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IN THE MATTER OF the Education Act, R.S.O., 1990, E2, as amended, S. 57(3)  
IN THE MATTER OF Ontario Regulation 181/98  
AND IN THE MATTER OF the minor child, Born 1993.

BETWEEN

M. W. and A. W.

Appellants

And

The Simcoe County District School Board

Respondent

**Tribunal Members:**

Paula Barber, Chair  
Sharon Carson, Member  
Dawn Roper, Member

**Parties:**

The parents  
Counsel for the Appellants:

Ellie Venhola

Joan Fullerton, Simcoe County District School Board  
Jeannette Schieck, Simcoe County District School Board  
Counsel for the Respondent:

Brenda Bowlby  
Allyson Fischer, October 6

A Preliminary Hearing on the matter of jurisdiction was held by teleconference on September 22, 2003.

The Hearing was held at the Nottawasaga Inn in Alliston on October 6, 7, 8 & 9, 2003



## Preliminary Matters

### Jurisdiction

At the teleconference on September 22, 2003 on the matter of jurisdiction for the appeal on behalf of the two students, Ms. Bowlby on behalf of the Simcoe County District School Board, argued that the Tribunal did not have jurisdiction to hear the appeal since the parents were appealing program, not placement. It should be noted that these two children's matters were heard together on this issue only.

### Respondent's Position

Ms. Bowlby, counsel for the Respondent, stated that this is not an appropriate case to appeal to a Special Education Tribunal. In referencing Section 57(3) of the *Education Act*, she argued that the parent is only permitted to appeal the decision of the IPRC ( Identification, Placement and Review Committee) related to the identification and the placement of the child, and that there can be no appeal regarding any recommendations that the IPRC makes. She maintained that the Appellants were seeking to have the Simcoe County District School Board provide therapeutic services instead of an educational placement. According to Ms. Bowlby's arguments, the Tribunal has no jurisdiction to hear appeals on programs or services. The Tribunal had no authority to direct the Board to provide a medical therapy or to provide a therapeutic program. The Tribunal's jurisdiction pertains to an educational placement, not a therapy.

Ms. Bowlby contended that the Appellants do not dispute the placement but rather the specialized program and services within the program that the parents of the two students want them to have. The Respondent stated that Intensive Behavioural Intervention (IBI) programming is a specialized behavioural program. The Board is providing specialized programming including behaviour management programming that is currently directed to children with autism, but is not providing IBI.

Ms. Bowlby referenced recent decisions of this Tribunal in *C. v. Simcoe County District School Board (SCDSB)*, September 15, 2003 (unreported) and *C. v. Dufferin-Peel Catholic District School Board (DPCDSB)*, September 18, 2003 (unreported) in which the Tribunal found that IBI is a therapy and under Program Policy Memorandum No. 81, the school board does not have the authority to provide therapy to children in schools. If therapy is needed by school aged children in school settings, the Ministry of Health or the Ministry of Community, Family and Child Services [now called Ministry of Child and Youth Services] provides such therapy. Ms. Bowlby argued that the parents really want IBI, a therapy, to be provided to their children in a school setting and therefore that the Tribunal should rule that it does not have the jurisdiction to hear the case regarding the two students. Ms. Bowlby further argued that the Appellants want a service provided for their children and that the Tribunal does not have the authority to order the Board to provide a service.

## Appellants' Position

The Appellants argued that the Tribunal does have jurisdiction to hear the case and referenced the *C. v. SCDSB*, September 15, 2003 (unreported) decision in which the grounds for the appeal were identical to the grounds put forward by the two families. Ms. Venhola, counsel for the Appellants, reminded the Tribunal that in earlier discussions about joining these matters it was noted that the children in these three cases are in the same class in the same school and within the same Board. She argued that since the Tribunal agreed to hear the case for *C. v. SCDSB*, under principles of natural justice and fairness, that the Tribunal should then also hear the case of these two students.

Ms. Venhola further argued that the issue is not whether IBI should be provided within the placement under dispute, but rather whether the placement under dispute is an appropriate placement for the two students. She further argued that there is different evidence for the two children, different from the evidence presented in the *C. v. SCDSB* tribunal and she asked the Tribunal to consider the needs of the two students as distinct cases.

Ms. Venhola argued that the situation is different from the *C. v. DPCDSB* (2003) case in which the child was placed in a regular class and that these two children are in special class placements.

Ms. Venhola referenced *L. v. Le Conseil Scholaire de District Catholique* November 2, 2001 (unreported) and stated that the argument in *L. v. Le Conseil Scholaire de District Catholique* is, in essence, the argument in the cases of these two students in that the programs and services made available are not meeting the needs of the two students and on that basis, the placement is inappropriate. With respect to *C. v. Dufferin-Peel Catholic School Board*, September 18, 2003 (unreported) Ms. Venhola argued that this is a different situation from *C. v. SCDSB* (2003) and these two students. She interpreted the Tribunal's decisions regarding jurisdiction as "discretionary" and argued that the Tribunal may consider services and programs that can be provided in a placement because they are interrelated. She posited that in *C. v. DPCDSB*, it was the idea of the child's learning style that could not be appealed and that none of the appeals for *C. v. SCDSB*, or these two students allege the same grounds as the Appellants in *C. v. DPCDSB*.

According to Ms. Venhola, the families in the *C. v. SCDSB* and these two students cases have asked the Tribunal to consider the needs of each of their children and whether the programs and services within the IPRC placement decision are appropriate for each child. Given that 1. the legal positions of the families of these two students in their appeals before the Tribunal are identical to the *C. v. SCDSB* (2003) appeal, and 2. given that the facts upon which the Tribunal held it would be appropriate to give the Appellant in *C. v. SCDSB* an opportunity to have her case argued and 3. that the position of the families of these two students are identical to those in *C. v. Simcoe County District School Board*, September 30, 2003 (unreported), it would be unreasonable and unfair to refuse jurisdiction to the families of these two students. There may be additional facts that the families of these two students are entitled to bring to the appeal, and therefore in order for the Tribunal to exercise its discretion fairly, the Tribunal should allow the appeals for these two students to be heard on the merits of each case. As well, it is important for the Tribunal to understand the needs of these two students and to understand the current

placement for these children in order to determine if the placement in the Special Education Class is appropriate.

Ms Venhola argued that in *R. v. the Ottawa-Carlton Catholic School Board* December 16, 1988 (unreported), the Board was ordered to purchase a placement from another school board if the Board could not offer a placement for the child. She stated that in *L. v. Le Conseil Scholaire de District Catholique*, November 2, 2001 (unreported), the Tribunal took program and services into account in its decision and recommendations. Further, she argued that in *D. v. Windsor-Essex Catholic District School Board*, September 24, 2002 (unreported), the Tribunal stated that program and placement are sometimes intertwined and that the narrow view of placement as a location does not permit the Tribunal to consider the best interests of a child. Ms. Venhola argued that a placement has to include content and that content has to be program.

Ms. Bowlby, in reply, stated that in *C. v. Simcoe County District School Board*, September 15, 2003 (unreported), IBI was before the Tribunal, and that for the first time the issue of the delivery of IBI has been dealt with squarely by a Tribunal. She argued that in *C. v. Simcoe County District School Board*, September 15, 2003 (unreported), the Tribunal found that IBI therapy was not an education program and not an education service. In addition, the Tribunal found that IBI was not a special education service and not a special education program. Ms. Bowlby stated that in both *C. v. Dufferin-Peel Catholic District School Board*, September 18, 2003 (unreported), and *C. v. Simcoe County District School Board*, September 15, 2003 (unreported), the Tribunal found that IBI was not education and was not something that could be ordered by the Special Education Tribunal.

### Reasons

The Tribunal has reviewed the evidence presented by both parties to determine if the Special Education Tribunal has the jurisdiction to hear the appeal.

The Tribunal determined that services and programs provided in a placement sometimes need to be considered because services, programs, and placement are interrelated and therefore difficult to separate and deal with individually. Due to the intertwining of the placement and program in the Elementary Special Education Class, the Tribunal believes that it is necessary to hear the case under appeal in order to understand the needs of these two students, to understand the placement proposed for these two students in the June 2002 IPRC decision, and in order to make a decision that would be in the best interest of these students. The Chair stated that tribunals are governed by the principles of natural justice and in keeping with the principles of fairness and the right to be heard, the Tribunal believes that it needs to hear the evidence of the witnesses in order to uphold the appeal, dismiss the appeal, or reserve its decision on jurisdiction after hearing the parties' evidence and the merits of the appeal.

## Decision

In order to make a decision in the best interest of these two students, the Tribunal believes that it must hear the merits of the case to determine if it has jurisdiction in the matters before the Tribunal. The question of the Tribunal's jurisdiction, therefore, will be decided after the evidence is called.

## Scheduling of Witnesses

The scheduling of witnesses was resolved with the consent of both parties.

## Affidavit Evidence

### Respondent's Position:

The preliminary matter of affidavit evidence was presented by Ms. Bowlby, counsel for the Respondent at the beginning of the hearing on October 6, 2003. The Respondent objected to the number of documents in the Appellants' binder that contained affidavit evidence. The Respondent objected to the fact that some witnesses would not be present and would not be available for cross-examination. Ms. Bowlby cited *Innisfel v. Vespra et al. (1981), 123 D.L.R. (3d) 530 S.C.C.*, and *Jackson v. Region 2 Hospital Corp. (1994) 145 N.B.R. (2d) 51; 24 Admin L.R. (2d) 220 (NBQB)*. Ms. Bowlby stated that this was a situation in which natural justice and fairness was being denied the Respondent because the article by Ron Leaf on IBI is in writing, and IBI is at the heart of the matter before this Tribunal. As well, the affidavit evidence from Dr. Konstantareas relates to an entirely different student.

