



ONTARIO SPECIAL EDUCATION (ENGLISH) TRIBUNAL File #57b

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

C., Appellant

-and-

The Durham District School Board, Respondent

Tribunal Members:

Eva Nichols	Chair
Julie Lindhout	Member
Noel Williams	Member

Appearances:

C. Parent

Brenda Bowlby Counsel for the Durham District School Board (DDSB)
Superintendent of Special Education, DDSB
Principal of Special Education, DDSB

Louise Sibbald Secretary

The hearing on the merits of the case was held on January 30, 31 and February 1, 2007 in Ajax, Ontario.

Introduction

On February 9, 2006, the Appellant appealed to the Ontario Special Education (English) Tribunal (the "Tribunal") regarding the special education identification and placement of her child. The child is a student with Autism / Pervasive Developmental Disorder (PDD), is twelve years old. Currently the student is in Grade 6 at an elementary school in Pickering, within the Durham District School Board (DDSB).

The Identification Placement Review Committee (IPRC), whose decision was appealed, was convened on September 30, 2005 and reconvened on October 27, 2005. The Special Education Appeal Board (SEAB) was convened on January 9, 2006. The DDSB considered the SEAB's recommendations on January 24, 2006 and communicated its decision to the Appellant on January 30, 2006.

The IPRC decision under appeal identified the student with Autism/PDD, but the box designating the student as an exceptional student was not ticked on the IPRC decision form. The IPRC decided to place the student in a Regular Class with Resource Assistance. Following the SEAB hearing, the IPRC decision was amended and a check mark was added to the box designating the student as an exceptional student. The Appellant did not accept this as an appropriate identification for the child.

Ms. Brenda Bowlby, Counsel for the DDSB, filed a motion on April 12, 2006, asking the Tribunal to dismiss the Appeal, on the grounds that there was no disagreement between the parties regarding the student's identification or placement. A preliminary hearing was held on June 27, June 28 and July 18, 2006, to determine whether the Tribunal had the authority to hear the Appeal. On September 21, 2006, the Tribunal issued its decision, confirming that the Tribunal had jurisdiction to hear the merits of the case.

On December 15, 2006, a teleconference was organized to discuss preliminary issues raised by the Appellant regarding the matter of disclosure and the issuing of summons to witnesses. At that time it was decided to hold a preliminary hearing on January 18, 2007, to hear submissions on the question of issuing summons to witnesses who are employees of the DDSB.

On January 18, 2007, the Appellant presented an oral listing of the individuals whom she wanted to summons to the hearing. The Tribunal heard arguments from both parties and issued its decision, without reasons, on January 19, 2007. The decision was to issue summons to five of the ten individuals, unless these individuals were brought forward by the DDSB as their witnesses.

The hearing on the merits of the case was held on January 30, 31 and February 1, 2007 in Ajax, Ontario.

At this hearing the Appellant asked to have her child identified as an exceptional student with Communication - Autism/PDD and to have the student placed in a self-contained Learning Strategies (LS) class at Highbush Public School. The Respondent stated that the appeal of the child's identification is moot, because the student is currently identified as an exceptional student with Communication - Autism/PDD. Regarding the student's placement, the Respondent asked the Tribunal to uphold the student's current placement in a Regular Class with Resource Assistance.

RELEVANT STATUTORY PROVISIONS AND CASES CITED

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

A number of specific sections of the *Education Act* concerning special education in whole or in part were used in the arguments presented by the parties. These were as follows:

Subsection 1: Definitions

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

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

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

Subsection 8 (3): Identification programs and special education programs and services:

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

- (a) require school boards to implement procedures for early and ongoing identification of the learning abilities and needs of pupils, and shall prescribe standards in accordance with which such procedures be implemented; and
- (b) in respect of special education programs and services, define exceptionalities of pupils, and prescribe classes, groups or categories of exceptional pupils, and require boards to employ such definitions or use such prescriptions as established under this clause.

Subsection 57 (3): Right of appeal:

Where a parent or guardian of a pupil has exhausted all rights of appeal under the regulations in respect of the identification or placement of the pupil as an exceptional pupil and is dissatisfied with the decision in respect of the identification or placement, the parent or guardian may appeal to a Special Education Tribunal for a hearing in respect of the identification or placement.

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

The Special Education Tribunal shall hear the appeal and may,

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

Regulations

Regulation 181/98: Identification and Placement of Exceptional Pupils, established under the *Education Act*, 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.

Special Education Tribunal Cases Cited

Both parties cited *E. v. Brant County Board of Education*, [1997] 1 S.C.R. 241

Ministry of Education Documents Cited

The Respondent cited *The Individual Education Plan (IEP): A Resource Guide*, 2004

PRELIMINARY ISSUES RAISED

The Appellant raised several preliminary issues regarding witnesses and evidence for this hearing for the Tribunal's consideration. These were as follows:

1. Witnesses

a) DDSB employees as witnesses

The Tribunal's decision, issued on January 19, 2007, stated that the Tribunal would issue a summons to five DDSB employees, unless any of these individuals were brought forward by the DDSB as their witnesses. The Appellant declined to issue the summons, because of financial considerations.

