



ONTARIO SPECIAL EDUCATION (ENGLISH) TRIBUNAL

File #2008-04

IN THE MATTER OF the *Education Act*, R.S.O. 1990, c. E.2, as amended, ss. 57(3),
IN THE MATTER OF *Ontario Regulation 181/98*,
AND IN THE MATTER OF the minor child born May 16, 1999

BETWEEN

Ms. J. K.. Appellant

-and-

The Toronto District School Board, Respondent

Tribunal Members:

Marilyn Thain	Chair
Carlana Lindeman	Member
Jim McCaughey	Member

Appearances:

Ms. J. K.	Parent
David Baker	Legal Counsel for the Appellant
Ms. Zahra Binbrek	Articled Student-at-Law
Paul Howard	Counsel for the Toronto District School Board (TDSB)
Ms. Megan Marrie	Counsel for TDSB
Marilyn Lowe	Supervising Principal of Special Education, TDSB

Louise Sibbald	Secretary
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The hearing on the merits was held on December 1, 2008 to December 5, 2008, in Toronto, Ontario.

INTRODUCTION

[1] On March 20, 2008, Ms. J. K. (the “appellant”) appealed to the Ontario Special Education (English) Tribunal (the “Tribunal”). The appellant did not agree with the Toronto District School Board’s (the “respondent”) decision to place her child (“the student”) in a Special Education Class.

[2] The student is a nine year old student enrolled in Grade 4 at School A. The student receives Withdrawal Services each morning in the Home School Program (HSP). In the afternoon the student receives Intensive Behaviour Intervention (IBI) in the home from an instructor therapist from Leaps and Bounds, an agency that provides IBI services. On October 7, 2008, the appellant notified the school that she was withdrawing the student from school as she was “extremely concerned about [the student’s] safety and the safety of others”. At the time of the hearing the student had not returned to school.

[3] The issue before the Tribunal is to decide on a placement for the student that is in the student’s best interests.

BACKGROUND

[4] On June 3, 2003, the Identification Placement and Review Committee (IPRC) identified the student as exceptional: Communication – Autism. The IPRC placed the student in a Special Education Class for half days. The appellant signed the statement of decision which indicated she agreed, but chose to enrol the student in the Berner Trail Child Care Centre.

[5] The IPRC review held on May 25, 2004 confirmed the original identification and placement. The appellant signed the IPRC statement of decision indicating agreement.

[6] From September 2004 to June 2006, the student attended mornings in a Developmental Disability (DD) Class at School B.

[7] On March 21, 2005, the student began receiving IBI in the home twenty hours weekly from an instructor therapist from Leaps and Bounds. This was recently increased to twenty-five hours weekly.

[8] On November 30, 2005, an IPRC review was held at the request of the appellant. The IPRC statement of decision changed the identification from Communication – Autism to a dual designation of Communication – Autism and Intellectual – DD. The appellant agreed to the changed identification, but did not agree with the decision to place the student in a Special Education Class. In December 2005, the appellant indicated that the student would remain in the program at School B until the end of the school year, and notified the school that she intended to enrol the student in the home school, School A, in September 2006.

[9] In September 2006 the student started attending School A in a Regular Class and receiving withdrawal services in the HSP.

[10] On June 13, 2007, an IPRC review was held. At the appellant’s request the IPRC was reconvened on June 27, 2007. The IPRC decided that the student’s exceptionality should continue to be Communication – Autism and Intellectual – DD, and that the placement should be in a Special Education Class: Intensive Support Program (ISP).

[11] On July 6, 2007, the appellant appealed the Special Education Class placement to the Special Education Appeal Board (SEAB). On August 13, 2007, the appellant also appealed the identification. On January 22, 2008, the SEAB issued a majority report. The majority of the SEAB disagreed with the June 13, 2007 IPRC identification, with respect to the exceptionality Intellectual – DD and agreed with the placement decision. On January 23, 2008, a minority report issued by the SEAB disagreed with the June 13, 2007 IPRC identification with respect to the category of Intellectual – DD and disagreed with the placement decision. The SEAB minority report recommended that the student be integrated into the Regular Class.

[12] On February 19, 2008, the respondent considered the recommendations made in the two SEAB reports. On February 21, 2008, the appellant was informed that the respondent approved the recommendations of the SEAB majority report.

[13] On March 20, 2008, the appellant appealed the June 13, 2007 IPRC placement decision to the Tribunal.

[14] On June 18, 2008, an IPRC was convened to review the student's identification. A statement of decision confirmed the identification to be Communication – Autism. Placement was stayed pending the appeal to the Tribunal.

POSITIONS

[15] The appellant seeks a placement in a Regular Class with Resource Withdrawal assistance in the Home School Program in the neighbourhood school, School A. In her notice of appeal the appellant requested that the student be placed in a Regular Class with qualified support and accommodations. The final submissions, entered by Counsel for the appellant, stated "Pursuant to s. 57(4)(b) of the *Education Act*, the appellant requests the Tribunal to make an order placing the student in a regular classroom at the home school, School A, with appropriate special education services and up to 50% of Resource Withdrawal in the HSP, as essentially occurred for Grades 2 and 3."

[16] The respondent requested that the appeal be dismissed and that the Tribunal uphold the school board's decision to place the student in an ISP, which is a self-contained Special Education Class.

RELEVANT STATUTORY PROVISIONS

[17] 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:**

[18] 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.

[19] 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.