### Appellant's Response:

Ms. Venhola, on behalf of the Appellants, stated that there were sworn affidavits and written submissions that were relevant and necessary, and requested that the Tribunal admit the evidence and then give weight to the evidence during deliberations. As well, she argued that the situation for *C. v. SCDSB* was identical to the situation for this student, and since the Tribunal admitted the affidavit evidence in the case for *C. v. SCDSB*, under the rules of natural justice it would be appropriate to allow this student's family the opportunity to have their evidence presented in a similar manner that occurred in *C. v. Simcoe County District School Board*, September 15, 2003 (unreported).

## Decision

The Tribunal told the Respondent that regarding the admissibility of affidavit evidence, it acknowledged the difficulties faced by the Respondent in not being able to cross-examine witnesses who created a report or document. Nevertheless, the Tribunal decided, as it is specifically entitled to do under the *Statutory Power Procedures Act, R.S.O. S. 15 (1)*, to allow the evidence under dispute to be presented, noting that the Tribunal would determine the weight of the evidence during its deliberations, and would take into account the fact that the Respondent was not able to cross-examine the deponents.

## **Introduction**

On October 6<sup>th</sup>, 2003 the Tribunal began the Hearing to determine the issue regarding the placement of the student. Both counsel agreed to present the evidence for one student initially, and hear the evidence relating to the other student subsequent to that. The Chair stated that the Hearing would be conducted under the authority of the *Education Act RSO 1990, c.E.2*, as amended, section 57, the regulations made thereunder, and the *Statutory Powers Procedure Act R.S.O. 1990, c. S.22*.

The student is an eight-year-old child living with autism. According to the student's mother, the student is an affectionate and active child. She added that her child is completely non-verbal, and becomes frustrated when others do not understand her child's needs. The Appellant also related that although her child observes other children, her child does not engage in play with them, and that her child does not so much play with toys as manipulate them. What the student clearly enjoys is listening to music, watching Disney movies, and jumping on the trampoline.

The Ministry of Education defines "Autism" under the "Communication" category as:  
A severe learning disorder that is characterized by:

- a) Disturbances in:
  - a. rate of educational development
  - b. ability to relate to the environment
  - c. mobility
  - d. perception, speech, and language
  
- b) Lack of representational symbolic behaviour that precedes language.

The student attends the Elementary School in Barrie, within the Simcoe County District School Board (SCDSB), and is in an Elementary Special Education Class.

It is the placement within the Elementary Special Education Class that is under appeal by the student's parents. Although the Appellants believe that the student needs a specialized program, they do not believe the current placement is an appropriate placement in that it is not providing their child with the educational opportunities their child needs to reach personal potential. Specifically, the placement is inappropriate without the requisite program of IBI and qualified teaching supports.

## **Legal Framework**

### **Statutes**

*Statutory Powers Procedure Act R.S.O. 1990, c. S. 22*

*Charter of Rights and Freedoms S.15 (1), Part I Constitution Act, 1982*

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

*Occupational Health and Safety Act (R.S.O. 1990, c.O.1)*

*Education Act, R.S.O. 1990, c.E.2 as amended*

*Education Act, Subsection 1 (1) Definitions*

Section 1.1 of the *Education Act* defines exceptional pupil, special education program and special education services in the following way:

*‘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, established under subparagraph iii or paragraph 5 of subsection 11 (1), of the board.*

*(a) of which a pupil is a resident pupil*

*(b) that admits or enrolls the pupil other than pursuant to an agreement with another board for the provision of education, or*

*(c) to which the cost of education in respect of the pupil is payable by the Minister.*

*‘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) describing the Power of the Minister of Education reads:*

*“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.”*

The *Education Act*, Section 57, Special Education Tribunals, reads:

*Section 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.*

*Section 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.*

*Section 57 (5) Decision Final*

*The decision of the Special Education Tribunal is final and binding on the parties to the decision.*

PART X.2 of the *Education Act*, Teacher Performance Appraisal reads:

Section 277.14- *The purpose of this Part is,*

*(a) to ensure that pupils receive the benefit of an education system staffed by teachers who are performing their duties satisfactorily;*

## **Regulations**

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

This Regulation governs the identification and placement of exceptional pupils, IPRC reviews, appeal procedures, and the role of parent(s)/guardian(s) in these processes. At least 10 days in advance of a meeting of a committee or special education appeal board, the chair of the

committee or board shall give written notice of the time and place of the meeting to a parent of the pupil and, where the pupil is 16 years of age or older, the pupil. O. Reg. 181/98, s. 5 (5).

Subsection 17 (1) When making a placement decision on a referral under section 14, the committee shall, before considering the option of placement in a special education class consider whether placement in a regular class, with appropriate special education services,

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

Student Focused Funding-Legislative Grants , 2003-04, Section 20, made under The *Education Act* governs the funding for programs in facilities for children in care and treatment facilities.

Teacher Performance Appraisal, O. Reg. 99/02 made under The *Education Act* applies to the performance appraisal of teachers conducted under Part X.2 of the *Act*.

Program Policy Memorandum No.81 [of the Ministry of Education] made under the regulations and *The Education Act* outlines respective responsibilities of school boards and Ministries of Health and Long-Term Care and of Child and Youth Services for ensuring that students with special needs receive the health services they require in order to benefit from an educational program. The Community Care Access Centres (CCAC) funded by the Ministry of Health and Long-Term Care, provide a single point of access for home care and school health support services to children in the school setting, including nursing, physiotherapy, occupational therapy, speech therapy, and dietetic services to enable children with special needs to attend publicly funded schools.

Program Policy Memorandum No. 85 [of the Ministry of Education] made under the regulations and *The Education Act* outlines the terms and conditions for an education program in Care and/or Treatment Facilities for pupils who cannot attend local schools because of their need for care and/or treatment. Eligible government-approved care and/or treatment facilities are listed in the General Legislative Grants regulation.

### **Special Education Tribunal Decisions**

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

*O. v. Wentworth (County) Board of Education*, June 5, 1987. (unreported)

*R. v. Carleton Roman Catholic School Board*, December 16, 1988. (unreported)

*E. v. Brant County Board of Education [1997]*, 1 S.C.R. 241; 31 O.R. (3d) 574; 142 D.L.R. (4<sup>th</sup>) 385 (SCC).

*L. v. York Region Board of Education*, October 9, 1985. (unreported)

*C. v. Dufferin-Peel Catholic District School Board*, September 18, 2003. (unreported)

*C. v. Simcoe County District School Board*, September 15, 2003. (unreported)

*D. v. Toronto District School Board*, December 24, 2002. (unreported)

### **Other Sources Cited**

*Auton (Guardian ad litem of) v. British Columbia (Minister of Health)*, 2000, B.C.S.C. 1142; [2000], 8 W.W.R. 227; 78 B.C.C.R. (3d) 55 (B.C.S.C.).

*Auton (Guardian ad litem of) v. British Columbia (Minister of Health)*, 2002, B.C.C.A. 538; (2002), 6 B.C.L.R. (4<sup>th</sup>) 201; 220 D.L.R. (4<sup>th</sup>) 411 (B.C.C.A.).

*Eldridge v. British Columbia (Attorney General) (1997)*, 151 D.L.R. (4<sup>th</sup>) 577 (S.C.C.)

*Innisfel (Township) v. Vespra (Township) et al. (1981)*, 123 D.L.R. (3d) 530 S.C.C

*Jackson v. Region 2 Hospital Corp. (1994)* 145 N.B.R. (2d) 51; 24 Admin L.R. (2d) 220 (NBQB).

Ontario College of Teachers, *Standards of Practice for the Teaching Profession*, 1999.

### **The Appellants' Request**

The Appellants are appealing the appropriateness of the placement decision of June 2002 of the Simcoe County District School Board placing the student in the Elementary Special Education Class. Due to a number of unusual factors during the school year of 2002 - 2003 and the Board's obligation, under legislation, another IPRC was held in June 2003. The family is appealing this second placement concurrently within this hearing. The Appellants believe their child's special programming needs are not being met in this placement and as a result their child's education is currently inadequate within this particular placement. The family is requesting that the Tribunal make an order granting the appeal and order the Respondent to place their child in a special education class that includes the requisite Intensive Behavioural Intervention (IBI) at a minimum of three hours per day and increased speech and occupational therapy. The level of such a program should be consistent with the IBI program their child currently receives [in the home]. This program should include very intensive programming. The family also requests an order by the Tribunal for instructors or teachers and educational assistants (EAs) who are specifically trained in the area of autism.

### **The Respondent's Reply**

The Board believes there have been no grounds for appeal, as the Appellants are not contesting the placement for their child in the Elementary Special Education Class, but rather the style of teaching or more to the point, the Board's refusal to carry out Intensive Behavioural Intervention (IBI) to the extent and in the manner the family believes their child requires.

The Respondent's position is that Intensive Behavioural Intervention (IBI) is a therapy rather than an educational placement or a special education program or a special education service. The Respondent's view is that the Board provides educational instruction, not therapy and that

teachers use teaching techniques guided by behavioural theories that incorporate applied behavioural analysis, but not the therapeutic program identified as IBI (Intensive Behavioural Intervention). The Respondent's view is that Intensive Behavioural Intervention (IBI) is delivered by unregulated instructors under the supervision of a psychologist, and is thus a therapy and not an educational program delivered by teachers. The Respondent questioned what role a teacher would play in a program developed and supervised by a psychologist, and administered by a person who requires no teaching qualification. The Respondent's view is that a program of Intensive Behavioural Intervention (IBI) as described by the Appellants would substantially substitute therapy for education, and would require the Respondents to utilize employees over whom they would have no authority. As well, the Respondent argued that teachers are responsible to a regulatory body, the Ontario College of Teachers, and are required to use the *Standards of Practice for the Teaching Profession* in the development and delivery of an educational program, while a therapist delivering IBI is not subject to a regulatory body.