Prior to the hearing, the DDSB offered to bring two of the five individuals to the hearing on the first day to appear as the Appellant's witnesses, provided that the Appellant agreed to question them on that day and also agreed not to summons any other DDSB employees as part of her presentation of her case

The Appellant stated that this approach would "handicap both her case and the Tribunal in arriving at a decision in her child's best interest". She asked the Tribunal to order that the witnesses should be available throughout the hearing.

Ms. Brenda Bowlby, counsel for the DDSB, clarified that the school board had no obligation to bring any of the staff to the hearing. None of the staff specified by the Appellant were on the school board's witness list, as disclosed on January 17, 2007. Ms. Bowlby stated that having staff at the hearing means that they are not able to work with other children or carry out their regular duties within the school board. She clarified that Dr. Mary Morrison and Ms. Elizabeth Hubley were present, but would not be back on the subsequent days of the hearing. Therefore, the Appellant could ask them to present evidence on that day or not at all.

Decision

The Tribunal did not need to rule on this matter as the Appellant agreed to have the two staff members appear as her witnesses and withdrew her request for a Tribunal ruling on this matter.

b) Child witness

The Appellant submitted a written motion to the Tribunal prior to the hearing, asking for her child to be admitted as a witness, but not to be questioned or cross-examined at the hearing. Ms. Bowlby responded on behalf of the DDSB, expressing grave reservations about this step. Her letter, submitted to the Tribunal prior to the hearing, was admitted as evidence.

The Appellant spoke of the importance of the Tribunal meeting the child and observing the child doing specific academic tasks. In response to the offer made by the Tribunal to visit the student's school and meeting the student there, the Appellant expressed her opposition to this. She spoke of the impact of this on the student and the potential reaction of other students as well as the staff. In response to the evidence given by the DDSB's witnesses, the Appellant cited the E. case, the Human Rights Code and its references to privacy, dignity and integrity.

Ms. Bowlby presented evidence related to this issue by introducing her witness, Ms. Cynthia Waugh, Special Education Facilitator for the DDSB.

Ms. Waugh's evidence was focused on the student's difficulties with making a transition from one setting to another, on the student's anxiety, desire to please and the stress that the student demonstrates when the student feels that [the student] may not please people. Ms. Bowlby suggested that if the Tribunal wants to meet the student, this meeting should take place in the natural setting of the school.

Decision

The Tribunal deferred its decision until the end of the day to enable the Appellant to present the Appellant's case and introduce the evidence of the two DDSB staff who were present on the first day of the hearing.

On the morning of the second day of the hearing, the parties were told that the Tribunal agrees to meet the student. The Appellant was given a choice of two venues. The Tribunal could meet the student at the hotel where the hearing was held. In that location there would be an informal "meet and greet" discussion with the student, who would not be asked to demonstrate any academic skills. Alternatively, the Tribunal was prepared to attend the school and meet the student in the resource room, where the student could be asked to demonstrate to the Tribunal certain academic skills.

After consulting with the student's father, who is not an Appellant in this case, The Appellant opted for the informal dialogue at the hotel. This was arranged for the following morning. It was agreed that The Appellant and Ms. Waugh on behalf of the DDSB would observe this meeting.

2. Evidence

a) IEP

The Appellant stated that she was not opposed to the Tribunal considering the student's Individual Education Plans (IEP), as part of the DDSB's evidence. However, she wanted to introduce a court endorsement from 2004 as part of her evidence and stated that if she was not allowed to do so, then the DDSB should not be able to introduce the IEPs.

Ms. Bowlby stated that the court endorsement related to a child protection matter. It has no relevance for the student's education in general, to the IEPs in question or to the IPRC decision under appeal. Also, the endorsement is dated 2004, which is well before the date of the matters in front of the Tribunal.

Decision

The Tribunal upheld Ms. Bowlby's objection to the introduction of the court endorsement on the grounds of relevance. The IEPs are admissible, because they are current and provide information to the Tribunal on the student's identification and placement, the matters under appeal.

b) Letter

The Appellant asked the Tribunal to admit into evidence a letter from the student's father, dated January 29, 2007 and to consider its contents in its deliberations. Ms. Bowlby objected to the introduction of the letter on the grounds that the father was not present to be cross-examined about the letter's contents.

The Tribunal did not need to rule on this issue because The Appellant agreed to call the father as a witness. The Tribunal agreed to admit the letter into evidence and issued a summons to the father to appear before the Tribunal.

ISSUE

The issues before the Tribunal are:

3. to determine whether the student has been identified as an exceptional student, and
4. to determine the most appropriate identification and placement to meet the student's needs.

POSITIONS OF THE PARTIES

Appellant's Position

The Appellant stated that she was appealing both identification and placement.

Identification

The Appellant said that the student was currently not identified as an exceptional pupil, because the DDSB had taken away the student's identification as an exceptional pupil, and she wanted the student to be identified as an exceptional pupil with Communication – Autism/PDD.

The Appellant reiterated that the DDSB had declined to identify the student as an exceptional pupil at the IPRC on September 30, 2005, which was a placement review meeting. The IPRC was reconvened October 27, 2005, to consider both identification and placement. The box on the IPRC decision form which is usually checked to indicate that a student is identified, was left blank, although the form described the student's exceptionality as Communication – Autism/PDD. The Appellant interpreted this as the DDSB's decision to revoke the student's identification as an exceptional student. Although the Appellant acknowledged that a correction was made in February 2006, to the IPRC decision following the SEAB hearing, by checking the box indicating whether the student is an exceptional student or not, she did not accept this as a formal identification statement.

