues we tend to think of that being up to about 12 years of age. After that their learning mechanisms and pathways for learning don't develop at least as rapidly or with the greatest efficiency. You then start to make decisions about what else could we do to try to facilitate school for them, and sometimes we then stop remedial intervention mechanisms and focus more on compensatory interventions."

[103] Dr. Edmunds testified: "In this case, it looks like there were times when the student was provided with remedial types of interventions and despite those interventions, the student did not seem to improve in some of the skill areas that they were designed to improve, even though the intervention, I think, at one point was several hundred minutes per week."

[104] Ms. Slomka explained that even without a regular withdrawal period, the student would still have access to a resource teacher to provide additional support when needed.

[105] The SERT testified that she assisted in remediating the student's difficulties with writing. They would discuss what the student needed to do, and how this would apply to the other subjects. They did a lot of work on editing and proofreading and she found the student to be a thorough proof reader. She testified that if she were asked to give the student a mark for writing, it would be 87 percent.

[106] The SERT testified that she would not recommend that the student continue to receive a program on a one-to-one basis. She said that the student was good at self-advocacy, and would be able to explain to a classroom teacher or SERT what kind of help [the student] might need. If help was needed from a SERT, the student would be able to go to the resource room on [the student's] own initiative.

[107] The Principal testified that he had heard no concerns about the student's progress from the SERT, any of the teachers, or from the student.

[108] Ms. Rossini testified that she did not think a continuation of the special one-to-one program of intensive instruction would be appropriate for the student. She said that "learning is a social experience and there are many cognitive and social benefits to learning in groups." She also agreed with Dr. Edmunds that what the student needs now is to move to a more compensatory approach.

## **Giftedness and the Related Benefits of Compensatory Strategies**

[109] The mother testified that “the instruction the student got in elementary school brought the student up to the level where Spell Check could pick up the errors”. She added, “to date the student’s success can be attributed to [the student’s] giftedness, higher order of thinking, and attentiveness in class which has enabled the student to learn orally, and lastly to the fact that the volume of the material delivered in those classes is manageable”.

[110] The mother stressed that as a rule, the student does not have problems with comprehension. The student infers meaning from context using [the student’s] gifted skills and high cognitive abilities and interprets them in context.”

[111] The mother also spoke about the importance of providing the student with an opportunity to enhance [the student’s] capabilities and to participate in a gifted program, focused on math.

[112] Dr. Linder provided the Tribunal with a detailed analysis of the student’s assessment data over the years. He stated that the test results imply “that the student’s using intelligence actively to compensate for some weaknesses at the word level and does so very successfully.”

[113] Dr. Linder also spoke about the fact that speed is “negatively correlated” to reading. The slower a person reads, the less reading comprehension that person would have, but in the student’s case, that is not the situation. The student is at the highest level for comprehension, while [the student’s] speed is much lower. Not having observed the student, Dr. Linder suspects “that the student using [the student’s] intellectual abilities and good knowledge of the world, which is very important in reading comprehension, to compensate for the student’s word level weakness and slow speed”.

[114] When asked to look at the student’s specific test scores, Dr. Lovett liked “the compatibility over time in results from the Wechsler Individual Achievement Test (WIAT) and the Woodcock Johnson”. She testified that she would have more confidence in a WIAT or a Woodcock Johnson than in a GORT. She stated that clearly the student has no problems with comprehension.

[115] Dr. Edmunds’s evidence focused on the student’s strengths and how these allowed the student to overcome some difficulties. He testified that “in this case, the student has some very, very well developed, complex, sophisticated mental processes that the student uses to learn with. So the student is a very good candidate for compensatory strategies. Despite the fact that the student has a significant learning disability with reading, the student does really, really well in school. Past grade four or five, the curriculum stops asking children to learn how to read and it now requires children to read so they can learn.”

[116] Dr. Edmunds testified that it is important to recognize that in the earlier years we are talking about improved skill development and in the later years we are talking about the ability for that skill to enhance performance. He complimented the student on [the student’s] excellent performance and said that “if the student is not working at maximum potential at this point, it’s not far off.” He continued “I am not sure you can wring much more out of this for the student in terms of [the student’s] potential.”