### **Witnesses**

The Tribunal heard the following witnesses:

#### **For the Appellants**

The Appellant - Ms. C. -	Parent, the student's Mother Senior Area Coordinator for Leaps and Bounds (a service provider for children with Special Needs)
Ms. B. -	Senior Therapist for the Autism Program for York Central Hospital
Ms. J. -	IBI Instructor-Therapist with Leaps and Bounds [currently an Educational Assistant for Simcoe County District School Board]

#### **For the Respondent**

Sheri Smith -	Integration Resource Teacher, Simcoe County District School Board
Linda Milhausen -	Special Education Consultant, Simcoe County District School Board
Ms. J.C. -	Classroom Teacher, Simcoe County District School Board, 2002-03 school year
Tracy Hunt -	Speech Language Pathologist, Simcoe County District School Board
Joan Fullerton -	Superintendent of Student Services, Simcoe County District School Board

### **The Issues**

1. Was the placement decision of June 17, 2002 by the Simcoe County Board of Education IPRC, placing the student in the Elementary Special Education Class the appropriate placement for the student?
2. Is the placement inappropriate because the staff members in the classroom are not knowledgeable about autism?
3. Is there a role for therapy in a school placement?

4. How can the student's communication needs best be met?
5. What effect did communication have on the relationship between home and school?

### **Appellants' Arguments**

Ms. Venhola, on behalf of the parents, stated that the Appellants' view is that the student has special needs that must be met both at home and in the educational system. The appropriate placement for the student to achieve full potential is a placement that delivers IBI (Intensive Behavioural Intervention), and because IBI is not being offered within the current placement, the placement is not appropriate.

The Appellant described IBI and ABA (Applied Behavioural Analysis) as interchangeable terms for the same teaching method for children with autism. Under this program, each task to be taught is broken down into its smallest element, and each element is taught individually in a progression leading to achievement of the task and then generalization of the task. The process for teaching these individual elements is called "discrete trials."

The student participated in the IBI program funded by the Ministry of Community and Social Services and delivered by Kinark [a community agency] as part of an Early Intervention Program for children with autism between the ages of two and five years of age. The student was admitted to the program when the student was age six, and received the maximum allowable hours of training. The student was to have participated in the program for a year, but was discharged early when a Ministry of Community and Social Services directive limited the program to children under the age of five.

The student made progress within the IBI program, including, most significantly, independence in toileting. It is the Appellants' view that placement in the Simcoe County District School Board's Special Education Class without the requisite program of IBI and without qualified teaching supports denies the student the opportunity to have an educational program that meets the student's needs under the *Education Act*.

The Appellant described the ideal placement for the student as being "a placement that includes IBI programming, a placement where the student receives very intensive programming, and instructors or teachers and educational assistants (EA's) who are specifically trained in Autism, who understand exactly what it [autism] is, what the behaviours [associated with autism] are and how to deal with those."

The Appellants argued that the Board's view that IBI is a therapy should not prevent the Board from delivering IBI to the student. The Appellants argued that the Board partners with therapists with respect to speech therapy and occupational therapy, and that teachers not only consult with these therapists, but also carry out therapeutic accommodations as a result of those consultations. The Appellants further argued that the Board has hired a psychologist and two staff who are trained and experienced IBI instructor-therapists, and that the classroom teacher can be trained to deliver discrete trial teaching to the student as part of the curriculum.

The Appellants argued that IBI is the appropriate program for their child, that the school is able to provide IBI without prejudice or additional cost, and that the Board ought to be ordered to do so. The Appellants argued that it is the program content [IBI or a program that mirrors IBI], not the program title or label that matters to their child.

### **Respondent's Arguments**

Ms. Bowlby, on behalf of the Board, argued the Appellants are not contesting the placement for the student in the Elementary Special Education Class, but rather the style of teaching, or more to the point, the Board's refusal to carry out IBI to the extent and in the manner Appellant family believes the student requires to achieve full educational potential. The Respondent argues the Elementary Special Education Class at the Elementary School is the appropriate educational placement for the student.

The Respondent argued that the Board provides educational instruction using teaching techniques guided by, among other things, the theories of applied behavioural analysis, delivered by teachers certified by the Ontario College of Teachers of the Province of Ontario, whose performance is supervised by administrative personnel and whose professional standards are established by the Ontario College of Teachers. The Respondent argues that IBI, on the other hand, is a therapy delivered by unregulated instructors, who are not highly trained in IBI, and who work under the direction of a psychologist.

The Respondent maintains the Special Education Class was created to specifically address the needs of children with autism who lacked communication skills and who demonstrated behaviours associated with autism such as self-stimulation and limited social skills. The student met the specific criteria attached to the placement. The Respondent reported that the Board developed an extensive 14-day training process for the teachers and educational assistants who work in the now designated Elementary Special Education Class so that the staff in the program would have expertise in teaching children with autism. As well, 25 teachers in the Board have taken a regulated [Ministry of Education] additional qualification 10-week elective course entitled, "Autism". The Respondent reported that the Board continues to invest in extensive supports for this class, including hiring additional resource personnel. At the time of the hearing, there is an enhanced in-class support ratio of one educational assistant (EA) per child in addition to the teacher in this classroom for six children with autism.

The Respondent questioned what role a teacher would play in a program developed and supervised by a psychologist, and administered by a person who requires no teaching qualifications. The Respondent's view is that a program of Intensive Behavioural Intervention (IBI) as described by the Appellants would substantially substitute therapy for education, and would require the Respondent to utilize employees over whom they would have no direction, and who would not be subject to the authority of a regulatory body such as the College of Teachers.

The Respondent stated that there are some young people in Ontario whose care and treatment needs supersede their educational needs at a particular time. Those needs are met through a treatment program as described in Program Policy Memorandum No. 85 and typically called a Section 20 program. (Section 20 refers to the section of the General Legislative Grants that funds

these programs.) Such a program is created upon the request of a care and treatment agency and is administered by a care and/or treatment agency. Within that setting, education is offered when the administering agency deems a child to be able to benefit from education at a particular time. The District School Board of Education, as the partner, would provide a teacher in that setting. The student is removed from the school attendance roll upon admission to a care and/or treatment program, and therefore is no longer a pupil of the Board.

## **Testimony of the Appellants**

### Testimony of the Mother of the student

The Appellant described her child as an eight-year-old who has been diagnosed with a Pervasive Developmental Disorder (PDD). She stated that her child is big, weighing about 105 pounds. Her child is completely non-verbal. Her child doesn't play like other children but rather manipulates objects by tapping [her child's] face with the object or throwing it down. Her child doesn't interact with other children. In the area of self-help skills, her child can eat with a spoon, wipe [the child's] mouth with a napkin, and is fully toilet trained. Her child cannot brush teeth or hair.

The Appellant described her child as having a global delay. Due to autism, her child doesn't learn through the environment like a typical child. In order for her child to learn, her child needs to be engaged in the "right way." The Appellant stated the right way to engage her child is through IBI.

The Appellant stated that her child spent the Grade 1 school year (2001 - 2002) in the Special Education Class at the Elementary School. There were six students with autism, one classroom teacher and five educational assistants in the classroom. Her child had a full time EA.

Prior to enrolling her child in the class, the Appellant testified that she asked whether discrete trials would be done within the Special Education Class, and was assured they would be. She said she unfortunately never asked how often discrete trials would be done. The Appellant said that in conversation with the Grade 1 teacher, she learned the programs they were working on were matching simple puzzles, listening to music, getting dressed and undressed, and toileting skills.

The Appellant described "discrete trials" as taking a program, i.e. brushing the child's teeth, and breaking down all the steps. Each step would be done ten times in a row. The therapist reported that the "trials" are repeated every day until the child has mastered the task.

The student is now in the Grade 3 year in this Special Education Class. During one two-hour visit to the classroom, the Appellant noted that she witnessed five minutes of discrete trial training.

The Appellant identified IBI as standing for intensive, for behavioural, and for intervention. She described it as a very intensive and repetitive method. The Appellant stated ABA and IBI are basically the same. The Appellant believes Dr. Lovaas (a Californian psychologist) designed ABA (Applied Behavioural Analysis), and that IBI (Intensive Behavioural Intervention) is the

term used for the Canadian equivalent of the ABA program. The Appellants attended a three-day workshop on ABA at the Geneva Centre, a resource centre for Autism in Toronto, at the end of February or start of March 2002.

In September 2001 the student's parents paid for three hours per week of IBI at home through private sessions provided by Leaps and Bounds, an agency providing IBI therapy. In June 2002, the student began a 30-hour per week program of IBI through an early intervention program funded by the Ministry of Community and Social Services. The program operated through Central East Pre-School Autism Services and Kinark Child and Family Services. Dr. Len Levin, the Assistant Clinical Director, a psychologist, assessed the student and recommended 40 hours per week based on the severe nature of the student's autism. The Ministry program was targeted toward children between the ages of two and five. Although the student was six at the time of assessment, the student received 30 hours per week from June 2002 until February 7, 2003. During that period when school was in session the student attended school Tuesday and Thursday afternoons from 1:00 until 3:30pm.

The Appellant described the student's Kinark IBI program during her testimony: there were five instructor-therapists, and on each day her child worked with a different therapist. At the end of two weeks there was a three-hour meeting to evaluate and adjust the program. During the seven months the student learned the following:

- Toileting
- To eat on [the student's own
- To make eye contact
- To increase sitting from five seconds to 30 minutes
- To match up to five items
- To wear a helmet
- To ride a tricycle and then to ride a bicycle with training wheels
- To wear head phones
- To listen to music for half an hour
- To get a puzzle, do it, and return it
- To use PECS [Picture Exchange Communication System] for food

The student's discharge assessment report from Kinark, after the student had received seven months of a 30 hour per week program, was written by Karin Earle-Williams, Senior Clinical Supervisor. She listed 46 skills the student mastered during the program. The recommendations in the discharge assessment letter were as follows:

- 1) It is of critical importance to develop communication skills.
- 2) Intensive and focused teaching are required to develop augmentative communication system (PECS).
- 3) the student's receptive language skills appear to be better developed than the student's expressive language.