Placement

The Appellant stated that the current placement in a Regular Class with Resource Assistance is not meeting the student's needs. The Appellant said that in this placement the student is not getting the level of individual support that the student needs. In the original Notice of Appeal, the Appellant did not ask for an alternative placement to the regular class, but asked that the description of the Resource Assistance be more specific. However, at the jurisdictional hearing, she requested a placement for the student in a Learning Strategies class at the student's current school. In her opening statement at this hearing on the merits of the case, she again requested the same placement: the Learning Strategies class at the student's current school.

Respondent's Position

Identification

Ms. Bowlby stated that there is no disagreement between the parties on the student's identification. She stated that the DDSB had identified the student as an exceptional student with Communication - Autism/PDD, which is the exceptionality designation wanted by the student's mother, the Appellant.

Ms. Bowlby stated that the DDSB would present evidence from two main sources on this matter. These are:

- a) the evidence given at the jurisdiction hearing by Ms. Liana Lafranier, principal of the elementary school and the chair of the IPRC, and
- b) the assessment report written by Dr. W. Ford, a clinical psychologist, who assessed the student during 2003.

Ms. Lafranier gave evidence in an earlier phase of the proceeding, specifically during the hearing on the matter of jurisdiction which was held on June 27 and 28 and July 18, 2006. The transcripts of this earlier part of the hearing and the evidence presented at that time form part of the record and are admissible as evidence for both parties on the merits of the case.

Ms. Bowlby quoted Ms. LaFranier's testimony from the jurisdiction hearing. At that time Ms. Lafranier testified that, at the 2005 IPRC meeting, she had forgotten to check off the box marked "identified", but following the decision of the Special Education Appeal Board hearing in January 2006 corrected the form. The IPRC's written decision stated that the student's identification was Communication-Autism/PDD. Ms. Lafranier stated that this exceptionality designation was changed from the previous Multiple Exceptionalities designation, and that the change was based on the recommendation of Dr. Ford, the psychologist who carried out the student's most recent psycho-educational assessment.

Ms. Bowlby asserted that the Appellant's insistence that the student was "stripped of identification" was untrue. The Board remains in agreement with the student's identification. The Respondent submitted that therefore the appeal of identification is moot.

Placement

Ms. Bowlby stated that the Board believes that the best placement for the student is a Regular Class with Resource Support and not the Learning Strategies (LS) class, as requested by the Appellant.

In support of this position, Ms. Bowlby stated that the Board would present evidence from Ms. Waugh, a special educator with expertise in autism. Ms. Bowlby indicated that evidence from the previous hearing on jurisdiction given by Ms. Lafrenier is consistent with that of Ms. Waugh. The position of both educators is that the student's needs are best met in a Regular Class.

Ms. Bowlby stated that Ms. Waugh will testify about programming in the elementary LS class and why it would not be in the student's best interest to be placed in that class. In fact, the Board believes that it would be "quite the opposite".

SUMMARY OF EVIDENCE

Appellant's Evidence

The Appellant gave evidence on her own behalf. In addition, evidence was presented by three witnesses: Elizabeth Hubley, audiologist for the DDSB, Dr. Mary Morrison, chief psychologist for the DDSB and the student's father, who was not an Appellant in the case. The Appellant reiterated that she wanted the student identified as an exceptional student with Communication - Autism/PDD and wanted the student to be placed in the Learning Strategies Class at the student's current school.

Ms. Hubley, a member of the DDSB's audiology staff who had assessed the student, testified that the student has been diagnosed with central auditory processing difficulties which have made it difficult for the student to focus on important information, while ignoring extraneous or meaningless information. She stated that this affects the student's ability to understand instructions which, in turn, can cause the student to under-perform and might lead to anxiety. She stated that on the basis of a listening performance assessment, the student was provided with an FM system, which assists with highlighting the teacher's voice over background sounds. She testified that the student has successfully used this system, which will continue to be available to the student as long as the student benefits from its use. She also testified that the particular system used by the student was chosen on the recommendation of the clinical audiologist and the wishes of the Appellant. On cross-examination, Ms. Hubley testified that the student is now using the system selectively, deciding when [the student] needs to use it.

Dr. Morrison, the DDSB's chief psychologist, has observed the student at school but has not assessed the student. She testified that she found Dr. Quilty's diagnosis of Pervasive Developmental Disorder - Not Otherwise Specified (PDD-NOS) in 2000 useful in moving ahead with programming, but that the report made no recommendations on placement. She then spoke to Dr. Ford's assessment of February, 2005. Dr. Ford recommended that the student's identification be changed from Multiple Exceptionalities with Communication - Autism and Physical - Physical Disability to Communication - Autism/PDD. Dr. Morrison stated that she agreed with the decision made by the September 2005 IPRC regarding identification and placement.

Dr. Morrison stated that the student still needs to work on [the student's] peer relations and on getting along with others. She commented that, having observed the student in the student's regular class, the student has a very supportive peer group and supportive teachers. This gives the student age-appropriate role models to help the student develop the social skills the student needs. She also said that the student's reading skills as well as computer skills have developed beyond what would be expected of students in the LS class. The LS class would not provide the kind of academic programming the student needs, and the placement would not make the student's anxiety, which is typical of students with autism, go away.