[20] 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:

- a) 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.

Regulation 181/98:

[21] Section 17 of the regulations provides that:

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

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

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

WITNESSES

[22] The appellant's witnesses were:

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| 1. Ms. J. K. | Parent and Appellant |
| 2. Ms. R. | Advocate |
| 3. Deanna Pietramala | Director of Specialized Programming Service for
Leaps and Bounds |
| 4. Ms. M. | Student at York University
Former Instructor Therapist with Leaps and Bounds |
| 5. Dr. Joel Hundert | Expert Witness
Director of the Behaviour Institute |

Dr. Joel Hundert is a psychologist and Board Certified Behaviour Analyst. Dr. Hundert is Director of the Behaviour Institute, a private agency providing a range of Applied Behaviour Analysis (ABA) services to children with autism. The Tribunal accepted Dr. Hundert as an expert in the treatment and instructional programming for children with autism.

Dr. Hundert submitted a written report based upon observations of the student in both at home and at School A, a review of documentation including assessments, and staff interviews.

[23] The respondent's witnesses were:

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|-----------------|---|
| 1. Marilyn Lowe | Supervising Principal of Special Education, TDSB |
| 2. Krista Shay | Special Education Coordinator, TDSB |
| 3. Ms. L. | Principal, TDSB
Former Principal of School A |
| 4. Ms. J. | Special Education Consultant, TDSB
Former Methods and Resource Teacher at School A |
| 5. Ms. C. | Special Needs Assistant (SNA) at School A |
| 6. Jan Fukumoto | Central Coordinator of Autism Services, TDSB |
| 7. Ms. P. | Principal of School A |

SUMMARY OF EVIDENCE

Issue #1 Placement

[24] The Tribunal heard evidence from a number of witnesses regarding the student's development in the following areas: Behaviour, Social Development, and Academic Functioning. Further evidence was presented on placement considerations. A video prepared by the appellant was entered into evidence. The video demonstrated Ms. M., an instructor therapist, working with the student at home.

a) Behaviour

[25] Ms. J., former Methods and Resource Teacher at School A, testified that when the student was in Grade 2 and Grade 3 at School A, the school maintained frequency charts to analyse how often incidents occurred and to assist with the development of a prevention plan. The school also completed behavioural inventories and functional behaviour assessments to determine the functions of the student's behaviour. Ms. J. testified that the frequency charts documented incidents when the school staff had to use physical restraint because the student was at risk of hurting other children or staff and of self-injurious behaviour. When school staff were unable to control the student's behaviour, they informed the appellant of the incidents through the daily communication book.

[26] Ms. L., former principal of School A, and Ms. J. consulted the TDSB Pervasive Developmental Disorder (PDD)/ASD team to assist with identifying antecedents to the student's aggressive behaviour. The respondent tendered a Special Education and Support Services Report completed on January 10, 2008 by Mr. Robert Gauthier, a psychological associate and member of the PDD/ASD team. The report indicated that the functions of the student's behaviour were to escape from situations and/or requests made of the student.

[27] Ms. L. and Ms. J. testified that when the student was anxious and frustrated, the student exhibited problematic behaviours: echolalia (compulsive repetition of words spoken by somebody else); kicking, scratching, hitting and lunging at staff and students; biting or ripping [the student's] shirt; screaming; throwing items; crying; hitting [the student's] head against the floor; biting, pushing desks over; flailing, and running out of the room. Ms. J. and Ms. C., the current SNA at School A, testified that staff had to act as buffers between the student and other students. Ms. C. said in the last fifty-seven days that the student attended Grade 3 there were eleven days with no incidents. Of the nineteen days the student attended Grade 4, there were two days with no incidents.

[28] Ms. C. testified that in September 2008, the student hit Ms. M., the current IBI therapist, while she was demonstrating strategies to the school staff. Ms. C. said that Ms. M. indicated to the school staff that she did not know what to do when the student hit her. Ms. P., current principal of School A, testified that Ms. M. told her that the student had hit her many times. Ms. C. testified that both the school and the home were struggling to deal with the same behaviour issues.

[29] Prior to preparing his report of September 16, 2008, Dr. Hundert, the expert witness, observed the student at home. Dr. Hundert stated in his report that the programs for the student were well laid out and detailed, as IBI programs should be. Dr. Hundert reported that during the home visit the student hit him and the IBI therapist. Dr. Hundert also indicated that “when he inquired”, there was no clear protocol at home for anticipating, preventing or dealing with the student’s problem behaviours. Dr. Hundert testified that although the information was somewhat unclear, there appeared to be two or three episodes of aggression in the home each week.

[30] Dr. Hundert observed the student in the classroom and he interviewed Mr. B., the classroom teacher and Ms. P., the current principal of School A. During the school visit Dr. Hundert did not observe any aggression but he observed disruptive behaviour. He reported that the student would yell out, make sounds and repeat things that the student had heard before. Dr. Hundert reported that the school log showed there were problem behaviours about seven to thirteen times a week.

[31] Dr. Hundert testified that when he was observing the student at school he saw the staff collecting data. He testified that it was his view that the data collection was not sophisticated enough to allow conclusions to be drawn about “the triggering antecedents, the maintaining consequence and the functions” of the problem behaviour. He said those are areas that require someone with more expertise than a teacher. He concluded that he did not think that the areas important to understand the student’s problem behaviours have been implemented through an ABA approach in school.