The Appellant stated that the student was a different child after the seven months with the Kinark and Leaps and Bounds programs. The Appellant said the Special Education Class doesn't meet the student's needs as,

- 1) it does not have IBI

- 2) it is not nearly as intensive [as IBI]
- 3) it is not one-on-one; and
- 4) the EAs are not specifically trained in autism.

The Appellant described her child's progress in Grade 1 and 2 within the Special Education Class at the elementary School as very slow when contrasted with the Kinark Program in which the student was able to accomplish a great deal within a short amount of time.

The Appellant described the following regressions in her child's behaviour:

- 1) Her child now waits for prompts to put on shoes.
- 2) Her child now only turns on the cold water to wash hands.
- 3) Her child now waits for her to dry [her child's] hands.
- 4) Her child does not initiate riding a bicycle any more.

The Appellant produced a copy of a prescription for "IBI ongoing" by the family doctor. He offered this prescription to help the student's family with their Human Rights complaint. The Appellant agreed with the statement that IBI is a treatment for a medical condition. She also stated that IBI could be considered a therapy, the same as a treatment and a medication, anything that helps the child to improve and to get better. The Appellant stated the way IBI is presented is very intense and repetitious until the child understands the concept or the instruction. The Appellant indicated that IBI includes behaviour modification.

The Appellant indicated that her child received one hour of speech therapy and one hour of occupational therapy provided by the Community Care Access Centre (funded through the Ministry of Health) per month at the school. Neither of the therapists providing speech therapy and occupational therapy are teachers.

The Appellant indicated that the behavioural class she knew about at Alcona Glen School would not be appropriate for her child as the children in those classes were verbal and basically had no identification other than "Behaviour."

The Appellant stated that the Special Education Class for the student's Grade 1 year was a better place for her child than earlier placements. In Junior and Senior Kindergarten her child cried and had tantrums so the Appellant was picking her child up almost daily. In the Special Education Class there were only six children, the noise level went down, there were toys everywhere, and her child was happy. The Appellant did not believe her child learned to learn in that placement or that the personnel (anyone) in the class knew what autism was. When her child started the Grade 2 year, the student had received 33 hours of IBI therapy a week for three previous months, (June - Sept.). Due to this instruction time, her child was absent 28 days in term one and 29.5 days in term two. On the first term's report card, "I", indicating "inconsistent" appeared under self-regulation behaviour, "transition to school, washroom and other activities." In the third term report card this area was "S", (satisfactory). The Appellant credited her child's progress in this area to the IBI program delivered outside of school.

The Appellant also noted a number of areas on the term one and term three report cards that indicated her child had regressed. She stated her concern that her child might regress in all areas.

There have been some toileting accidents. Her child still needs rewards. The Appellant stated that IBI does not have to be delivered by a teacher. It could be provided by an EA. As well, the Appellant believes an IBI program could be delivered in the classroom. She stated that each child has a little work area now that would be perfect for IBI. The personnel would have to be specifically trained in IBI.

The Appellant stated again that her child required a placement that consists of “IBI, a placement that provides intensive one-on-one programming, and individuals who are working with her child that are specifically trained in autism.”

During cross-examination the Appellant agreed that there had been a number of different methods of school/home communications. There were report cards, a Communications Book; Individual Education Plans (IEPs), Case Conferences, and meetings with different staff personnel, plus a phone in the classroom which provided opportunity for immediate communication.

The Appellant stated that IBI was delivered mostly in the dining room of their home at a small rectangular table by Leaps and Bounds therapists. However, Kinark therapists sometimes presented IBI at the kitchen table, on the floor, on the sofa in the living room, or in the family room.

The Appellant outlined how Kinark’s IBI hours with her child were done in three-hour blocks. They were from 9 – 12 am., and 1 – 4 pm. on Monday, Wednesday, Friday and Saturday. On Tuesday and Thursday the student only received IBI from 9 – 12 am. These times were during school hours and contributed to the student’s absence of 34.5 days the first year and 75.5 days of the last year.

The Appellant explained that once her child had mastered a program her child no longer needed the repetition over and over, although the program needs to be reviewed now and then.

The Appellant acknowledged that she has brought a Human Rights complaint against the Board, as she believed the school was discriminating against her child by not providing IBI. The Appellant also agreed that the family doctor, had no expertise in autism and that she supplied the family doctor with the information about IBI

The Appellant testified that although she believed her child was “whiney” on the day of the discharge assessment and perhaps didn’t do [her child’s] best, there was no notation in the assessment report that indicated that there were circumstances that would have interfered with her child being able to give the best effort and the assessment would not have to be redone.

Ms. Bowlby directed the Appellant to IEPs from her child’s Senior Kindergarten year where under *Self-Management* her child was working on toilet training. She also noted that in the end of year report card there was a description of the progress that was developing in toileting. This was before Leaps and Bounds had begun working with her child.

In response to questioning regarding the gains her child made, and whether they are attributable to the school program of 5 days, 27-1/2 hours or the Leaps and Bounds program of three hours, The Appellant replied that she believes the gains her child made were a result of the IBI her child received. The Appellant stated again that she believes IBI is the fastest way for her child to learn.

The Appellant agreed that the occupational therapist and speech pathologist came to her child's classroom once a month to provide consultative services and recommendations to the teaching staff.

The Appellant again explained that her ultimate goal for her child is "I'm just looking for an intense program to get [my child] caught up as quickly as we can to peers so we can start getting [my child] into a regular classroom."

### **Testimony of Ms. C., Senior Area Coordinator for Leaps and Bounds**

Ms. C. testified her responsibilities are as Area Coordinator for Leaps and Bounds. Leaps and Bounds offers several services, but primarily services for children with autism. It provides tutoring, ABA sessions, respite care, behaviour management, and pre-school services, and IBI programs.

Ms. C. related that she received her training to become an IBI Therapist at Thistletown Regional Centre in 1985. She provided IBI therapy for three years, and then transferred to the adolescent branch at Thistletown. She then worked for the York Region School Board and had a private practice. She attends and makes presentations at conferences, including a presentation on ABA at a conference in Victoria B.C. in the summer of 2003.

Ms. C. testified that ABA and IBI is the same thing to her. Ms. C. has worked for Leaps and Bounds for three years and testified that Leaps and Bounds has been providing services to the student since September 2001.

Ms. C. worked with the student for three months at the beginning of the student's program. She delivered the IBI program twice a week for a total of six hours. Ms. C. stated Leaps and Bounds believes IBI "is really the only way children with autism learn, the most effective way." IBI, the main focus for Leaps and Bounds, is the program that is delivered at their centre-based program in Thornhill, and in their in-home programs throughout the region.

Ms. C. stated, "But every child that I've ever seen have [sic] made gains using an IBI program." When asked what principles underlie the IBI/ABA program Leaps and Bounds provides, Ms. C. stated "...They have to be broken down into small steps. You have to be able to analyze each child, where they are in the curriculum, to make sure that you start at the appropriate spot, to make sure that they meet the criteria for mastery on every single step before moving on. We have two psychologists that we consult with who are both experts in ABA. We make sure – sometimes they'll change mastery criteria for a specific child depending on – on the program, on the child, but whatever the mastery criteria is, you have to make sure that they – that they meet the criteria before going onto each step. You have to be able to analyze the data, analyze the

graphs to make sure that the programs are running appropriately, that the children aren't stuck on a particular step, and if they are, what you have to do to move on. You know, have they not mastered a step before? Have they not generalized a step before? You know, do we have to change something in order to make the move on? So I think all of those things have to be present to have an effective IBI program."

In her testimony, Ms. C. stated, "...Typically developing children learn skills almost through osmosis, almost just through daily living. Children on the autism spectrum don't do that. We have to teach these children, we have to teach them to learn to learn, and that's why breaking things down into small steps, that's what that does, it teaches them how to learn, and that's why it's critical that you do break down; and we break down everything from toileting skills to academic skills, to life skills, brushing their teeth, getting dressed. You know, even a dressing program that we have for our children might have 20 steps on how to put on a shoe, and these kids have to learn every single step, you know, in order to move on."

Ms. C. described discrete trial teaching. She stated it was a series of 10 trials on any one given program. It is not the steps; it is the presentation of the program. The therapist calculates the percentage of correct responses, examines the data collection on the 10 steps and counts how many times the child got the task correct, without prompts. Ms. C. described mastery criteria as achieving 80% accuracy over three different groups of ten trials, over two days, with two or more therapists. She went on to describe generalization as "To be able to make the skills that children learn in the discrete trial teaching a functional skill, and so that they can take that skill and they can apply it no matter where they are, no matter who asks them to apply the skill, or no matter what materials are used at any given time, that they've mastered the skill in a general sense."

Ms. C. stated a good IBI program requires a trained therapist, good programs, good supervision of programs, and good data collection. Ms. C. said the word "intense" relates to the presentation of the trials and the entire program. She discussed how much IBI a child should have. She said a two-year old in the centre-based program was receiving 30 hours a week and doing well. Finances often dictate how much IBI a child receives.

The centre-based program has seven children who attend five days a week, for six hours a day. It is not a school, as there is no teacher. Ms. C. described the IBI curriculum as having three levels: beginning, intermediate and advanced. Responding to a question on who wrote the curriculum, Ms. C. said "...It's a Hamilton-Niagara curriculum.... two of our psychologists were involved in writing the curriculum. There's many people that I don't know of that were involved in writing the curriculum.... It's the curriculum for an ABA program from beginning to end."

Ms. C. stated that in her opinion it was possible to have an IBI program in the school. The school would need trained IBI people, someone to supervise, make sure data collection is done appropriately, to analyze the graphs, and to make sure the program is running smoothly. The school would also need a space. The program would also need a psychologist who has training and expertise in ABA.

Ms. C. briefly described some of the training people receive at the centre-based program. All staff had had some autism experience. Ms. C.'s experience with behaviour modification while working with the school board had some similarities to IBI therapy. However, the students in the school system with whom she worked had severe behavioural exceptionalities. Ms. C. stated she has personally conducted an IBI program with 30 clients, trains people to conduct IBI, and provides hands-on training for staff.