[117] Dr. Edmunds added: “You have to move to more compensatory interventions which in a sense circumvent forcing the child to work or to try to work with a skill that they haven’t mastered or can’t master or will not become much more efficient at. The child is able to gain a lot more out of school and the curriculum that they are exposed to and their learning processes and their ability to manipulate information becomes much greater if you focus on compensatory mechanisms. Even if [the ability to develop new processes] still exists, it does not exist in the same efficient manner as the young child would do if they were developing the same process.”

[118] Dr. Edmunds suggested accelerating or telescoping the curriculum, rather than providing an enrichment program, which is often seen by gifted students as busy work. He stated that it is important to

change those parts of the school day that the student is gifted in, but not necessarily all of the school day. He also suggested potential participation in the Shad Valley program, a summer school program, based at several Canadian universities, which has a large math component and would give the student the opportunity to learn with like-minded peers.

[119] Dr. Edmunds spoke at length about the importance of focusing and building upon the student's giftedness. He stated that at least 50-60 % of students identified as gifted or talented do not enjoy school

[120] He stressed that the only difference between programming for a student who is gifted and talented versus a student who is gifted and talented and has a learning disability would be accommodations that would be required for the identified learning disability.

[121] Ms. Slomka testified that a typical way of delivering gifted programming is by compacting the curriculum, to allow time for other activities, depending on the student's interests and needs. She added that the way the student's math program is currently planned, the student will not complete Grade 10 earlier than the other students in the course.

[122] The student testified that [the student] hasn't yet been exposed to any math gifted programming. The student testified that working in a group with other very bright and gifted students who are interested in math would be fun and something that the student would really enjoy. The student testified that [the student] benefits from learning with other students, especially with those who have unique strengths such as creativity, from whom the student could learn. The student went on to state that [the student] would like the math program to be more advanced. The student would like to do the Grade 10 course faster, so that [the student] can start Grade 11. The student understands math quickly and wants to learn new things.

[123] The student described how [the student] had participated in the University of Waterloo Cayley math contest without relying on any accommodations such as extra time and managed to finish the test.

[124] Regarding gifted programming, the Principal testified that the teacher was still assessing the student's performance in math with a view to later compacting the curriculum. In the meantime, the student had participated in the Cayley contest, and had access to specialized math software that other students do not use.

[125] Ms. Rossini explained that the student's math program could be "collapsed", and that she would want to see the student continue to have opportunities to work with another student in the way the student described in [the student's] testimony. She also mentioned scheduling the student's math class so that the student could possibly move into Grade 11 math after completing the Grade 10 course. There is also the possibility for the HCDSB to look at clustering some gifted students.

### **Secondary School Environment**

[126] The mother clarified that she and the father did not want the student to take the GLE course because "organization is not one of the student's deficiencies, that the GLE would not engage the student, it [would not be] addressing the student's primary needs. The student has had intensive training in technology, so the discussions on technology within the GLE wouldn't be suitable or a good use of the student's time. The GLE is a guidance and career education course. None of these [curriculum components] are the student's identified exceptionality needs."

[127] Ms. Slomka spoke of the benefits of the GLE course for students with exceptionalities and stated that most students acquire the necessary technology and learning skills through a GLE course.

[128] The mother testified that "moving forward, we would like to make sure that these programs do include a credit, that the credit is an English credit that reflects the fact that the focus of the course programming is on reading and writing."

[129] Ms. Slomka testified that the Ministry of Education needs to approve all locally developed courses. She also stated that no other students would be taking the kind of course that the parents are seeking for the student, and that the work that the student has done through the KEN course would not qualify for a credit by itself, but combined with other work it might.

[130] With regard to the KEN course the student took, the student testified that the writing activity helpful since the student was also doing English during the same semester. But the student did not think that there was much progress seen from the reading part of the course. The student thought that some continued help with writing, when needed, would be helpful when writing an essay for English or for another subject.

[131] The SERT explained the content of the KEN program, which was developed for the student. She described how the reading material was chosen, how she administered the reading fluency part of the program and how she calculated the fluency rate. She explained the difficulty with finding reading material at the right level of difficulty with the right level of interest, given the student's age and level of comprehension. She thought that if the reading fluency program were to be continued, it should focus on material from the student's other courses or relate to the student's curriculum area. She also said that the student was a "competent" reader who was able to understand the overall message of what [the student] was reading.