[32] Dr. Hundert testified that the problem behaviours tend to be used to escape, to avoid, to delay some unpleasant event or to get a reaction. In his opinion, staff members need to determine the antecedents, and the consequence of the behaviour. They require a good understanding of the function before coming up with the intervention that would teach the student a positive functional skill alternative.

[33] Dr. Hundert recommended a functional assessment and the collection of data on a daily basis so that the behaviour plan could be modified. He testified that in his view, the information collected by the school did not assist in identifying triggers. More sophisticated methods would allow the school to come up with a firmer conclusion about the student’s behaviours to make sure the interventions being used were appropriate.

[34] Dr. Hundert gave evidence about school safety plans. He stressed that when a school safety plan involved intrusive strategies, parental consent as well as safeguards are needed. The plan must be implemented consistently and include staff training and supervision. With appropriate interventions and strategies, the problem behaviours could be greatly reduced, to a point where the student would not be a risk to other children. Dr. Hundert testified that in his view the student poses a safety risk wherever the student is placed.

[35] Ms. L. testified that in 2006–07 and 2007–08, the school had a safety plan that included informing staff in advance that there was a risk of injury. Ms. P., current principal of School A, testified that she developed a safety plan for the 2008–09 school year, so that students could learn in an environment where no one would get hurt. The appellant indicated that she had not been involved in the development of the school’s safety plan and she was concerned that the school had included restraint as an intervention. The appellant testified that she observed the student eight times in the school and on March 25, 2008, she saw the student’s arms being held by a staff member, while another held the student’s legs so the student could not move. This occurred a second time on April 8, 2008. Further evidence regarding restraint was reported in documents produced by the respondent. The appellant testified that she was aware children at the school were being hurt by the student.

b) Social Development

[36] The appellant testified that before the student began IBI in March 2005, the student had no friends and did not communicate with [the student’s] siblings. The appellant testified that since starting IBI, the student has shown that [the student] wants to connect with others. The student participates in activities outside the home setting. Ms. R., the appellant’s advocate, testified that the student needed to

develop social skills and connections with typically developing peers and that could happen only in a regular classroom.

[37] Dr. Hundert testified that placing children with autism in physical proximity of their peers will result in little spontaneous improvement in their adjustment. It is not until systematic programming is introduced that the social behaviours or academic skills of these children will improve. He indicated the need for adequate resources, including people, knowledge, time and expertise.

[38] At the June 13, 2008 IPRC Review, the appellant identified social goals as key for the student, more so than academic goals. The committee, however, found that there was a need for more emphasis on academic goals. The committee determined that the student was not making the expected academic gains.

[39] In response to the video prepared by the appellant and shown at the hearing, Ms. Lowe testified that the student was demonstrating a need to move from the one-to-one environment at home to a small group setting, where the student would be given the opportunity to practise social skills.

[40] Ms. P. testified that the student required explicit social skills embedded in the program. Ms. L., Ms. J. and Ms. C. testified that the student was not socializing with other students. The student had very limited spontaneous conversation skills, did not socialize with peers at recess, made no eye contact and sometimes did not face the person to whom [the student] was speaking. Ms. L. testified that other students found it difficult to make conversation or initiate play. Most of the student's interactions were with the SNA and the teacher. Ms. C. testified that the school tried to facilitate more peer contact through greetings in the hall, playing with a ball at recess, the development of social stories and promoting group play at circle time.

[41] Ms. J. testified that at the appellant's request when the student was in Grade 3, she invited Ms. Foster from Extend-a-Family to come to the school during one lunch hour to try to foster friendships between the student and the other students. However, it was very stressful for the student, and the student hit the mother and three students.

c) Academic Functioning

[42] Ms. L. and Ms. J. stated that in September 2006, when the student was in Grade 2, the student was able to complete two tasks coupled with a reward. Ms. J. testified that by December 2006, the student was not settling into the routines and was refusing to do work.

[43] During her testimony, Ms. J. reviewed the student's timetable for Grade 2 and Grade 3 at School A. She testified that the student participated in daily physical activity every morning, followed by circle time in the Regular Classroom. The gym was reserved just for the student and the SNA for ten minutes daily, followed by mathematics and literacy activities in the HSP before leaving the school before noon. Ms. P. testified that for Grade 4, she proposed that the student's timetable be revised so that the student had mathematics and literacy in the HSP, and computer, library and physical education with the Grade 4 class. Ms. P. testified that the appellant initially agreed, but subsequently requested that the student participate in opening exercises with the Grade 4 class and then transition into the HSP.

[44] Ms. L. testified that by the end of Grade 3, the student was able to do rote reading but did not demonstrate the required reading comprehension and understanding. Ms. J. said that the student could spell familiar words but was unable to do the Grade 1 curriculum. The student was not able to plan, to reason, to communicate or to apply skills. Ms. J. testified that the student is at the beginning stage of writing; the student can string words together such as: "My, family, mom, the student, Dawn". The student understood simple instructions but did not understand higher-level figurative language, figures of speech, or abstract concepts. The student's vocabulary included many words and could say two-to six-word utterances. If the student wanted something [the student] would ask for it, but was unable to initiate or carry on a conversation.

[45] Ms. L. and Ms. J. testified that the student could add and subtract two-digit numbers, but had a very difficult time with the language of mathematics and could not communicate reasoning in problem solving. Ms. J. testified that she used the Kindergarten expectations in mathematics. Ms. S. testified that the student had Kindergarten and early Grade 1 skills in some areas, and rote skills in reading and some higher computation skills. Ms. P. testified that with support, in September 2008, the student was able to demonstrate some knowledge and skills at a Grade 1 level.