Under cross-examination, Ms. C. testified that Leaps and Bounds is a privately owned company that sells IBI services, and that it would benefit from a contract to sell IBI to a school board.

She testified she has a college diploma from the Child and Youth Worker program from Centennial College and has no other formal qualifications.

Ms. C. testified her involvement with children with autism has primarily been through the provision of IBI, either doing it herself or supervising others. Ms. C. said most of her career has been involved in delivering IBI, except for a three-year period when she was employed by the York Region Board of Education in a classroom for children whose designation was behaviourally exceptional. During that period, Ms. C. testified, she had access to the Ontario School Records (OSRs) of the children in the class and wrote the behavioural component of the report cards and Individual Education Plans (IEPs).

Ms. C. testified she has no additional qualification in autism, but did take courses in applied behavioural analysis as part of her Child and Youth Worker Diploma, and is familiar with the work of B.F. Skinner (1904-1990) [psychologist deemed to be responsible for developing the Behavioural theory of learning]. Ms. C. testified that she consults with Dr. Rincover, a consulting psychologist to Leaps and Bounds and who is an expert in autism and IBI, for guidance when she needs it. Ms. C. testified that she does not consult with Dr. Rincover often. Ms. C. testified she could, with the support of someone like Dr. Rincover, supervise an IBI program within a school, and that a teacher would not be necessary in such a program. When asked whether she would see the need for IBI therapy to be delivered in lieu of education, Ms. C. replied she sees IBI as a form of teaching children with autism.

Ms. C. testified she has no expertise on teaching techniques used in schools but was aware that applied behavioural analysis underlined the delivery of developmental life skills programs.

Ms. C. testified Leaps and Bounds offers two types of programs: centre-based and home-based. Parents pay \$30 per hour for either, and in some cases parents pay \$900 per week for a 30-hour program of IBI therapy at their centre.

Ms. C. stated that one hour per day or three blocks of 15 minutes a day would not be enough IBI for the student. Not all children need the same amount of IBI, she testified, and their goal is to integrate children into a school settings.

### **Testimony of Ms. B., Senior Therapist for the Autism Program with York Central Hospital**

Ms. B. testified she has four years experience with children with autism. She received two weeks training in IBI at a behaviour institute in Toronto, and there was an exam upon its conclusion. Ms. B. has a BA in Sociology and Psychology from Wilfred Laurier University. Ms. B. testified she provided instruction therapy to children age six and under in the Central East Pre-School Autism Services Program, a government funded York Region Hospital Program with clinical supervision provided by Kinark, "...with the hope of transitioning them [children in the program] to school."

Ms. B. testified the student received therapy for 24 hours a week from June 3<sup>rd</sup>, 2002 to Feb. 7<sup>th</sup> 2003. During Ms. B.'s testimony the Appellants showed a ten minute segment of a video showing the student's progress. Ms. Venhola questioned Ms. B. on the contents of the video, and Ms. B. described the process of discrete trials.

In her cross-examination Ms. Bowlby questioned Ms. B. about the existence of a regulatory college or professional organization that regulates IBI instructors or therapists. Ms. B. said there was no regulatory body for IBI at this point.

Ms. Bowlby questioned Ms. B. about the video, how many videos were taken and for what purpose, and then focused on the process used to teach the student independent toileting. Ms. B. testified that the student was in underwear for this training.

Ms. B. testified that her notes revealed an earlier therapist had two contacts with the classroom teacher, who has since passed away, but there were no contacts with the new teacher. Ms. B. testified she also attended one meeting with the previous classroom teacher, the parents, the Principal, and her Clinical Director, for the purpose of a smooth transition back into school. Ms. B. testified she prepared a Pre-School Autism Transition Summary for the benefit of future service providers, the school and the parents. It was an overview of what the student had accomplished with her program, and strategies to proceed with the program. This report was given to the parents.

### **Testimony of Ms. J. – Instructor Therapist with Leaps and Bounds**

Ms. J. testified she had six days of training from the Geneva Centre, and informal training at Leaps and Bounds. She has an undergraduate degree, but no certification as an IBI Instructor/Trainer. She is now an EA for the Simcoe County School Board. She worked with the student and the Appellant for two years at home under the direction of Leaps and Bounds doing discrete trials. She is of the opinion that the student progressed during the two-year period of her involvement. Under cross- examination Ms. Bowlby clarified that Ms. J. had worked with the student for one and a half to two hours per week.

### **Witnesses for the Respondent**

#### **Testimony of Ms. Sheri Smith, Special Education Consultant, IEP Portfolio**

Ms. Smith's curriculum vitae (CV) was entered into evidence to establish her credentials as an expert witness in education. Ms. Smith has a three-part specialist qualification in special education and has been the (IRT) Integration Resource Teacher, providing teachers with the Board with strategies to support students with autism spectrum disorder.

Ms. Smith outlined her background, and then described the evolution of the Simcoe County District School Board's Special Education Class. The Special Education Class had been developed to meet the needs of a particular group of children with autism. It was directed at those who:

- were of primary age
- had a diagnosis of autism spectrum disorder
- had minimal awareness of their surroundings
- had no functional communication skills
- had stimulatory behaviour which affected their ability to learn
- had complex needs in all areas of functioning

Ms. Smith related the development of the Special Education Class and testified that the local Community Care Access Centre and the Geneva Centre had been consulted as well as many special education personnel from the Board. The maximum class size for these classes was six pupils. The student's class began in 2001/02 with one teacher and five EA's. In 2002/03 the number of EA's was increased to seven. Additional support was provided by an IRT, a Consultant, a Superintendent, and the Principal of Special Education. Within the school, support was also provided by the Principal and Vice-Principal.

Ms. Smith informed the Tribunal that part of the annual training for staff included a presentation on ABA by Janet Seymour of the Geneva Centre. Ms. Seymour covered applied behavioural analysis principles, backward chaining, breaking down tasks into small steps, ways to determine whether a child is functioning independently, and then taking the next step. The EA training included task analysis, and included role-playing to ensure they understood how to break down tasks.

The teachers in the Special Education Classes also took this training. The initial training before the classes were started was five days, and following that it was three – five days. In addition to this the Board offered a Special Education Qualification in autism for twenty-five teachers over a period of ten weeks.

Ms. Smith testified the students in the Elementary Special Education Class have the Picture Exchange Communication System (PECS) program, and testified about the training the staff received in its use. Ms. Smith said PECS is a picture exchange communication system wherein students use a visual [picture or object] to make a request, so that they can get the desired reinforcer. Students exchange a picture and receive what they requested.

Ms. Smith described the differences between applied behavioural analysis and IBI. She described that ABA principles are present in all aspects of teaching, both in the regular classroom and in special education programs. She said *"It's just good teaching."*

Ms. Smith described how the Special Education Class addressed the needs of children with autism by taking care to provide consistency, smooth transitions, and predictable routines. Ms. Smith described the various programs used to support the students to understand their schedules. She then described the self-regulatory needs of children with autism. She described the alternative curriculum developed based on the student's need for self-regulation, self-help skills, social skills, as well as some literacy and numeracy skills. She described the classroom and the resources that have been used to accommodate the special sensory and transitioning needs of the children. She described the Snoezelen Room, a separate room that has many different items to assist the children with sensory integration. There is a ball bath, a bubble tube, fiber optic strings, musical mats, and a rocking device. All these pieces of furniture and equipment assist in soothing and relaxing children with autism. Ms. Smith described integration into the regular classroom as the ultimate goal of the class, when the students are ready to be integrated. She said integration is very important as it gives the children a chance to generalize what they've learned. In addition to the generalized components of the program, Ms. Smith stated there was a highly individualized program based on the specific needs of each child.

In cross-examination, Ms. Smith described the differences between ABA and IBI. She testified that ABA and IBI share the same program goals but that IBI is overseen by a psychologist. Discrete trial training in her opinion is reinforcing appropriate responses adding that any children's computer program works on the basis of discrete trial training. Each element of the task is practised separately and reinforced until mastery is achieved. Ms. Smith testified that she sees the difference between ABA and IBI is that while both share the same theories and same elements, ABA is educational and IBI is used as a therapy model conducted by a therapist under the direction of a psychologist. She testified that while outside therapists are brought into the school to provide input and consultation to teachers, and to give them ideas on strategies and steps to work on with the children, they do not work one-to-one with children

### **Testimony of Linda Milhausen – Special Education Consultant**

Ms. Milhausen's CV was entered into evidence to establish her credentials as an expert witness. Ms. Milhausen, currently a Special Education Consultant, has had extensive experience in a variety of roles in special education: team leader to the autism support team; county resource teacher; and speech-language resource teacher.

Ms. Milhausen described her responsibility for the Special Education Class. She became involved with the program in January 2003 and helped complete the IEPs (Individual Education Plans) for the students.

Ms. Milhausen described the staff support for the Elementary Special Education Classes. Staff support includes a special education consultant, a speech language pathologist, an integration resource teacher team, and two resource EA's whose job is to provide coaching and training to other EA's across the county in effective strategies for children with autism.

Ms. Milhausen described the training that has been provided to the staff in the Elementary Special Education Class. (Exhibit 14) Ms. Milhausen testified that the Board was able to offer the Geneva Centre Summer Training Institute to their ASD/PDD teachers, some special education consultants, and their speech language pathologist. The Board was also able to provide a five-day session at the end of August for the educational assistants. In addition, the Board also provided a half-day in-service in ASD/PDD to principals and will offer it again soon for regular classroom teachers, special education teachers and educational assistants who are not currently involved in the ASD/PDD classes. For those currently working in the classes, the Board will offer in-service around the *Boardmaker*, *PECS*, and *Writing With Symbols 2000* programs.