[132] The Principal testified that the school considered several possibilities to provide a credit for the special work the student was doing, but never came to an agreement with the parents. He said that he would still be able to grant a credit for the work.

[133] In response to the question whether he would recommend the ongoing implementation of the program requested by the parents, under point 4 of the Remedies Sought, Dr. Edmunds testified that this would not improve the student's ability to perform in [secondary] school. The student's cognitive abilities are well beyond what this remediation would attempt to remedy. It would take time away from other things the education system could provide that would benefit the student. Dr. Edmunds thought that the student was beyond the developmental period in which closing the gap is a realistic expectation. Since the student's present condition is not preventing the student from making good academic progress, the opportunity cost to the student would far outweigh the benefit.

[134] Dr. Edmunds applauded the student's self-advocacy skills, and suggested that those should be further developed. Universities will be able to provide the student with much the same accommodations as [the student] is getting in high school, but the student will have to ask for these.

[135] After reviewing the student's Grade 9 and Grade 10 report cards, Dr. Edmunds concluded that the student is doing very well relative to the peer group, and in English in particular. The student is doing really well with print. He went on to say that it is possible that the writing remediation program in Grade 10 helped to improve the student's English mark, but it is also possible that maturity, getting used to the high school curriculum, familiarity with the teacher, etc., all played a role.

[136] The English teacher described the accommodations provided for the student in her classroom both in Grade 9 and 10, in accordance with the student's IEP. She also indicated that sometimes the student chose to do handwritten work, rather than use the available technology and did not always take tests out of the classroom.

[137] Commenting on the recommendations made by Carol Jepson, Ms. Slomka suggested that, as each subject course has its own vocabulary, the student would further develop [the student's] word recognition skills from the required reading in the regular courses. Editing is also a regular part of the English curriculum, which also includes direct instruction. She stated that regular classroom teachers can also help in other ways.

[138] Ms. Slomka explained that the student definitely is exempted from French, but this will not be formally recorded until the student has completed the extra compulsory credit required for graduation to replace the compulsory French credit.

[139] Ms. Slomka also stated that typically the HCDSB does not provide updated psycho-educational assessments for students going on to post-secondary education. "That is the family's responsibility", she stated.

[140] Dr. Lovett addressed the issue of the various assessment tools that have been used to test the student's progress. She stated that the Woodcock Johnson is probably the set of tests used in the majority of research intervention studies in this field now. She stated that she had used the GORT in earlier research with younger children, but dropped it because the data seemed to have many outliers.

[141] In response to a question about transition planning, the student testified that [the student] had not met with a guidance counsellor since the beginning of secondary school.

[142] The English teacher stated that she did not see the student having any difficulty with the transition from Grade 8 to Grade 9. She thought the student was successful and she had no concerns about the student's progress or performance in academic English. She also said that the student was well liked by other students and did well in small group work.

[143] The Principal explained that the student's course selection forms and report cards indicated that the student has taken a full course load of academic and compulsory courses each semester with exceptional results. The student was withdrawn from one class in Grade 10 in order to be in resource. The Principal also described the math and science courses that will be available to the student in Grades 11 and 12.

[144] The student expressed an interest in having the math teacher as a mentor. The student thought [the student] would feel comfortable discussing any problems with him and seeking guidance from him. The Principal confirmed that the student's math teacher had agreed to be the student's mentor for Grade 10.

[145] Dr. Edmunds commented on his conviction that the student will be successful in [the student's] future education. He stated that while many students have difficulty adjusting from high school to university, "the same types of organizational things that I think the student has and is demonstrating that the student is using, are going to be exactly the same beneficial strategies that the student is going to have to use when the student gets to university."

### **Access to Technology and Accommodations**

[146] The mother acknowledged the instruction that the student had received in the use of technology. She commented that "what the student didn't have is a lot of instruction on the integration of the technology into the classroom. The student didn't have an opportunity to spend much time understanding how this technology actually worked to help to create written assignments."

[147] The mother testified that she questioned whether it made sense to promote the student's dependence on technology by ending the remediation. She stressed that her goal was to enable the student to close the gap between the student's reading and writing level and the level attained by other students of the same age and who are of similar intellectual capacity by providing the student with an intensive one-to-one remedial program for one semester of both Grade 11 and Grade 12.