With regard to Dr. Ford's recommendation that the student get two 40 minute periods per day of withdrawal assistance, Dr. Morrison explained that because of the time-tabling in the school, the student gets nine half-hour sessions per week. At the school the periods are 30 minutes long, and she believes that the student's academic needs are best met by having the student's programming fit in with the general structure of the day within the regular class.

Dr. Morrison commented on the student's self-injurious behaviour and suicide ideation, which had been raised as a concern by both parties at the jurisdiction and the current hearings. Dr. Morrison testified that there is a distinct difference between the two. Self-injurious behaviour is a habitual type of behaviour, while suicidal ideation arises out of an emotional frustration with a particular situation. She testified that suicidal ideation is not unique to students who have autism, and that it would not typically be noted on a student's IEP. She also stated that while the school would "naturally pay a little more attention to the student", safety is not a significant current issue, although it may have been an issue in the past.

She testified that she had observed the student two or three times a year for two to three hours at a time in the student's regular classroom and that the student is interacting very well with [the student's] peers and teachers. She stated that if the student were placed in a Learning Strategies classroom with students who are below the student's level of academic achievement, the student would be wondering why [the student] was in that class. Dr. Morrison also spoke of her concerns about the other students in the LS class being appropriate role models for the student. This proposed placement could be damaging to the student's self-confidence and self-esteem.

Testifying on her own behalf, the Appellant spoke first about the student's speech difficulties. Several speech language assessments, dated between 1998 and 2005, were entered into evidence. These showed that, although the student has made good progress, the student still has moderate speech difficulties. The Appellant spoke about the fact that the student still requires speech therapy, for which [the student] has been on a waiting list with Durham Access To Care for more than a year. She also testified that the regular class placement is not supporting the student to the extent that she believes the student requires, in order to focus more on "[the student's] potential than on [the student's] handicaps". She stated that she wants the student to be placed in a self-contained LS class that would help the student improve in the student's greatest area of difficulty which is written language. She also stated that she wanted a placement with an integration component and one that enabled students to graduate from Grade 8 and subsequently from secondary school.

She stated that the student has strengths in Mathematics. In spite of that, the student's achievement in math is limited because of language processing difficulties. The student also has sensory, balance and fine and gross motor developmental issues. In addition, she stated that there are no medical orders on the record for the student, but that the student does have medical issues that have an impact on the student's ability to learn. She confirmed that the student is on daily medication.

During cross examination, the Appellant stated that she is concerned that the challenges for the student are getting harder and that the student is suffering anxiety. Responding to a question from the Tribunal, the Appellant stated that the issue of suicidal tendencies only arose once.

The father testified that, according to Dr. Ford's report, the student has needs in written language. Dr. Ford wrote that the student has the ideas, but cannot write them down. The father, therefore, asked that the student be given extra time and assistance with penmanship. He also emphasized that consistency is an important aspect of life for his child. He described that the student's teacher last year was a great teacher, much loved by the student, and she "got the best work out of [the student]". He also testified that, in his opinion, with the student's work on the Dragon Dictate software, "the student is teaching the computer to write, but the student is not learning to write". He stated that he wants the Tribunal to decide what is best for the student, rather than merely resolving the disagreement between the Appellant and the

DDSB. During cross-examination, the father agreed that the student has friends at the school and that is why he wants the student to stay there.

In her summation, the Appellant spoke about the fact that the student is a student who is entitled to an appropriate identification and to a special education placement. She spoke about the student's need to have an opportunity to develop [the student's] skills. She stressed that she saw a difference between "developing" and "improving" academic skills and that the student's IEP and report card only speak of developing skills, which implied that the student does not as yet possess the requisite skills. She urged the Tribunal to make a decision in the student's best interest.

Respondent's Evidence

Ms. Bowlby called only one witness to give evidence on behalf of the Respondent: Ms. Cynthia Waugh, special education facilitator for the DDSB.

Identification

Ms. Bowlby, in her opening statement, summarized the evidence that had been given by witnesses during the jurisdiction hearing. The student first began attending the DDSB in 1999. In January 2000, the IPRC identified the student with Communication - Autism. At an October 1, 2002, IPRC, this identification was changed to Multiple Exceptionalities: Communication - Autism and Physical - Physical Disability.

In February 2005, the DDSB once again changed the student's identification to Communication - Autism/PDD. This change was based upon the results of a psycho-educational assessment conducted by psychologist Dr. W. G. Ford, which was arranged and paid for by the parents and was accepted by the DDSB.

The next IPRC was held in September 2005. Mrs. Bowlby stated that the Appellant had taken the position that the DDSB has not identified the student as exceptional because on the IPRC decision form the box beside the word "identified" was blank. The circumstances of this situation and how it had been remedied following the Special Education Appeal Board (SEAB) hearing in January 2006, were described in detail by several witnesses during the jurisdiction hearing.

Ms. Bowlby reiterated that it was untrue that the student was ever stripped of [the student's] identification as an exceptional student. Furthermore, Ms. Bowlby stressed that the school board's identification was based upon the recommendation of Dr. Ford. Thus both sides were in agreement regarding the student's identification as Communication-Autism/PDD and therefore the appeal of the student's identification was moot.