Ms. Milhausen testified that two children, who met the criteria of the Special Education Class when they began it, did not return to the Special Education Class in September 2003, because they had made significant gains and were able to move into neighbourhood schools. Neither child received IBI training. Based on that and on the gains of other students as reflected in the report cards of the students, the Special Education Class was deemed to have been a success.

Ms. Milhausen testified she attended a conference on Autism in 2003 at which Psychologist Ron Leaf made a presentation. Ms. Milhausen's notes on this conference are included in the Appellants' Submissions, Exhibit 2, Appellant's Joint Record, Tab 9. Ms. Milhausen testified she saw similarities between the principles of applied behavioural analysis as described by Dr. Leaf and teaching. Ms. Milhausen related that in his speech, Dr. Leaf described applied behavioural analysis as something that has been effect for a long time, and not just regarding autism but also in many venues. It comes from the School of Behaviourism, and is the application of the theory and principles of Behaviourism. An underlying premise of Behaviourism is that behaviour can be learned or unlearned. The analysis component of Behaviourism regards data as important so that a person can adjust the rewards and behaviours demonstrated and evaluate a difference in behaviour allowing the person using the system to see what is working and what is not working.

In his presentation and in reference to the Appellants' brief, Exhibit 2, Tab 2, Ms. Milhausen described Dr. Leaf's findings about the effectiveness of early intervention with children with autism. Factors that affect outcome, according to Dr. Leaf were: early intervention; intensity of the programming; consistency between home and school; the quality of the intervention; and cognitive ability. As reflected in Ms. Milhausen's notes on Dr. Leaf's session, "cognitive ability [is] half the equation." The predictors of success for children entering the program, according to Dr. Leaf, are some language; presence of aggression; and interaction with the environment. According to Dr. Leaf, within six months there would be a pretty clear picture of whether the child was learning imitative responses and verbal and receptive responses.

Ms. Milhausen testified that the similarity she saw was that those principles are the underpinnings of good teaching. They are the kind of things teachers do all the time. Teachers are taught behavioural principles and strategies during their initial teacher training and throughout their careers. Ms. Milhausen said that in her opinion, applied behavioural analysis was just good teaching, good pedagogy.

Under cross-examination, Ms. Milhausen described support: as being available with resources; case conferences; liaison with outside agencies; assessing the need for in-service and training; and providing that training. She described the partnership the Board has with outside agencies to provide expertise such as speech therapy. Ms. Milhausen testified to what she sees as the differences between IBI and ABA. She testified that ABA is something with which she has been engaged throughout her career. It is good teaching and good pedagogy, while IBI is something that she is learning about. In describing her knowledge about IBI, she stated that in her understanding, IBI is delivered in an isolated context by a therapist as opposed to education which is delivered by a teacher in a classroom. The principles of ABA are used by teachers.

Ms. Milhausen testified that not all children receive the same supports within the Special Education Class, but that they get what they need depending on where they are in their progress towards their goals. Though all students in the class meet the criteria of the program, all the children are still very different and each has an individualized program.

### **Testimony of Ms. J. C. – Classroom Teacher**

Ms. J. C. was the classroom teacher for the Special Education Class for much of the 2002 –2003 school year. Ms. J. C.'s CV was entered into evidence to establish her credentials as an expert witness in education. Ms. J. C. has been a teacher with the Upper Canada District School Board and the Simcoe County District School Board. Ms. J. C. has specialist qualifications in Special Education, and has attended a three-day conference on autism at the Geneva Centre.

Ms. J. C. testified she became the classroom teacher upon the sudden death of her predecessor. The class was in some turmoil when she started both due to the death of the previous teacher and because of issues with another child. It was some time before things settled down. The student's IEPs were not completed when she arrived in the class, and she obtained help from the Integration Resource Teacher; an occupational therapist and a speech pathologist; from previous IEPs; from the OSRs and earlier IPRCs; and the special needs committee-a school based team, to help her complete the IEPs.

Ms. J. C. testified that the student's attendance was irregular, and she never knew in advance when the student would be there. The student was not present in the mornings because the student was attending IBI and the student was present some afternoons. This irregular attendance made it difficult for the student because the student needed structure and routines. She found the student to be an affectionate child who sought attention from adults and liked being tickled. When the student returned to school on a regular basis, in the second term, the focus for the student's program was in five main areas: self-regulation and behaviour, communication, social skills, self-help skills, and academic skill. These areas were set out in the student's IEP. Ms. J. C. described the student's school day, and described the student's attention to the schedule and some of the gains the student made over the year. She described the Communication Book that was sent home daily to the parent, and explained how it worked.

Ms. J. C. testified she knew the student was attending a program when the student was not at school, but did not know what sort of program it was. When the student returned to school full

time Ms. J. C. said she did not receive a copy of the transition report prepared by Ms. B. of the Eastern District Pre-School Autism Program, but did have a meeting with the student's parents to discuss a smooth and successful transition.

Ms. J. C. further testified that she did not have much time to prepare an assessment for the student during the first term after she arrived at the school because of the student's frequent absences, and was thus instructed by the Principal, Mr. Bell, to put "NE" (Not Evaluated) on the student's report card. Ms. J. C. testified she attempted to discuss the student's progress during one of the Appellant's classroom visits, but that the Appellant had indicated she was not interested in discussing programming. Ms. J. C. said she did not know the Appellant had been instructed by Mr. Bell not to have discussions with her during classroom visits.

According to Ms. J. C., the student made gains in a number of areas during the year, most notably, in her opinion, was the ability to look at people both when instructed to do so and as well as independently. The student also increased the ability to focus on tasks with fine and gross motor skills, with independent self-help skills such as getting the student's own lunch, and with toileting. Ms. J. C. said that since many of the gains the student made occurred during February until June when the student was in full attendance, she would infer that that the student would have done better in all five areas of the program had the student been at school full time during the first semester. Ms. J. C. described a typical day for the student which included self-help skills, transitions to and from school; circle time for group participation where all students took part in taking turns; seating skills, standing for O Canada; the sensory program developed in conjunction with the occupational therapist; work activities (for the student this consisted of gross motor skills using the recycling bins); alerting activities to prepare for transitions; fine motor skill activities such as pencil grasping, and colouring. Ms. J. C. testified she believed the student's cognitive level is at the lower range in the class, and she thought the Special Education Class was a good placement for the student.

Ms. J. C. described the Communication Book that was used to communicate to the parents on a daily basis.

During cross-examination Ms. J. C. said there were no outside agencies or service providers involved in the preparation of the student's IEP, nor did she recall any correspondence from the parents stating they would not sign the student's IEP.

Ms. J. C. recalled a meeting at which a transition plan was discussed when the student was coming back to school full-time. She said Mr. Bell was there, the parents, and someone from their IBI program, but she could not remember who this was. She said she received a sheet of some of the tasks the student had mastered, and that they discussed incorporating those tasks in the school program. She did not receive a transition plan from Kinark, and did not follow-up with Kinark at a later date. Ms. J. C. stated communication from outside agencies generally came through the parents.

Ms. J. C. testified that the program she developed for the student was not an IBI program. It contained some of the underlying principles of applied behavioural analysis such as defining behaviour, recording behaviours, understanding behaviour patterns, determining antecedents for

behaviour and developing practices to modify behaviour. Ms. J. C. gave an example of a program developed to prevent the student from flopping on the floor.

Ms. J. C. testified she saw the big difference between the way she provided instruction at school and the way IBI was conducted in the home program was the isolation in the IBI programming. Tasks at school are more generalized, she believes, so that students are able to perform the tasks in various different settings. As well, one person in an isolated room provided IBI, whereas her program operated in a classroom with a number of EAs and other students.

Ms. Venhola, counsel for the Appellants, directed Ms. J. C. through a detailed explanation of the student's report card for the 2002-2003 year, discussing each area of change. Ms. J. C. said that when existing goals were met, a new set would be developed. It became clear through Ms. J. C.'s cross-examination that although it seemed, based on the report card entries, that the student did not make gains during the year, the student had in fact gained many skills and had moved on to other more challenging skills.

Under redirect, Ms. J. C. said the student did not receive discrete trial teaching in her classroom. She clarified that she understood "discrete trial teaching" to be "teaching that is conducted during IBI therapy sessions."

### **Testimony of Tracy Hunt – Speech and Language Pathologist**

Ms. Hunt's CV was entered into evidence to qualify her as an expert witness and she described her education and career background. Ms. Hunt has credentials as a qualified teacher with an honours degree in psychology and a Bachelor of Education degree. Ms. Hunt has a Master's Degree in speech language pathology, and is a member of the College of Audiologists and Speech Language Pathologists of Ontario. Ms. Hunt is also an IBI therapist. Ms. Hunt is currently employed with the Simcoe County District School Board as a Speech and Language Pathologist with the Board's Autism Support Team. She has a certificate in the PECS at Level 1 and 2, and attended the Geneva Centre Autism Training Institute in 2003. She has extensive background training in autism and has worked with over 200 clients with autism. Ms. Hunt testified that in her previous employment as a speech language pathologist, she worked with many children with autism who were using IBI therapy. She herself received about 10 weekends of training in IBI and has had hands-on training, and has delivered IBI therapy.

In her new position, Ms. Hunt testified, she offers consultative services to the teachers in the elementary special education classes, but provides no hands-on support to the students in any of the classes.

Ms. Hunt testified she has observed the student in the classroom about ten or twelve times. She commented that the student's cognitive abilities are at the lower end of the range of children in the class. She agreed with the statement from the student's discharge assessment report from Kinark that stated in its summary, "The student presents with global developmental delays consistent with mental retardation." She said that typically the student is a very happy child in the classroom, though the student is very passive and it takes a lot to get the student excited. The

student is using a PECS binder for communication system, but is still having quite a bit of trouble discriminating between pictures. One of the student's strengths is to match identical items, though it takes the student several seconds to process the request. It is important to give the student the time to process so the student can be successful.