[148] Dr. Lovett testified that she would want to "get [the student] as far along as the student could get in terms of written output, editing, revising, and so on, with the use of technology because the student would have access to that technology in university. Universities tend to be well informed these days in terms of accommodations and services for students with learning disabilities".

[149] Dr. Edmunds testified that, if he were responsible for the student, he would not have the student write anything unless it was dictated. He would provide a digital audio recorder such as a Sony Stick and have the student dictate almost anything the student had to write. Then it would be transcribed and read back for editing. Dr. Edmunds commented that if the student thinks that support with some writing tasks is helpful, then that support should be provided, but to make it 25 percent of the school day is not efficient.

[150] Dr. Edmunds stressed that most of the writing improvement that the parents are looking for can be provided within the regular classroom through a process of writing drafts and receiving teacher feedback before submitting a final product. Improvement in writing is also a matter of maturity and of practice in the context of subjects. He also focused on the use of assistive technology as an accommodation, stating that while software does not make the student's understanding of content any better, it may help the student to work more efficiently and demonstrate [the student's] knowledge more effectively.

[151] Ms. Slomka outlined the information technology and the electronic versions of textbooks that are available to the student. She said that these would continue to be available, regardless of placement. She confirmed that the student would also continue to receive all necessary accommodations such as extra time and assistive technology for writing tests.

[152] The student said that [the student] did not want to be totally dependent on technology for writing. Regarding the student's expertise in using technology, the student said that [the student] was better at using the technology than any of the teachers.

[153] The Principal testified that he understood that the student was provided with all necessary accommodations and had regular access to the resource room. He also explained that someone was brought in to train the student on the use of Kurzweil software, and that the HCDSB has an itinerant staff member who could provide in-service to staff and students on Inspiration.

## REASONS

[154] In *Brant County Board of Education v. Eaton*, the Supreme Court of Canada held that a placement should be in the child's best interests. [1997] 1 S.C.R... 241; (1996) 31 O.R. (3d) 574; (1996) 142 D.L.R. (4<sup>th</sup>) 385

## Identification

[155] There was no dispute between the parties about the student's identification as an exceptional student with the dual exceptionality of Communication – Learning Disability and Intellectual – Giftedness. All the assessment data entered into evidence supported this identification. The Tribunal accepted the evidence that the student is a gifted student with specific learning disabilities.

[156] The dispute related to identification arises from the inclusion of the term 'dyslexia' in the formal identification of the student's exceptionality.

[157] The Tribunal noted that the five categories of exceptionality are in the *Education Act*. The specific definitions of exceptionalities are not in the *Act* or the regulations. They are included in the Ministry of Education's 2001 document, **Special Education: A Guide for Educators**. The definition of learning disability in that document dates from 1981.

[158] The Tribunal noted that the HCDSB and the appellants agreed to include 'dyslexia' in the student's identification in their 2005 Settlement Agreement. Also, in October 2009 the SEAB recommended the inclusion of 'dyslexia' in the identification. The HCDSB confirmed that the student's exceptionality would be Communication – Learning Disability (Dyslexia) and Intellectual – Giftedness.

[159] Drs. Edmunds, Linder and Lovett, witnesses who have the requisite qualifications to comment professionally on the student's assessment data, all supported the student's identification as a student with both exceptionalities (Learning Disability and Giftedness) in their evidence. The Tribunal accepted their evidence.

[160] Drs. Edmunds and Lovett, the respondent's expert witnesses, both described the student's learning disability as a language based reading disorder, otherwise known as 'dyslexia'. Although they testified that 'dyslexia' is sometimes considered an old-fashioned term, they both in fact used it.

[161] Both expert witnesses also cited and quoted from "*Overcoming Dyslexia: a New and Complete Science-Based Program for Reading Problems at Any Level*" by Sally Shaywitz, M.D. Although neither the parties or the Tribunal were able to question Dr. Shaywitz, her reputation is such that the Tribunal accepted the relevance of the information quoted by witnesses, including the opinions of the expert witnesses, based on Dr. Shaywitz's work.

[162] The Tribunal accepted the evidence that 'dyslexia' is a term that is widely used internationally and that it provides a sound basis for understanding the condition and for specific programming directions.

[163] The Tribunal accepted the expert evidence and opinions including the information quoted by both parties from Dr. Shaywitz's book regarding the importance of diagnosing dyslexia and differentiating it from other types of learning disabilities for the purposes of appropriate programming and support.