Placement

Ms. Bowlby described the student as a high functioning Grade 6 student. This description was echoed by Ms. Waugh. The student's most recent report card, dated November 28, 2006, was entered into evidence. This report card indicated that the student is working on the Provincial curriculum, receiving accommodations in most core areas and receiving reasonable grades, mainly Bs and Cs. The only area where the student's program is modified is the writing component of the English curriculum. Therefore, the Board's position is that the student's current placement, Regular Class with Resource Support, is the best placement for the student.

Ms. Waugh gave evidence about her involvement with the student and her observations of the student in the classroom. Ms. Waugh said that she first met the student in the fall of 2004. In the course of that school year, her involvement with the student was limited, because the student was doing quite well and, as a result, her advice and guidance were only required occasionally. During the 2005-2006 school year, she had the opportunity to observe the student on several occasions and to speak with the resource teacher. Her last encounter with the student was a week before the Tribunal hearing. Ms. Bowlby asked Ms. Waugh to relate her observations about the student in the current placement.

Ms. Waugh described the student as “for lack of a better term, a model student”. She described the student as polite, a student who follows the teachers’ directions and classroom routines very well. The student participates in classroom discussions, agreeing or disagreeing when [the student] feels the need to do so. The student is engaged the classroom work. Ms. Waugh stated that the student’s willingness to ask questions and to give answers indicated that the student was comfortable in the student’s classroom. She also said that, “If I didn’t know the student, I really would not be aware that [the student] was a student who was identified with some special needs.”

When commenting on the student’s engagement with the student’s classroom peers both inside and outside the classroom, Ms. Waugh related that the classroom teacher said that the student is “just like any other student”. Ms. Waugh said that, at her most recent observation, she saw the student working in pairs and being quite focused. Ms. Waugh said that she had observed the student in the school corridor as well as outside in the playground and that the student looked “pretty typical”. The student interacted with [the student’s] peers when getting ready to go outside and, once outside, was engaged with four or five peers talking and playing in the snow. Ms. Waugh indicated that the student was certainly part of the group.

Ms. Waugh also indicated that the student is making quite good progress in the area of social skills development, although [the student] still has alternative expectations and outcomes recorded in this area on [the student’s] IEP. She described her observation of the student during less structured times, such as in the gym class or in the playground. When the students start playing a game and the game is not going the way the student feels that it should, the student may become a little agitated and anxious. But the student is easily redirected. Ms. Waugh said that she has seen the student “time out”, so that when the student could not manage a situation, the student would go and sit down for a while. This was accepted by the teacher. Then, when the student was ready, [the student] would rejoin the game. Ms. Waugh was of the opinion that this shows some self-awareness and self-regulation.

Ms. Waugh spoke of the student’s difficulties with transitions, the student’s anxiety when faced with changing circumstances and some of the self-injurious behaviours, when stressed. She stated that this is quite usual for students with autism, even those who are as high functioning as the student. She stated that the student has “communication difficulties in the social realm”. She also stated that although there are no major safety concerns about the student on a routine basis, safety is always a consideration in a special education placement.

Ms. Waugh said that, to the best of her knowledge, while the student was following the Ontario curriculum and doing quite well in most subjects, modifications were provided for the student in writing. The writing problems that the student experiences are typical for children with autism and consist of difficulties with fine motor skills and the organization of ideas. The student does much better when expressing thoughts orally rather than writing them down. The program that the school board has adopted to help the student is “the writing strand”. This is a series of computer programs which the student can use, so that the student is not dependent upon a

scribe. It helps the student to become more independent. Ms. Waugh indicated that these tools are available to the student throughout the day at school.

Instructional support for the student is provided by both the Special Education Resource Teacher (SERT) and the Educational Assistant (EA), in addition to the classroom teacher. This support is typically provided in the resource room when the student's class has a French lesson and also at times when it is considered beneficial for the student. For most of the time, support is given in the regular classroom, where the student is given every opportunity to do as much as possible, independently, amongst [the student's] classroom peers.

Ms. Bowlby questioned Ms. Waugh about a document, entered into evidence, that Ms. Waugh had prepared for the Tribunal hearing to compare the contents of Dr. Ford's psycho-educational assessment report with the student's current IEP and report card. Ms. Waugh stated that the DDSB's program for the student is following Dr. Ford's recommendations and that the student is responding in a positive way, as evidenced by the student's current report card. Ms. Waugh agreed that Dr. Ford recommended an "appropriate academic placement" for the student without specifying the type of class where the student should receive special education programming.

Ms. Bowlby asked Ms. Waugh to look at the description of the LS class in the DDSB's *Special Education Plan*, and asked her to give a brief overview of the program that the class is designed to provide. Ms. Waugh said that most students who attend this class come from the same family of schools, and some are transported to the school. The students in this class at the student's school are made up of two groups. One group consists of students from Grade 4 through 6 who participate in the class for a half-day, focusing primarily on language and math. During the balance of the day they are integrated with their age-appropriate peers for other, typically non-core subjects. During the other half of the day, the LS teacher is with the grade 7/8 group, providing core subject instruction. Most of these students are performing at least two years below their grade level in reading, writing and math and are usually identified as having Learning Disabilities. Ms. Waugh stated that the student does not have Learning Disabilities.

Ms. Waugh went on to say that students in the LS class have typically experienced a lot of academic failure before coming to the class. Furthermore, many of the students present with some significant social and behavioural problems. The main focus of the program is to provide remediation in addition to teaching specific learning strategies. Many of the students in the class are either non-readers or have very low reading ability and this, in turn, affects their math skills. Technology is used extensively with mixed success in some cases.