In terms of the student's needs, Ms. Hunt testified the student has a good communication system for the needs within the classroom. People who are familiar with the student know what the student likes and dislikes, but when the student wants an object that is not in sight, there is no way the student can tell someone so the student needs a communication system such as PECS.

Ms. Hunt testified that principles of applied behavioural analysis play a role in the program that is being provided to the student in the classroom. There are routines around many of the activities in the class, such as lunch, that are broken down into steps. The routine triggers part of what the student has to do so the student does it independently, and for other parts the student has to be prompted.

When asked what she sees as the difference between IBI therapy and the educational program being provided in the classroom, Ms. Hunt testified that IBI is a therapy under the auspices of the Ministry [of Community and Family Services], overseen by a psychologist, and performed by instructional therapists. ABA is the applied behavioural analysis theory and practice, upon which IBI is based. It, [ABA] is a set of good teaching practices: task analysis; finding out where the child is; prompting; reinforcing; shaping; and molding responses to move the child along a continuum.

When asked to comment on the video taped evidence, Ms. Hunt noted that there were different therapists who accepted different responses as "correct" which could lead to confusion in the student, and also that there was inconsistent data kept of the student progress. She further noted that the student responded to new tasks with the response expected in the previous task, which indicated to her the student was not attending [to the new task] or understanding what was expected of the student.

Ms. Hunt described that using the principles of applied behavioural analysis of breaking down the tasks and repetitively going over them so that the student can understand what is expected of [the student], is somewhat the same as a discrete trial, though a discrete trial gets very specific in terms of a decision made ahead of time on how many repetitions will be done. IBI is usually conducted in blocks of 10, but in the classroom she would not know precisely how each activity would be determined.

When asked of other differences between IBI and ABA, Ms. Hunt pointed out that the Ministry [of Community and Family Services] funds IBI and the programming needs to be overseen by a psychologist and conducted by an instructional therapist. In the classroom, a teacher and educational assistant are carrying out programming. Ms. Hunt affirmed that typically, IBI doesn't focus on functional settings, but is done in isolation. The difficulty, she pointed out, is that often if you teach a skill in isolation, sitting at a table, a child will learn that skill in that setting, but will have to learn it again in a generalized setting. Learning a skill within a functional activity gives true meaning to the skill, why the child is learning it, and why the child

needs to perform it. Learning a skill in isolation, she noted, is essentially a form of rote learning. Although the methods taught in the schools may take longer, these methods have depth and are a foundation for future learning.

As well, Ms. Hunt testified, teachers are overseen by the Ontario College of Teachers, which developed specific *Standards of Practice for the Teaching Profession*. Working within the schools are other regulated professionals such as speech pathologists and psychologists, professions that are governed by colleges or regulatory bodies that have standards and regulations.

During cross-examination Ms. Hunt was asked why, if there are similarities between IBI and the school program, IBI is not be used in the school to teach the student. Ms. Hunt replied “I think within the school you have educators who are trained in education, who have the qualifications to be teaching, and that within that setting, it’s an educational setting. They’re already using the same principles that IBI is based on, the behavioural teaching, breaking the skills down, task analysis, teaching to the next step. So the similar teaching methods are being employed now.”

When subsequently asked why, if the teaching methods are similar, do you need to have educators providing it [education in the classroom]? Ms. Hunt answered “Again, educators have training. They have education. They have been taught how to train or teach skills to children, how to make it functional. There’s the College of Teachers that oversees us and makes sure that we’re up to the Standards of Practice. Within the schools too, you have the other regulated professionals working there as well that have colleges overseeing, making sure that standards of practice are met.”

And then when asked what makes IBI a therapy, Ms. Hunt replied, “It is a therapy. It comes down from the Ministry of Community and Family Services, overseen by a psychologist which is medical, and being delivered through instructional therapists.”

Ms. Hunt was asked how she would determine whether the student had made gains despite the inconsistencies she noted on the tape. She replied that she had no doubt that the student made gains. There was programming both with IBI at home and the educational program at school. Even with inconsistencies there would be gains, but the inconsistencies may have an impact on how quickly gains are made.

### **Testimony of Joan Fullerton – Superintendent of Student Services**

Ms. Fullerton’s CV was entered into evidence to establish her qualification as an expert witness. She testified that as Superintendent of Student Services, she was responsible for curriculum development and supervision; ESL programs (English as a Second Language); and Special Education programs and services. In addition to her qualifications as a supervisory officer, she has specialist qualifications in Special Education and extensive involvement in Special Education.

When asked why she did not have the school staff provide IBI, Ms. Fullerton testified that it is a therapy, which is provided by other agencies, not by educators in educational settings. Educators provide education. Ms Fullerton noted that applied behavioural analysis would be part of the curriculum at a faculty of education. Ms. Fullerton described the Ontario College of Teachers as the regulatory body that established the *Standards of Practice for the Teaching Profession*. Principals who supervise teachers are also bound by the *Standards of Practice for the Teaching Profession* and are members of the Ontario College of Teachers. Under *The Quality in the Classroom Act*, [now part of *The Education Act*] all teachers must have a formal teacher performance appraisal every three years. All teachers and principals have acquired an undergraduate degree followed by a Bachelor of Education degree. Subsequent to that initial qualification additional qualifications can be acquired.

When asked why the Board did not provide an IBI placement as requested by the student's family, Ms. Fullerton replied an IBI placement would not be available as it is not an educational placement. Educational placements are supervised by the Board and taught by a teacher. The placement proposed by the parents, (IBI) is not [an educational placement].

When questioned about the statement attributed to Mr. Lindros that the Board would not implement IBI because of the cost, Ms. Fullerton replied that Mr. Lindros would not be in a position to make that assessment because he would not be in a position to know the rationale for decisions at that level in this matter.

Ms. Fullerton described IBI as a therapeutic program that is designed by a psychologist and delivered by a therapist. She noted there is data collection, and the psychologist must approve changes to the program. She stated that an educational placement is regulated by the *Education Act*, taught by teachers and supervised by principals.

Ms. Fullerton said she would agree there is an element of instruction in IBI. She testified that teachers would use behavioural instruction and behavioural modification, but not in the same way as in IBI. A teacher would look at the classroom routine and modify it to create a routine that would elicit the desired behaviour. Teachers do not provide behavioural modification as a stand-alone program. Ms. Fullerton said a teacher would modify how she/he organizes the day to create an orderly flow within the classroom. That is behavioural planning. The teacher would focus on what behaviours are desired and develop a plan to achieve them. The Board does not conduct IBI at all, as it is not within its mandate.

Ms. Fullerton testified that provision of IBI is outside of the Board's mandate, and when asked how she knew that, she answered that she is a supervisory officer of the Province of Ontario and with that qualification is responsible to her employer, the Simcoe County District School Board, and to the Ministry of Education for the implementation of its legislation. In order to earn her certificate as a supervisory officer, she was required to study acts, regulations, and statutes and how they apply to education. She has been certified by the Ministry of Education, so that her knowledge, experience, and qualifications permit her to speak on behalf of the Board. Ms. Fullerton was then asked whether she knew of Ministry legislation or regulation that prohibited provision of IBI, and she directed the Tribunal to Exhibit 26 in which the then Ministry of Community and Social Services (MCSS) Minister Brenda Elliott, spoke of her Ministry's

commitment to provision of IBI to children at an early age, until the age of six years. Ms. Fullerton said that exhibit indicates provision of IBI is an area of responsibility for that Ministry. Later, the same Ministry of Community and Social Services (MCSS) document references that “Elementary school-aged children will also have out-of-school programs available to them that are focused on developing and improving social interaction” which also indicates which Ministry will be in charge of IBI or social programs. Finally, the document mentions the Ministry of Education for the first time while stating that the Ministry of Education will pilot Autism Program Standards so that teachers and School Boards around the province can help teachers learn about new approaches in teaching children with autism.

Ms. Venhola then asked Ms. Fullerton about the role of the Office of Integrated Children’s Services, to which Ms. Fullerton replied that the intent of that office is to coordinate “a service delivery in all aspects of a child’s life.” Locally, there is a Simcoe County Coalition for Children, Family and Youth, where all service providers come together on a regular basis to coordinate the services and programs between health, family services, and education, and so on. There are many members of the Simcoe County District School Board who participate in that committee. Participation in this committee does not change each organization’s own mandate.

Testimony moved to the role of registered psychologists within the Board, and Ms. Fullerton said they had several roles, most importantly to provide educational assessments for children for whom there are questions around the delivery of educational programs. Psychologists would communicate those assessments to both staff and parents. Based on the results of those assessments, the psychologists would also provide advice on educational programming. Similarly, the speech pathologist or occupational therapist would make an assessment, pass the results on to the educators, and provide advice. These professionals do not conduct therapy within school settings. They would, if necessary, engage in a referral process to a community service. They hold a supervisory capacity for assessments and diagnosis, but not over education staff.

Ms. Fullerton was asked where families would turn if they feel that IBI is the best programming for their child. What are their options within the school system? Ms. Fullerton replied that there are some young people in the Province for whom care and treatment needs are greater than educational needs at a particular point in their life. The Province has many Care and Treatment Programs, often called a Section 20 program throughout the province. Ms. Fullerton indicated she holds responsibility for Section 20 programs in the Simcoe County District School Board and within those programs are partnerships with other ministries, with the school board playing a role. A Care and Treatment Program can occur without the involvement of education, she said, but an education program cannot occur without a teacher. To her knowledge there is no Care and Treatment Program in Simcoe County that is providing IBI therapy. The decision to develop such a program would have to be initiated through the Ministry Child and Youth Services offices or another relevant ministry [other than Education which cannot initiate a Care and Treatment Program]. A treatment program for a student with severe mental health problems is an example of a care and treatment program. Some care and treatment programs have residential placements. The School Board could not place a child in a Section 20 class, but rather such a placement would be a suggestion by the agency that controls intake and discharge. As well, the child’s suitability for the program and ability to participate in education would be determined by

the treatment staff, not the educational staff. When students are admitted to a Section 20 program those students are removed from the school roll of the school board because they are considered to be in need of care and treatment.