[164] The Tribunal determined that, given the previous agreements by the parties and the expert evidence provided, including the term 'dyslexia' in the identification best describes this part of the student's exceptionality. It provides appropriate programming directions for the student's programming and accommodations in secondary school and will assist with the student's transition to post-secondary education.

## **Placement**

[165] In considering the most appropriate special education placement that would be in the student's best interest, the Tribunal considered the definitions of the placement options in the HCDSB's *Parent's Guide to Special Education Programs and Services*, entered into evidence. The appellants requested Regular Class with Withdrawal Assistance as the student's placement. The respondent requested Regular Class with Resource Assistance. These options are defined in the *Parent's Guide* as follows:

### *A regular class with resource assistance*

The student is placed in a regular class for most or all of the day and receives specialized instruction, individually or in a small group, within the regular classroom from a qualified special education teacher.

### *A regular class with withdrawal assistance*

The student is placed in a regular class and receives instruction outside the classroom for less than 50 per cent of the school day from a qualified special education teacher.

[166] The Tribunal noted that the HCDSB offered Regular Class with Withdrawal Assistance for the student in both the 2005 Settlement Agreement and in the April 28, 2009 IPRC statement of decision.

[167] The Tribunal noted that in the October 2009 response to the SEAB recommendations, the HCDSB confirmed that the student's placement would be Regular Class with Withdrawal Assistance. The HCDSB changed this to Regular Class with Resource Assistance in the disclosure documents prepared for this hearing.

[168] The Tribunal accepted the evidence heard from Dr. Edmunds and from the student about the potential benefits of regular withdrawal for gifted programming, which would enable the student to interact with other gifted or high achieving students for math programming.

[169] The student's identification as gifted, the student's strengths and needs and current achievement levels suggest that the student will benefit from access to planned regular withdrawal programming to meet the student's gifted needs.

[170] The student's identification as a student with Communication – Learning Disability (Dyslexia) as the second exceptionality suggest that the student will continue to benefit from access to withdrawal programming for the 'dyslexia' needs, as needed or as requested by the student.

[171] The Tribunal accepted Dr. Edmunds's evidence about the benefits of withdrawal programming to assist the student with written work. The Tribunal accepted the expert evidence that the student does not need intensive remedial help in a one-to one setting and Dr. Edmunds's opinion that the student is beyond the developmental period in which closing the gap is a realistic expectation. The Tribunal noted Dr. Edmunds's evidence that 15 to 20 minutes per day for withdrawal assistance to address the needs resulting from the student's learning disability would be adequate.

[172] The Tribunal considered the appellants' request for the ongoing one-to-one withdrawal programming for one semester of both Grades 11 and 12, with the goal "of closing the gap between the student's reading and writing skills and those of students with similar intellectual abilities by June 2012". The Tribunal did not accept that this is in the student's best interest and did not accept that the student requires 75 minutes of intensive special education help on a one-to-one basis each day at this stage of [the student's] education.

[173] The Tribunal accepted that the student will also continue to benefit from having the option to write tests and examinations in a quiet room or to have the opportunity to go to the resource room "when the student feels overwhelmed by the demands of the regular classroom".

[174] The Tribunal determined that Regular Class with Withdrawal Assistance is the most appropriate and enabling special education placement for the student to meet [the student's] identified strengths and needs arising from the student's dual exceptionality.

### **Programming within the Placement**

[175] Assessing the appropriateness of the placement, the Tribunal considered the special education programming that should be provided in the student's best interest in Grades 11 and 12. The programming must enable the student to build upon and maximize [the student's] giftedness and enable the student to compensate for the challenges that still arise from [the student's] learning disability or 'dyslexia'.

[176] The Tribunal was impressed by the extensive evidence demonstrating the student's achievement levels and high marks in the academic Grade 9 and 10 programs. There was unanimous agreement from all witnesses that the student is doing well; that the student is using intelligence and other competencies to compensate for the evident 'dyslexia'; that the student's comprehension is very good; and that there is no question that the student is a suitable candidate for the university-bound program in the senior grades. The Tribunal was particularly impressed with the student's ability to articulate [the student's] needs in an appropriate manner to the members of the Tribunal.