Ms. Waugh stated that the student can read and already uses the technology to which the LS students are being introduced. The student's social needs are, for the most part, quite different as they relate more to difficulties with social insight or social pragmatics, whereas the LS class students have experienced a lot of school failure and, as such, tend to be "more manipulative and work-avoidant". The student is very polite and is not a manipulative student. The students in the LS class require a lot more help and incentives to keep them motivated because of their history of school failure. Ms. Waugh stated that the student would probably react quite negatively to being relocated to the LS class.

Ms. Bowlby asked Ms. Waugh to provide an overview of the student's current placement. Ms. Waugh stated that the student is in a regular Grade 6 class with Resource Assistance. The student has the support of an EA for the equivalent of half a day, which can occur at various times throughout the day. The student spends the whole day with the same group of students,

which is important for the student as it offers continuity. Ms Waugh said that the student is making steady progress and following the same pathway that [the student's] peers are taking. The student continues to make the progress that you would hope a student with autism in a regular class placement would accomplish from year to year. When Ms. Waugh asks members of staff who are involved with the student how the student is doing, their response is that the student is doing very well.

When asked about the student's IEP and its contents, Ms. Waugh stated that some of the inconsistencies noted within the IEP document related to the DDSB's use of an "IEP engine and the drop down menus". She stated that such computer programs do not always allow for an individualized description of programming.

Ms. Waugh concluded her evidence by stating that the best placement for the student is Regular Class with Resource Assistance and the most appropriate identification is Communication - Autism/PDD.

Meeting With The Student

The members of the Tribunal met with the student on the morning of Thursday, February 1, 2007. Due to circumstances related to the student's brother, the Appellant was not present for the meeting. However, she agreed to the meeting going ahead, in spite of her unavailability. Ms. Waugh was present as an observer, sitting to the side, but not participating in the discussion.

Most of the discussion focused on the student's interests, the books the student likes to read, the games the student likes to play and the activities that the student enjoys outside school. As agreed with the parties, the student was not asked to comment directly on [the student's] school experiences nor was the student asked to demonstrate any academic skills.

The panel found the student to be a polite and engaging child, who appeared to have no difficulties in meeting with and speaking with three adults, whom [the student] did not know. The student spoke well, maintained eye contact with the panel members, answered the questions in a polite way in complete sentences. The student demonstrated that [the student] listened well by making reference at the end to a comment made by the chair at the beginning of the discussion.

REASONS

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

"The Special Education Tribunal shall hear the appeal and may,

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

1) Identification

Both parties presented the assessment history without any dispute. With the exception of the assessment carried out by the DDSB in 2000, the assessments had been arranged and in some cases paid for by the parents. Both parties stressed the importance of the results of the most recent psycho-educational assessment, carried out by Dr. W. G. Ford, which confirmed the student's identification as a student with autism and recommended that the student's

identification be Communication - Autism/PDD. This assessment report also contains many recommendations, which were used by the DDSB in developing the student's program, services, supports and accommodations.

The assessments entered into evidence included the following:

- Dr. Robert Quilty, DDSB psychologist: psychological assessment, April 18, 2000;
- Hearing Health Care Consultants Group: audiological assessment, December 13 and 17, 2001;
- Dr. W. G. Ford, Ford and Associates: psycho-educational assessment, February 3, 2005;
- Grandview Rehabilitation and Treatment Centre of Durham Region: speech-language therapy and medical screening assessment, September 15, 1998;
- Inter-Action: speech-therapy assessment, April 21, 2005;
- Toronto East General Hospital: speech-language screening, August 11, 1998;
- DDSB: speech/language pathology assessment, October 7, 2005;
- Speech, Language and Learning Centre: speech/language assessment, November 10, 2001;
- Hospital for Sick Children, Child Development Centre, Department of Paediatrics, Division of Neurology: medical assessment, October 26, 2001;
- Inter-Action: sensorimotor assessment, January 25, 2005;
- Dr. Till Davy, M.D.: medical assessment, May 26, 2005;
- Dr. Mark Handley-Derry, M.D.: medical and developmental assessment, December 3, 2001.

Although the assessments introduced into evidence focused on diverse aspects of the difficulties faced by the student, there was consensus on the student's diagnosis of high functioning autism spectrum disorder, which directly leads to the IPRC identification of Communication - Autism/PDD.

The audiological assessments confirmed the presence of a central auditory processing disorder, which often appears in conjunction with autism. The various speech-language assessments identified that the student entered school with a severe speech delay. The most recent assessment confirmed that the student's difficulties are now more in the mild to moderate range, but that the student still would benefit from speech therapy to address this need. The occupational therapy and sensorimotor assessments confirmed that the student continues to have problems with cursive writing due to [the student's] fine motor skill difficulties. Evidence was given that this is a common feature of autism.

The student had been identified with Multiple Exceptionalities during the student's early years in school. Subsequently, the student had the dual designation of Communication - Autism/PDD and Physical - Physical Disability. It was clarified that the Physical Disability identification related to earlier speech problems due to oral surgery and the student's lack of teeth. This identification was changed on Dr. Ford's recommendation to Communication - Autism/PDD.