[46] In her evidence, Ms. J. commented on the student's strengths. She testified that when the student was not anxious, the student

- 1) could be cooperative with staff and with students;
- 2) could follow simple directions;
- 3) had receptive ability and would ask for items appropriately when prompted;
- 4) enjoyed puzzles, certain computer games, and started to learn keyboarding skills;
- 5) was very good at drawing;
- 6) had very good fine motor skills; and
- 7) had a good visual memory.

[47] Ms. Pietramala, director of Leaps and Bounds, stated that the student was functioning between a Grade 1 and Grade 3 level. In [Leaps and Bounds] activities the student worked independently for twenty to twenty-five minutes.

[48] Dr. Hundert, in his testimony, described the *Assessment of Basic Language and Learning Skills* (ABLLS) as a tool designed to track improvement in children with autism. He indicated that this tool is widely used by Regional Autism Service Providers to evaluate the gains made with children in IBI. The instructor therapist used ABLLS with the student and tracked the student's progress in IBI. Dr. Hundert testified that the student was probably working at a Grade 2 level in computational mathematics but was not as capable in tasks that required advanced language.

[49] Ms. Lowe testified that the video presented at the hearing, demonstrated the student working at a language level of approximately Kindergarten to Grade 1. Ms. Lowe testified that the video showed the student had made some improvements, but the activities demonstrated very basic rote skills that appeared rehearsed and lacked the higher order thinking skills expected in a classroom. She testified that the video demonstrated that the student could generalize the skills learned in a one-to-one setting with other children.

[50] Ms. Lowe, Ms. L., and Ms. Shay, Special Education Co-ordinator, testified that the work the student was doing on another video, prepared by the appellant for the 2007 IPRC Review, was not consistent with the Ontario Curriculum. Ms. Shay testified that it demonstrated the student doing IBI therapy with no distractions and receiving one-to-one attention. Ms. S. testified that IBI teaches skills that are not based on age norms or on the sequential organization of the Ontario Curriculum as is taught in school.

[51] The IEPs for 2007-08 tendered by both parties indicated that the student was offered alternative curriculum expectations. Ms. L. indicated in her testimony that there were numerous consultations with the appellant regarding the IEP in 2006-07 and 2007-08. The appellant requested that the student receive modified mathematics and language programs. Ms. L. testified that the school wanted to implement the appellant's requested changes where possible and ultimately based their decisions on best practices and on the student's ability to succeed.

[52] Ms. P., the special education teacher and the classroom teacher developed the IEP for 2008-09. Ms. P. testified that she asked for input from the appellant around September 24, 2008, but none was received. She said that there was a meeting to discuss the student's IEP where input from the school support team and from Leaps and Bounds was received. At the request of the appellant, the school psychologist, the school's social workers and the occupational therapist were not invited to attend the meeting. Ms. Shay, Special Education Coordinator stated that the student's IEP should indicate an

alternative curriculum with a focus on communication skills, social skills, functional academic skills, behaviour and activities of daily living.

[53] Ms. Shay testified that the information provided to the June 2007 IPRC indicated that the student did not demonstrate the prerequisite skills that the student would need to be successful in a regular class. These included:

- 1) Independence with communication skills;
- 2) The ability to follow basic rules and routines independently;
- 3) The ability to learn in a group;
- 4) Limited problem behaviours; and
- 5) The ability to self-regulate.

d) Placement Considerations

[54] The student has had experiences in a Special Education Class, a Regular Class and a HSP. The Tribunal heard evidence about the student's response to each of these situations.

[55] The student's first experience in the school system was a placement in a Special Education Class- DD during 2004-05 and 2005-06. The appellant testified that progress indicated on the report cards while the student was in the DD class was directly related to the IBI services Leaps and Bounds began to provide in March 2005. The report cards, tendered as exhibits at the hearing, showed improvements in all areas of development, although the student was not achieving at the expected level within the Ontario Curriculum. The student made gains in the ability to follow routines and in academics. The student did not initiate social interactions although [the student] was involved in activities with classmates, and that had not been possible previously. It is noted that the June reports indicate that during Grade 1, 2004-05, the student was absent one hundred days and during Grade 2, 2005-06, the student was absent sixty days.

[56] Ms. Lowe in her testimony described the ISP as a structured environment with fewer students, less noise, fewer distractions and a peer group in which other students are working on similar goals. There are opportunities for students to work in small groups, thereby experiencing social interaction. Students in an ISP often begin within a self-contained classroom until they adjust to that environment. As they show their readiness, integration into the Regular Class is established. If a student has strengths in a particular area or an interest in a particular subject, then that integration can begin early. Ms. J. testified that since the student was very anxious in the Regular Classroom, the lower teacher-to-student ratio in an ISP would decrease the student's anxiety. Ms. L. testified that the student needed to be in a structured and consistent setting with fewer stimuli and fewer transitions.

[57] Dr. Hundert testified that in his opinion, it is important to move a child from an intensive one-to-one setting to a small group before the child is moved into a regular education situation. He found that based on his observations, the student was demonstrating the need to practise social skills and to generalize the skills the student was learning in a one-to-one setting.