[177] The Tribunal accepted the student's evidence about the need for enhanced programming in the area of giftedness by accelerating and enriching the curriculum, and also providing the student with an opportunity to work together in a cluster or some other time-tabled withdrawal program with other gifted or high achieving math students. The student was very clear in stating that working with other very bright and gifted students who are interested in math would be fun and something that the student would very much enjoy. It was clear that the student understands math quickly and wants to learn new things.

[178] The Tribunal noted Ms. Rossini's statement that the HCDSB could consider clustering some gifted and high achieving math students. This could be highly beneficial to the student.

[179] The Tribunal accepted Dr. Edmunds's evidence about the benefits of withdrawal programming to meet the student's gifted needs and to provide the student with an opportunity to work with other gifted students. Dr. Edmunds commented positively on the student's excellent progress in secondary school in spite of [the student's] learning disabilities, stating, that "students with disabling conditions like the student, who are not gifted, do not do what the student is doing despite interventions".

[180] The Tribunal accepted Dr. Edmunds's evidence that the student is working at or close to maximum potential and has reached a stage where remediation is no longer the most appropriate primary intervention and compensation and accommodation should be the primary focus of programming for the student's Learning Disability.

[181] The Tribunal also accepted Dr. Edmunds's statement that the only difference in programming for a student who is gifted and talented versus a student who is gifted and talented and has a learning disability would be accommodations for the identified learning disability.

[182] In addition, Dr. Lovett's evidence that the student's reading difficulties are not anywhere near severe enough for the student to be a candidate for the kind of remedial programming that her [Dr. Lovett's] research program provides for dyslexic students indicated that although the student still needs specific help to meet the student's needs arising from having 'dyslexia', direct one-to-one instruction would not be appropriate at this time. The Tribunal accepted this evidence.

[183] The Tribunal also accepted the relevance of the following quote from Dr. Shaywitz's book, cited by both Drs. Lovett and Edmunds: "Dyslexia is a chronic condition; it is not outgrown. There is absolutely no evidence to indicate that a person who is dyslexic as an adult somehow metamorphoses into a person who is a fluent reader and uses traditional primary brain systems for reading."

[184] The Tribunal also accepted the student's evidence that the special education programming helped [the student] with writing, but did not benefit the student very much in reading. The student also stated that there was not enough writing activity in the regular English class.

[185] The Tribunal accepted the evidence provided by the respondent's witnesses, including the expert witnesses and also the student, about the benefits of assistive technology accommodations. This evidence led the Tribunal to conclude that the student needs to have ongoing support and accommodations for specific academic tasks such as writing and proofreading, either in the resource room or in the regular academic English class.

[186] The Tribunal determined that the student requires access to appropriate withdrawal programming to receive special education services and accommodations to meet [the student's] needs related to both [the student's] exceptionalities within the Regular Class with Withdrawal Assistance placement.

## **DECISION**

[187] In accordance with Subsection 57 (4) of the *Education Act*, the Tribunal grants the appeal.

[188] The Tribunal will remain seized of this matter until the end of the student's first semester in Grade 11 in January 2011, to decide any disputes that might arise in respect of the implementation of its orders.

## **ORDER**

[189] The Tribunal orders that the HCDSB comply with its own decision of October 6, 2009 to accept the recommendations of the SEAB and identify the student as an exceptional student, with the dual exceptionality of Communication – Learning Disability (Dyslexia) and Intellectual – Giftedness and ensure that this identification is consistently recorded on all documentation for the student.

[190] The Tribunal orders that the student's special education placement be Regular Class with Withdrawal Assistance. In this placement the HCDSB is to provide appropriate programming and accommodations to meet both of the student's identified exceptionalities, Communication – Learning Disability (Dyslexia) and Intellectual – Giftedness.

[191] The Tribunal orders that an IPRC be convened as soon as possible before the start of the 2010/11 school year to determine the specific components of the student's special education program to meet [the student's] dual exceptionality needs in Grade 11, based on the Tribunal's orders and the recommendations listed below.

[192] The Tribunal orders that the HCDSB correctly record the student's exemption from the French language compulsory credit for secondary school graduation in the student's IEPs and Ontario Student Record.

[193] The Tribunal orders that the HCDSB comply with its own agreement to update the student's psycho-educational assessment data to meet the stated requirements of Ontario universities for the admission and accommodation of students with learning disabilities.