The Tribunal considered the Ministry of Education's categories and definitions of exceptionalities, as set out in the *Special Education Guide: A Guide for Educators*, (2001). Based on the assessment results that both parties accepted, and because of the evidence presented describing the student's numerous difficulties, the Tribunal considered the definitions of Speech Impairment and Language Impairment as potential secondary identifications in addition to the definition of Autism.

Speech Impairment is defined as follows:

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

Although evidence was provided to the Tribunal that the student would benefit from speech therapy, the evidence and assessment results did not cite any perceptual motor problems, as the reason for the student’s difficulties. Therefore, the Tribunal determined that the student should not be identified as a student who has a Speech Impairment.

Language Impairment is defined as follows:

“A learning disorder characterized by an impairment in comprehension and/or the use of verbal 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) include one or more of:
 - language delay;
 - dysfluency;
- voice and articulation development, which may or may not be organically or functionally based.”

Although evidence was provided to the Tribunal indicating that the student has difficulties with the language part of the core curriculum, this evidence stressed that the student’s most significant difficulties relate to writing problems rather than language processing, as described in this definition. Therefore, the Tribunal determined that the student should not be identified as a student with a Language Impairment.

The Tribunal next considered the definition of Autism. Autism is defined as follows:

“A severe learning disorder that is characterized by:

- a) disturbances in:
 - rate of educational development;
 - ability to relate to the environment;
 - mobility;
 - perception, speech and language;
- b) lack of the representational symbolic behaviour that precedes language.”

The Tribunal noted that all the assessments entered into evidence referred to the student as a student with Autism and both parties agreed that the student should be identified as an exceptional student with Communication - Autism/PDD. The Tribunal agrees with this identification. The Tribunal accepts that the omission of the check mark in the identified box on the IPRC decisions of 2001 and 2005 was an oversight on the part of the DDSB, that has been corrected and should not occur again. It is the Tribunal’s opinion that the student’s identification, as an exceptional student, should be maintained, as long as it is in accordance with the available assessment results.

The student is 12 years old and, from a developmental point of view, the student will benefit from having:

- an updated psycho-educational assessment, as recommended by Dr. Ford,

- an updated audiology and speech/language assessment, to determine the need for the continued use of the FM system and as the student awaits the provision of speech services from Durham Access to Care, and
- a medical assessment regarding the student's ongoing monitored use of medication as the student enters puberty.

2) Placement

The Appellant wants the student to be placed in a self-contained special education class at the student's school, the LS class. She stated that the current placement is not meeting the student's needs and the student is regressing in this placement.

The Respondent stated that the student's current placement in a Regular Class with Resource Assistance is the right special education placement for the student. The DDSB's primary witness, Ms. Waugh, and The Appellant's witness, Dr. Mary Morrison, the DDSB's chief psychologist, both stated that the LS class would be an inappropriate placement for the student.

The Tribunal considered both these placement options.

The Regular Class with Resource Assistance placement is described in the *Special Education Guide: A Guide for Educators*, (2001) as follows:

"The student is placed in the 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."

The LS class is described in the DDSB's *Special Education Plan* as follows:

"Students in Learning Strategies Classes within the DDSB have a significant discrepancy between academic achievement and intellectual ability. Programming is multi-dimensional and focuses on specific strategies to compensate for areas of deficit in the learning profile."

On the basis of the description of the LS class and its students, and on the basis of the comparison with the student's identified needs and strengths, the Tribunal determined that the student would not be well-served by being moved to a Learning Strategies class at any available location.

The Tribunal notes that in the original Notice of Appeal, the Appellant stated that her appeal of placement related to the fact that the description of Resource Assistance needed to be more specific in terms of how it meets the student's needs. The Tribunal agrees that clear directions need to be included in the student's IEP as to how the program is to be delivered to meet the student's needs.

The IEP states that the student receives "100% integration with E.A. support". In the evidence provided by witnesses it was stated that the student is withdrawn from the regular class during the French period to receive individualized help with writing from the special education resource teacher. This is the one part of the curriculum where the student needs modified programming. As part of this intervention, the student is provided with access to adaptive technology, including the use of a laptop computer (IBM Think Pad) and Dragon Dictate software. This will help the student to develop and strengthen the conceptual and organizational aspects of writing instead

of purely focusing on penmanship. There were also references to some small group activities that the student participates in from time to time.

Based on the evidence provided by witnesses, including Dr. Ford's assessment results, it is clear that the student continues to require a modified program in the writing component of the English curriculum and accommodations in the other core subject areas. This assistance should continue in order to meet the student's needs. The student also has ongoing social skill needs, which should continue to be addressed in a planned way, utilizing the most effective programming possible.

Witnesses for both parties stressed the benefits that the student is receiving from being in a Regular Class with a consistent group of students who accept the student well and who are good role models for the student.

The Tribunal also understands the Appellant's request for integration, for programming and supports that lead to Grade 8 graduation and potentially to secondary school graduation. These are all reasonable goals for a student who is as high functioning as the student and being identified with Autism should not prevent the student from achieving them. At the same time, it is important that the student continue to have access to a modified program and one to one intervention with an appropriately qualified special education teacher to address the student's needs.