[58] Ms. Lowe explained that the HSP focused on literacy and numeracy and that generally children are two years behind in their skill level. The students in the HSP class demonstrate that they are able to work within an environment of up to sixteen students who are working on a variety of different activities.

[59] Ms. Lowe testified that the student had been in a Regular Classroom with significant supports since September 2006 without making noticeable gains. The majority SEAB report found that the student's educational needs were not being met in the Regular Classroom because the student had been in a Regular Classroom with significant supports since September 2006 without making noticeable gains. Ms. L testified that when the student was in the HSP/Regular Class, transitions were difficult for [the student]. The student required a lot of support in order to adapt. When there were fewer transitions during the school day, the student had fewer disruptive behaviours. Ms. Shay testified that there was evidence that the student was anxious in the Regular and HSP classes.

[60] Dr. Hundert testified that in his opinion, providing ongoing support in a general education classroom is not easy. He indicated that these supports are easier in a Special Education Class and it certainly is easier in an IBI situation where service is delivered one-to-one. Consistency is difficult when more than one staff person is involved or if there are cross-settings. Without consistency, there is no reason to expect any transfer of the child's skills from one environment to the other.

[61] Dr. Hundert testified that the student needed an environment in which the teaching is based on principles of ABA. His report indicated that it was not in the student's interest to have a failing experience by being placed in a general education classroom if the supports were not there for the student and others to ensure everyone's safety and for the student to learn under optimal conditions.

[62] Ms. Shay testified that although she understood that the appellant wanted a Regular Class placement for mainly social reasons, there was no evidence of the student meeting the social goals the parent had set out. Ms. Shay testified that the appellant wanted the student in the home school that the student's siblings attended so the student could interact with other students. Ms. Shay testified that the sole focus of the school had been on behaviour while other important areas, particularly academics, functional living skills and communication were not being addressed.

[63] The June 13, 2007 IPRC considered the elements needed in the student's program and which environment would be best to deliver those elements: the Regular Class, a combination Regular Class and HSP, or the Special Education Class (ISP). Ms. Shay testified that the IPRC heard evidence about the student's anxiety in the Regular and HSP classes. The IPRC placement decision was for a full-time ISP. The IPRC was concerned for the safety of the student, other students and adults because of the student's frequent outbursts and incidents of aggression.

Issue #2 Collaborations and Transition

a) Cooperation in the School

[64] The appellant testified that she had a good relationship with Ms. L. when the student first started at School A. She testified that now she felt there was very little cooperation with School A. Ms. L., in her testimony, agreed and stated that while the appellant and her advocates shared information and suggestions with the school, by January 2007 the quality of the relations between home and school had changed.

b) Leaps and Bounds in the School

[65] Ms. F., Central Coordinator for Autism Services, TDSB, testified that a staff member from Leaps and Bounds could go into the classroom to support the student's transition through observation, modelling and consultation consistent with TDSB's *Transition to School Protocol* and the transition plan developed by TPAS. The appellant testified that on March 6, 8, and 9, 2007, Ms. M., the student's instructor therapist from Leaps and Bounds, came to the school. The appellant said that on the third day of Ms. M.'s visit at the school, the student was in the regular class doing double the amount of work with no undesirable behaviours. The appellant said that forty days were noted with no behavioural problems. Ms. L. testified she had seen a significant decrease in undesirable behaviours. From March to June 2007 the report cards, tendered as exhibits, indicated that the student was absent thirty-seven days. Ms. L. testified that there was still evidence of kicking, echolalia and some anxiety during the period following Ms. M.'s consultation. Ms. L. said she was optimistic that the progress would continue until June, which was the scheduled time for the IPRC review.

[66] Ms. L. testified that generally when suggestions were received from Leaps and Bounds, they were implemented. Ms. L. said that although there was collaboration to some extent between Leaps and Bounds and the school, it was difficult for the two parties to have regular face-to-face meetings.

c) Coordination of Services

[67] In his September 2008 report, Dr. Hundert wrote that there was no coordination or communication between the school and the service providers. There was no systematic involvement into development of plans, routine sharing of information, or monitoring of how the student was dealing with situations in each setting.

[68] Ms. F., Central Coordinator of Autism Services, TDSB, testified that Toronto Preschool Autism Services (TPAS) and TDSB have a protocol for the transition of children from an IBI service provider to a school. She stated that Leaps and Bounds is not one of the five providers under TPAS because it is a Direct Funding Option (DFO). The transition coordinator is available through TPAS for parents using a DFO provider, but it is up to parents to access this coordinator to facilitate the process. She said that when the protocol is followed, it can take a few weeks to implement the transition process. Communication would continue between the school and the TPAS coordinator after the child is in school for up to twelve months, depending upon the child's needs. Ms. F. testified that regarding the student's transition, documentation was often not shared or was shared after the student had started the transition process.

[69] Dr. Hundert testified that a partnership should be formed between the school and anyone involved in planning for the student. He testified that Leaps and Bounds could be in the school if it was a time-limited part of an overall school goal. He said that there needed to be buy-in by the school's staff, as they would be the ones implementing the strategy and they needed to feel supported by the school and TDSB administrators.

Issue #3 Identification

[70] The appellant did not appeal the identification to the Tribunal. However, at the hearing, the parties entered assessment reports as exhibits and gave testimony on this issue.