## **RECOMMENDATIONS**

### **Regarding programming**

[194] The Tribunal recommends that the IPRC convened as a follow up to this hearing include in its statement of decision the following programming options to meet the student's identified gifted needs:

- a) Accelerating the curriculum to enable the student to make faster progress in math.
- b) Providing the student with appropriate enrichment opportunities within the math curriculum.
- c) Providing the student with a regularly time-tabled opportunity to work with other gifted and high achieving math students, such as in a cluster or withdrawal program.

[195] The Tribunal recommends that the IPRC convened as a follow up to this hearing include in its statement of decision the following programming components to meet the student's identified Learning Disability (Dyslexia) needs:

- a) Provision of support on an as needed basis, primarily for writing. This should include assistance with the planning, writing, previewing, editing and proofreading of essays and other written assignments in English and other language-based subjects from the SERT and from the classroom teachers, as needed. This may be provided on a one-to-one or small group setting basis or in the regular classroom, as deemed most appropriate or requested by the student.
- b) Provision of regular access to the special education resource room for the writing of tests, examinations or simply when the student feels overwhelmed in the regular class. Every effort should be made to ensure that the student is not allowed to fall behind [the student's] peers when the student returns to the regular classroom after spending time in the resource room.

- c) Direct and explicit assistance to enable the student to move from a primary focus on remediation to using compensatory strategies and assistive technology accommodation supports to meet [the student's] identified needs and achieve [the student's] potential.

[196] The Tribunal recommends that the student continue to receive access to and support in the utilization and application of assistive technology (hardware and software) integrated with the student's educational program. Consideration should be given to exploring the student's use of voice to text technology, for example the Sony memory stick, as suggested by Dr. Edmunds to compensate for the student's difficulties with writing.

[197] The Tribunal recommends that the student continue to have access to all necessary accommodations, including instructional, environmental and assessment accommodations, as included in the IEP.

[198] The Tribunal noted that the student's math teacher had agreed to be the student's mentor during Grade 10. The Tribunal recommends that the provision of mentoring support for the student, whether the mentor is the math teacher or someone else, be further explored and implemented in full consultation with the student.

[199] The Tribunal recommends that the student's transition plan include a process for supporting and promoting self-advocacy; better access to in-school guidance services; and the exploration of external options, provided that the student and the parents support these. These options could include the possibility of applying to the SHAD Valley program after Grade 11 and to Project ADVANCE at York University, after Grade 12. This course is a summer preparatory program for students with learning disabilities who are planning to attend postsecondary education in Ontario.

[200] The Tribunal recommends that the student participate in all future discussions and decision making related to [the student's] educational placement and programming, given the student's age and level of maturity.

### **Regarding Other Issues Raised by the Parties**

[201] The Tribunal declines to issue any declarations regarding this appeal, as requested by the appellants, as that is outside the Tribunal's mandate.

[202] The Tribunal declines to order the HCDSB to carry out annual standardized testing for the student or specify the tests to be used by the HCDSB.

[203] The Tribunal declines to order that the student should be provided with a modified version of the EWC4C in Grade 11 and EWC4U in Grade 12 on a one-to-one basis. If these credit courses are available at the school and the student is interested in taking them as [the student's] English courses then the student should, of course, be able to do so.

[204] The Tribunal declines to determine what credit, if any, the Principal should grant for the special education program that was provided to the student during the first semester of Grade 10. The granting of credits is the responsibility of the school principal. If the Principal requires some advice on how to proceed in this regard, he may consult HCDSB or ministry personnel.

### **OBITER**

[205] The Tribunal wants to extend its appreciation to both parties for ensuring that the focus of the hearing was on the student and on the student's best interests. The Tribunal was particularly pleased to hear directly from the student.

[206] The Tribunal urges the parties to work towards improving the way they communicate with one another, to co-operate and collaborate in the implementation of this decision and to ensure that the student is fully involved in all future decision making regarding [the student's] education and transition to postsecondary education.

[207] The Tribunal congratulates the student on [the student's] current levels of achievement and wishes the student well in the remaining years of secondary education and for the future.

Eva Nichols, Chair

---

Ross Caradonna, Member

---

Julie Lindhout, Member

---

**DATE: 2010 JUNE 9**