Therefore, the Tribunal determined that the most enabling special education placement for the student at this stage of the student's education is Regular Class with Withdrawal Assistance. This placement is defined in the DDSB's *Special Education Plan* as follows:

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

This placement will enable the student to continue at the current school with the student's current peer group in the regular Grade 6 class. At the same time, the placement will ensure that the student's needs are met in a consistent way, with regular withdrawal for less than 50% of the school day and the withdrawal programming provided by a qualified special education teacher rather than the EA.

It is important to note that placement in a Regular Class is only beneficial to an exceptional student if the programming is well described, such that both the parents and teachers understand how the programming is linked to and meets the student's strength and needs. This is done in the student's IEP.

3) IEP

The Individual Education Plan is a very important component of the program provided to exceptional students. The ministry's *IEP Resource Guide* (2004) describes the IEP as an accountability tool for the student, the student's parents, and everyone who has responsibilities under the plan for helping the student meet the stated goals and learning expectations as the student progresses through the Ontario curriculum. To meet this expectation and to serve as an accountability tool, the IEP needs to be individualized and reflect the strengths and needs that relate to the individual student's learning. It is supposed to include any specialized health support services that the student requires and a list of the accommodations the student requires to help him or her learn and demonstrate learning.

Evidence was given that certain components of the student's IEP were probably created through the application of an IEP engine and a drop-down box within it. As a result, as described earlier, some of the information on health consideration, special services and personalized equipment and integration and modifications/support within the student's IEP do not necessarily reflect the student's situation.

Evidence was also given that the ministry has directed school boards not to include any references to the use of medication on the IEP. At the same time, evidence was also given to the Tribunal by the Respondent that when the student has not taken [the student's] medication, the student's behaviour and attitude become problematic and the student may engage in self-injurious behaviour. The *IEP Resource Guide* allows for the inclusion of health support services information on the IEP under certain circumstances. Where the parents request the inclusion of such information, this should be done, especially where the results impact the student's learning. In the student's case [the student's] medication use should be recorded on the IEP.

The IEP is best written in language that parents and teachers not familiar with special education will understand. For example, it is not clear to everyone that the IBM Think Pad is a laptop computer. Further, the description of the "planned frequency" for the involvement of support staff, as it is recorded on the IEP should be clear to all concerned. Terms like "daily" without specifying what that means in terms of time allocation and "as required" are not clear enough for parents and sometimes teachers to know what help the student receives.

The *IEP Resource Guide* states that it is most helpful to parents if the IEP indicates whether the student is scheduled to participate in a provincial assessment during the current school year. The student is in Grade 6 and it is assumed that the student will participate in the provincial assessments. There is no reason to assume otherwise. Assessment accommodations for the provincial assessments must be identified in the IEP. The Tribunal notes with concern that this section of the student's IEP has been left blank.

The Tribunal recommends that the student's IEP be amended in accordance with the items identified above, thereby ensuring that the IEP is an accurate and appropriate accountability tool for the student's education.

DECISION

The Tribunal grants the appeal.

1. The Tribunal orders that the Durham District School Board continue to identify The student as an exceptional pupil with Communication - Autism/PDD.

In accordance with the recommendations made by Dr. W. G. Ford, this identification should be reviewed following a full psycho-educational re-assessment, when the student is in Grade 7. At the same time, the student would benefit from a follow up audiological and/or speech and language assessment to clarify the student's ongoing need for the FM system and speech therapy.

2. The Tribunal orders the DDSB to change the student's placement to Regular Class with Withdrawal Assistance, in accordance with the description of special education placements in the DDSB's 2005-2006 *Special Education Plan*.

This placement shall enable the student to continue in the student's current school and class with the student's established peer group and teachers, while at the same time enabling the student to receive consistent intensive help from a qualified special education teacher for less than 50% of the school day to meet the student's identified needs. Exemption from French should be maintained.

3. The Tribunal orders the DDSB to amend the student's IEP to reflect the above identification and placement. The Tribunal recommends that the IEP be amended as follows:

- (i) under Health Considerations there should be a reference to the student's daily use of medication;
- (ii) in the descriptions of Integration and Modifications/Support (boxes on the first page), the IEP should reflect the student's current level of individualized service;
- (iii) in the description of Areas of Need, it is in the student's best interest that there be a reference to the student's identified safety needs. The Tribunal also notes that all of the student's needs are described with a heading of "the student requires significant assistance". There was evidence provided to show that the student has made some significant progress in some areas, e.g., participation in the class, certain social and communication skills, reading, etc. These should be noted in the needs statement in terms of assistance to improve the student's skills rather than developing them from a baseline level;
- (iv) in the description of the role of Human Resources and the planned frequency of the involvement of support staff with the student, the amount of time that staff spend with the student should be clearly specified. In particular, there is a need for the IEP to describe the type and extent of support that is being provided by the EA both in and outside of the classroom.
- (v) under Provincial Assessments, the student's accommodations in the classroom should be listed to enable the student to utilize these same accommodations for the Provincial Assessments in Grade 6.

OBITER

The Tribunal wants to express its appreciation to the student and to both parties for facilitating the meeting with the student. We encourage the student to continue to utilize the supports and accommodations that are available to [the student]. It is the Tribunal's hope that, following the receipt of this decision, the parties will communicate and collaborate more effectively, with a continued focus on the student's needs and best interests.

Eva Nichols, Chair _____

Julie Lindhout, Member _____

Noel Williams, Member _____

Date March 31, 2007