[71] Mr. Baker, counsel for the appellant, tendered a report dated March 13, 2003, completed by Dr. Mary Archer, psychological associate at North York General Hospital. She diagnosed the student with ASD and a DD. She reported to Toronto Children's Services that the student was experiencing a more severe form of the disorder. She indicated that a well-structured preschool program with appropriate supports was one of the most important interventions. As a result of this assessment, referrals were made to TPAS and to the Geneva Centre for Autism.

[72] Mr. Howard, counsel for the respondent, tendered a report dated March 19, 2005, completed by Ms. Janet Quintal, a psychological associate contracted by Surrey Place Centre. The report stated that the student scored below the first percentile on measures of intellectual ability and adaptive behaviour. Ms. Quintal's assessment indicated that the student was functioning like a student with a DD and that the student required programming comprised of an alternative curriculum.

[73] Both parties entered into evidence a Speech and Language Assessment Report dated May 31, 2005, completed by Ms. Sharon Leuchter, a speech language pathologist with the TDSB. In her report, she described a spontaneous growth in the student's expressive language since September 2004 and indicated that the student was more verbal and increasingly responsive to guided language expansion models offered by the teacher. Ms. Leuchter reported that the student's vocabulary was developing smoothly but was significantly delayed. The report stated that the student presented with ASD and DD.

[74] The majority report of the SEAB recommended that the student's identification of Intellectual – DD be reconsidered in respect to the DD, because the identification had not been adequately supported by formal psychological, educational and behavioural assessments.

[75] At the hearing, Ms. Lowe, Supervising Principal of Special Education, testified that following the release of the SEAB report, an offer was made to the appellant to have the school psychological department conduct a psychological assessment but the appellant declined the offer.

[76] Ms. Lowe further testified that the appellant, at this time, told her that she was investigating getting a psychological assessment done, but the appellant wanted it to be used for programming and not for identification. Ms. Lowe stated in her evidence that additional assessments were completed in June 2008, but the results were not available, as they had not yet been written. She indicated that these assessments included an occupational therapy assessment and a speech and language assessment.

Issue #4 Distinguishing ABA and IBI

[77] There appeared to be disagreement in use of the terms to identify the delivery of services for the student in the home. The TDSB school personnel used IBI when referring to services provided to the student in the home and ABA for describing instructional strategies utilized in the school for the student. Counsel for the appellant consistently used ABA to identify both of these services.

[78] Two documents tendered as exhibits in the hearing were:

- 1) The *Ministry of Education Policy/Program Memorandum No. 140 (P/PM140), Incorporating Methods of Applied Behaviour Analysis into Programs for Students with Autism Spectrum Disorders (ASD)*, May 2007; and
- 2) *The Autism Intervention Program: Program Guidelines*, Ministry of Children and Youth Services (MCYS), 2006.

[79] *P/PM 140* provides direction to school boards to support their use of ABA as an effective instructional approach in the education of students with ASD. *P/PM 140* states that ABA methods are based on scientific principles of learning and behaviour to help students build useful repertoires of behaviour and reduce problematic ones. In this approach the behaviours are clearly defined and recorded. The antecedents (triggers) of any undesirable behaviour(s) are analysed, as are the re-enforcers that might be maintaining the undesirable behaviour(s) or that might be used to help develop adaptive behaviours.

[80] *The Autism Intervention Program: Program Guidelines*, states that ABA can benefit all populations and difficulties. IBI, an intensive application of ABA, is an approach delivered to children with autism to decrease challenging behaviours, increase appropriate behaviours and promote development. Services provided by Regional Autism Service Providers, funded by MCYS, include assessments, child and family support services, transition planning and IBI for children with an autistic disorder considered to be towards the more severe end of the spectrum.

[81] Dr. Hundert, in his testimony, defined ABA as an approach that consists of a systematic breakdown of what is being taught into a sequence of smaller steps, and teaching by using empirically validated learning procedures. He testified that IBI is one form of ABA that consists of the delivery of highly structured learning sections by trained and supervised staff. He added that "All of IBI is ABA; not all ABA is IBI". He testified that his definition of ABA and the Ministry of Education's definition in *P/PM 140* are very similar.

[82] Counsel for the appellant entered documents into evidence that identified the service the student receiving in the student's home as IBI. The Leaps and Bounds Progress Report, July 20, 2007, and the Leaps and Bounds – Individual Service Plan described the services that the student started receiving in the afternoons in the home starting on March 21, 2005 as IBI services.

REASONS

[83] 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. (4th) 385

Placement

[84] The Tribunal panel considered the following before deciding a placement that would be in the student's best interests.

a) Behaviour

[85] The Tribunal accepts the evidence of the respondent's witnesses that the student's behaviour posed a safety concern for the student, other students and staff. There was no disagreement between the parties that the student has significant behaviour needs. The student's aggression and spontaneous hitting of people made the classroom and the school an unsafe environment. Dr. Hundert observed that there were two to three episodes of aggression in the home each week; at school there were seven to thirteen incidents each week. The evidence showed that the escalation of disruptive behaviours began upon the student's entry into the combination HSP/Regular Class. Whenever the student was anxious and frustrated, undesirable behaviours increased.

[86] The Tribunal heard evidence from both parties regarding the collection of data on the student's behaviour. Dr. Hundert testified that the data collection completed by school staff was not adequate to allow conclusions to be drawn and that the data collected was not helpful to determining triggers and functions of the student's problem behaviour. Dr. Hundert's testimony and Mr. Gauthier's report provided evidence that in their opinion, the purpose of the student's problem behaviours was to escape. Although Ms. J. testified that there were times she did not know what the triggers were, the school staff did have the support of the PDD/ASD team to assist them.

[87] Dr. Hundert testified that he had a short visit to School A. to observe the student. Dr. Hundert said that the student responded well during his visit. Dr. Hundert testified that in his opinion ABA was not being implemented adequately in the school. It is the Tribunal's opinion that Dr. Hundert did not observe long enough to conclude that ABA was not being implemented adequately.

[88] The testimony of school staff indicated that they were well versed in ABA and were continuing to receive assistance from the PDD/ASD team. This is consistent with *P/PM 140* which was to be implemented beginning after May 17, 2007. Ms. Lowe testified that school staff will continue to be provided opportunities to learn about ABA instructional strategies.

[89] The Tribunal agrees with Dr. Hundert that a safety plan requires parental input. Every parent should be well advised of the procedures school staff are going to use in situations where the safety of self and others is in question. The appellant demonstrated her acknowledgement of the gravity of the student's behaviour as she said she withdrew her child from school for safety reasons. However, withdrawing the student from school is not the solution. The student needs to be in school and a safety plan that may require restraint measures, needs to be in place. All parties must work together to design a plan that can be used when the need arises.

b) Social

[90] The Tribunal agrees with Dr. Hundert's testimony that placement of children with autism in physical proximity of their peers will result in little spontaneous improvement in their adjustment. It is not until systematic programming is introduced that social behaviours or academic skills of individual children with autism improve.

[91] The Tribunal further finds that socializing is not a compelling reason to have the student placed in a Regular Class at this time. Until the student's behaviours are under control, social learning will also be inhibited and opportunities to learn academics will be hampered. The Tribunal agrees with Dr. Hundert's testimony that the student needs opportunities to generalize skills and these opportunities should be made available in the student's placement.

c) Academic Functioning

[92] There were discrepancies in the reports between the school staff and from Leaps and Bounds about the student's progress in learning. The teachers' evaluations of the student's level of achievement in school showed the student between Kindergarten and Grade 2, depending upon the Ontario Curriculum expectation. These results placed the student approximately two to five years behind the expected grade level. The Tribunal acknowledges the distinction between the expectations of the Ontario Curriculum that teachers must deliver and the Leaps and Bounds goals and tasks that are identified through the use of ABLLS.

[93] The Tribunal found that an educational assessment should be done as soon as possible, so that an academic program can be put in place for the student that will provide the student with opportunities to progress in those areas in which the student has strengths, and learn new skills that will help the student attain independence.

d) Placement Options

[94] When considering the type of placement that would be in the student's best interests, the Tribunal reviewed a range of placements from a Regular Class to a Special Education Class.

[95] The Tribunal first looked to the Regular Class in the home school. The evidence showed that if the student were to remain in the home school in the Regular Class with Resource Withdrawal, the advantages would be that the student could go to school with [the student's] siblings and could continue trying to develop friendships with other students. The Tribunal considered that the student is presently in the third year at School A and that it was reported that the student continued to have difficulty establishing relationships with other children. The student experienced very little success with this placement. The student's behaviours were so disruptive that little or no academic achievement occurred and the student's anxiety levels were high. The evidence showed the escalation of disruptive behaviours began when the student entered into the combination HSP/Regular Class. Whenever the student was anxious and frustrated, undesirable behaviours increased.

[96] The Tribunal considered the HSP class and noted that a class of sixteen students would have numerous distractions. This class would have multiple transitions and the student would have ongoing difficulties adapting to the numerous changes that would interfere with the student's learning.

[97] The Tribunal considered the ISP class. This class would provide a more structured environment with fewer students, less noise, fewer distractions and a peer group of students working on similar goals. The Tribunal heard from the school staff that there would be opportunities for integration from the ISP class into the Regular Class as soon as the student showed readiness to do so.

[98] For each of the placements, the Tribunal considered the significant behaviour issues that had been presented, as well as the student's need to acquire academic skills. The evidence showed that the student's behaviour first improved once IBI services began and continued to improve while the student attended the ISP class at School B. The Tribunal learned that the student's behaviour worsened from the time the student entered Grade 2 at School A. Despite the efforts that were made by the school staff to accommodate the transition from School B to School A, the student had a difficult time. The Tribunal heard that the student demonstrated anxiety through physical actions.

[99] The Tribunal heard testimony about the student's previous and current placements from the witnesses presented by the appellant and the respondent. The benefits of the Regular Class placement with the services provided were minimal. While the student was in the Special Education Class, there was evidence that the student made gains in language, behaviour, and social skills. Despite the appellant's dissatisfaction with this placement, and the student's absences, the student was able to learn while in that class.

[100] It is the view of the Tribunal that an ISP placement is appropriate and would be of significant benefit to the student, until the issues related to the student's behaviour, socialization, and academic program can be addressed. This placement will offer the student stability and reduce the number of transitions because of the more controlled environment. There should be a significant reduction in anxiety and frustration leading to fewer behaviour incidents. A smaller class will provide for a lower student-to-staff ratio, resulting in more attention and opportunities for direct supports for the student. Given the progress that the student made in the self-contained class during Grades 1 and 2, the Tribunal believes that this is the best option for the student at this time. This placement should be full time. The provision of ABA instructional strategies should be clearly articulated in the IEP established for the student, pursuant to *P/PM 140*.

Collaboration and Transitions

[101] The Tribunal has no doubt that both parties want the student to have an effective education that will foster the student's potential. Since communication between the parents and the school board personnel had ceased to be effective, the Tribunal recommends that a plan be developed to establish communication channels and work toward reaching a better working relationship on behalf of the student. It is the Tribunal's view that consistency and frequency of communication between the home and school are critical for the student's program to address the student's needs.

[102] The Tribunal learned through Dr. Hundert and school staff that consistency is critical if the student is to make gains. Consistency has to be maintained between the school and the home, and this means ongoing communication must occur. Building good parent-school relationships is proven to have a positive effect on the progress of a child. The student will benefit when both parties are working towards the same goals. This includes the appellant making an effort to ensure that the student is attending school as the student's absences only contribute to more disruptions in the student's learning.

Identification

[103] Identification was not appealed to the Tribunal but the Tribunal takes this opportunity to comment on the identification as it is integrally linked with placement.

[104] The evidence showed that there was disagreement between the appellant and the respondent regarding the student's identification. The respondent agreed with the recommendations of the SEAB majority report that recommended that an IPRC reconsider the student's identification. The SEAB stated that the identification of Intellectual – DD had not been adequately supported by formal psychological, educational, and behavioural assessments. The Tribunal found that there is a question about those results, given the student's age at the time of testing and the challenges that the student presented at that time including the student's language acquisition and behaviour.

[105] The Tribunal reminds the respondent and the appellant that *Regulation 181/98* states that subject to the *Health Care Consent Act, 1996*, the IPRC shall obtain and consider a psychological assessment of the pupil if the committee determines that the assessment is required to enable it to make a correct identification or placement decision, {O. Reg. 181/98, s. 15(3)}. It is clear that the IPRC and the SEAB both recommended this type of assessment. It will be important for the parent to consider giving permission to have the assessment completed.

[106] The Tribunal heard that other assessments have been administered but the assessment reports were not completed at the time of the June 2008 IPRC. The Tribunal encourages the appellant to share those reports with the school in order to provide information that will assist the student's teachers in planning an appropriate program that will meet the student's needs.

Distinguishing ABA and IBI

[107] Confusion resulted from the inconsistent use of the terms ABA and IBI and did not assist the Tribunal. The Autism Intervention Guideline distinguishes IBI from ABA and describes the specialized funding mechanism in place for parents to access services for their children with autism. IBI was shown to be a more intense service delivered to a child by a therapist, in a one-to-one setting. In this case, the evidence showed that the appellant accessed these specific services for her child and that she continues to receive funding to support IBI services for the student in her home. P/PM 140 clearly indicates that teachers are to use ABA instructional strategies when working with children with autism. The Tribunal determined based on the evidence before it that IBI is the correct term to describe the services provided in the home, and ABA is the term used to describe instructional strategies used by staff at school.

DECISION

[108] In accordance with Subsection 57 (4) of the *Education Act* the Tribunal dismisses the appeal.

The Tribunal upholds the placement decision made by the IPRC on June 13, 2007.

RECOMMENDATIONS

[109] The Tribunal encourages the appellant to either arrange for a psychological assessment or accept the offer from the respondent to conduct an assessment. Without the appellant's permission, this assessment cannot be done.

[110] An educational assessment should be completed as soon as possible. The variation in the reporting of the student's abilities to work in academic subjects indicated that there is an urgent need to determine the student's strengths, needs and levels. Once an assessment is completed, an appropriate program should be implemented to ensure that the student will continue to expand [the student's] overall knowledge.

[111] A collaborative process should be established to provide appropriate supports for the student. The school, Leaps and Bounds and the home should collaboratively develop similar expectations and consequences for behaviour. The Tribunal agrees with Dr. Hundert's evidence that consistency between the home and the school regarding the student's behaviour management program is essential. A joint safety plan should be designed collaboratively to ensure there is a common understanding of the expectations and consequences, and how it will be implemented at home and at school. The Tribunal encourages the appellant and school personnel to begin discussions to develop and implement an ongoing plan that will meet the student's needs. Restraint matters are of importance to all parties and should be openly discussed when developing a safety plan.

[112] TDSB and Leaps and Bounds should develop a protocol for transition and support. The Tribunal heard that TPAS has a transition protocol in place to provide support for students returning from IBI therapy back into the school. This transition plan offers support and security for students with autism and can be available for up to a year. In the student's case, transition into school was haphazard at best. There was no plan in place and the communication was intermittent and unreliable. A protocol between TDSB and Leaps and Bounds should be in place to ensure that students can move seamlessly from one setting to another. Consideration should be given to using the time allotted for Leaps and Bounds

services to be used in the school for regular consultation with the purpose of assisting with the transition. This will be particularly important as the student begins to attend school full time.

[113] TDSB should continue building the capacity of staff to effectively implement *P/PM 140*. TDSB has an implementation plan in place as required by the memorandum. The Tribunal encourages TDSB to focus on teachers and support staff who have direct contact with students with autism.

[114] TDSB should ensure that the PDD/ASD team is readily available for consultation as required. TDSB should consider how to use the expertise of the community agencies for in-servicing PDD/ASD and other staff about approaches to deliver effective ABA instructional strategies.

OBITER

[115] The Tribunal wishes to extend its appreciation to Mr. Baker and Mr. Howard for presenting evidence that was focused on the student and the student's best interests.

Marilyn Thain, Chair

Carlana Lindeman, Member

Jim McCaughey, Member

March 12, 2009.