In cross-examination, Ms. Venhola asked Ms. Fullerton to further explain the role of Physical Therapy, Occupational Therapy and Speech Therapy services in schools. Ms. Fullerton explained that speech pathologists working for the Community Care Access Centre provide speech and language to school aged children by suggesting accommodations that can be provided in a classroom setting. As an example, Ms Fullerton described how a speech language pathologist would help a teacher implement a communication system for a child in the classroom. Special education involves modifications and accommodations. When a student's program has been modified to such a degree that it is no longer based on the Ontario curriculum, such as the student's, that student is being taught an alternative curriculum. When speech pathologists and occupational therapists and other are involved, these are part of the accommodations made to the "environmental pieces and other pieces of the teaching strategies for that child."

When asked if a teacher or EA would ever perform any kind of occupational therapy such as leg stretching or muscle stretching, Ms. Fullerton testified that they might, but that such action would have a context in Physical Education, which is a required element of education in Ontario.

Ms. Venhola made the point that if discrete trial teaching is part of the educational program of the autism class, much like the PECS program, and it is delivered to the child, it could also be an accommodation. Ms. Fullerton testified that if Ms. Venhola was referring to *discrete trial training* within IBI it would be neither an accommodation nor a modification, but a therapy. Ms. Fullerton expanded her answer by adding that there are many examples of discrete trial training within schools with *Reading Recovery* being one of them. The teacher would set a goal and "backward chain" to figure out where the child is, and then develop a program for reading education. Discrete trial training within the context of IBI has a different construct attached to it than the kinds of teaching strategies that are used in classrooms.

## **Reasons and Analysis**

### **(1) Background**

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

1. The student, an eight-year-old child born in 1995, was diagnosed with PDD (Pervasive Development Disorder) in the Autism Spectrum Disorder continuum in 1998.
2. In September 1999, the student started school at Alcona Glen Public School in a Junior Kindergarten (JK) classroom. The student continued at Alcona Glen PS for Senior Kindergarten.
3. From the beginning of the student's schooling, the student was identified as an exceptional student and provided with an Individual Education Plan (IEP).

4. The student moved to the Elementary School for Grade 1 in 2001 and was placed in the Special Education Class. As well, the student became involved in the Leaps and Bounds IBI (Intensive Behaviour Intervention) program in September 2001. The cost of this program was \$30.00 per hour at the parents' expense. The student received three hours of IBI per week through Leaps and Bounds.
5. The student spent the Grade 1 year in that class and it appeared that the placement was a good one for the student.
6. In June 2002, the student started an IBI program with the Kinark Child and Family Services receiving 30 hours per week of IBI. The government covered the cost of this program. This program ended on February 7, 2003.
7. When the IPRC was held in June of 2002, recommending that the student remain in that class placement for 2002-03, the parents appealed the June 18, 2002 IPRC decision. The parents agreed with the identification of Pervasive Developmental Disorder, but did not consent to the student's placement in the Special Education Class.
8. Due to the "stay of placement", the student remained in the Special Education Class placement during the school year, 2002-03.
9. In March 2002, the parents attended a three-day workshop at Geneva Centre on ABA (Applied Behavioural Analysis) and how to start a home program in ABA.
10. On September 12, 2002, the Special Education Appeal Board hearing was held and agreed with the IPRC decision of June 18, 2002.
11. The Simcoe County District School Board met on September 25, 2002 and received and accepted the recommendation of the Special Education Appeal Board to uphold the IPRC decision.
12. The parents appealed to the Special Education Tribunal and on May 2003 submitted their Statement of Grounds for Appeal to the Special Education Tribunal.
13. Beginning June 10, 2003, the Special Education Tribunal heard the case of C. vs. SCDSB, with respect to a child identified with autism, in the same class as the student. Initially there was consideration in having the Special Education Tribunal hear the cases for the three children in a "joined" manner, but it was decided to hear the case of C. vs. SCDSB first. The Decision was released on September 15, 2003, denying the appeal of the parent.
14. The parents have appealed the IPRC decision of June 2003, which also recommended that the student remain in the Special Education Class.
15. As of September 2003, the Special Education Class was renamed.
16. The Special Education Tribunal conducted a preliminary hearing on September 22, 2003 to determine if it had jurisdiction to hear the cases of this student, and the other child within the Special Education Class placement that was being appealed.
17. On September 24, 2003, the Tribunal wrote to the counsel of the parties that the Tribunal did not have sufficient information to determine whether it had jurisdiction in this matter and therefore the Tribunal would proceed to hear evidence and arguments on the merits of these cases to determine if it had jurisdiction.
18. The Tribunal began proceedings for the hearing for the two students on October 6, 2003.

The Tribunal adjourned on October 9, 2003 without hearing the case for the other student, which was scheduled for a time in February, 2004.

## **(2) The student's Needs**

From the information presented, the student is an affectionate eight-year-old child, who loves music, watching Disney movies, jumping on a trampoline, and swinging. Recently the student has learned to ride a two-wheel bike with training wheels. The student has autism and is completely non-verbal. The family and the school are working to have the student learn to use a Picture Communication System (PECS) to communicate, the priority need for the student since the student gets frustrated if someone doesn't understand what the student wants. With respect to social skills, the student will watch other children but doesn't play with others; rather the student plays alone. Regarding self-help skills, the student learned to become toilet-trained when seven years old and can now eat with a spoon and wipe [the student's] mouth with a napkin. The student cannot brush [the student's] teeth or hair.

On the assessments, the Vineland Adaptive Behaviour Scales, the student's Adaptive Behavioural Composite age equivalency was one year in 2001, and one year, six months in 2003. The student has significant global delays in addition to autism.

The student's IEP outlines several areas of need that are addressed in the student's individual program plan: communication; self-regulation; sensory needs; social needs; academic needs, and behavioural needs.

### **Issue #1: The Appropriate Placement for the student**

The Tribunal sought to determine the placement that would be in the best interest of the student. In the Appellants' Statement of Grounds for Appeal, under Remedies Sought from Special Education Tribunal, the family wants the Tribunal to make an order stating that the student's placement include IBI (Intensive Behavioural Intervention) programming at a minimum of three hours per day. In addition to the IBI, the parents want increased speech and occupational therapy.

Having reviewed the evidence, including the videotape of the student at the beginning and the end of the IBI therapy, the Tribunal was not convinced that the placement proposed by the Appellants was a better placement than the Special Education Class placement for the following reasons.

The Appellant described the IBI program that the student is receiving at home, the one that she would like to see in the student's placement at school. She testified that in the Kinark Program there were five instructor-therapists, so every day the student worked with a different person in order to generalize learning instead of becoming dependent upon one person.

The Tribunal did not accept the argument that the IBI placement requested would be a better placement than the special Education Class. In the school class placement, the student had the opportunity to generalize learning among the seven educational assistants and the teacher as well as the student's classmates. In addition, the student was integrated into a Grade 2 classroom with typical peers for Music and Gym and was given the opportunity to generalize learning within the

school environment with numerous people. There was numerous support staff visiting the classroom on a regular basis with whom the student had the opportunity to be engaged in generalizing learning. The Tribunal found that there were many more opportunities for the student to generalize learning in the current placement compared to the placement requested by the parent which would find the student in a one-on-one therapy situation with adults for most of the day.

The Appellant testified about the kind of programming, in an educational placement, she believes the student needs to achieve personal potential. The necessary placement, she testified, consists of IBI. The Appellant testified that the student's special needs are not being met within the current placement at Elementary School because the Special Education Class does not include the requisite program of IBI. During testimony the Tribunal heard The Appellant say she sees ABA (Applied Behavioural Analysis) and IBI (Intensive Behavioural Intervention) as "exactly the same." The Appellant described the appropriate placement for the student as one that consists of IBI, a placement that provides intensive one-on-one programming for the student, and that individuals who are working with the student are specifically trained in autism.

Tracy Hunt, witness for the Board did not agree with the Appellant regarding the appropriateness of the home-based IBI program that the Tribunal saw on the videotape and as described by the Appellant and other witnesses for the parents. Tracy Hunt testified for the Respondent as an expert witness in the areas of Speech Pathology, Education, Autism, and IBI therapy. Ms. Hunt's unique qualifications caused the Tribunal to give considerable weight to her testimony.

In her testimony Ms. Hunt related her observations of inconsistencies in IBI delivery and data collection in the video, and stressed her concern that the hurried pace of delivery appeared on occasion to confuse the student and not allow the required time to process the request.

The Tribunal is of the opinion that the manner in which IBI was conducted for the student in the student's IBI program was not good pedagogy and not consistent with the underlying principles of behaviourism.

The Tribunal found in *C. v. Simcoe County District School Board*, September 15<sup>th</sup>, 2003 (unreported), and the Appellant agreed, that IBI is a therapy. Considering the parent's remedy sought from the Special Education Tribunal included increased speech-language therapy and occupational therapy in addition to her request for a minimum of three hours IBI therapy, the Tribunal accepts the Respondent's argument that such a placement would have the effect of substituting therapy for education in a five-hour school day.

The Tribunal also heard from the Board about the placement and the programming within the placement for the student. The classroom placement had rich human and physical resources to provide for the student and the other five children in the class. There were seven educational assistants in addition to the teacher for the six children. In addition to the material in the classroom, there was a Snoezelen Room that specifically addressed the sensory needs and provided calming experiences for the student and the other children in the classroom. The opportunity to have soothing exercises to assist in relaxing and therefore being able to focus allowed for an environment that enhanced the opportunity for the student to learn.

The school program described by the classroom teacher and the consultants demonstrated to the Tribunal that there was a classroom environment rich in meaningful experiences at the level where the student could be successful in addressing a variety of needs.

The student was integrated with typical peers for Music and Gym where the student had the opportunity to observe typical peer behaviour and to be in a setting where the student enjoyed the activities and where there would be the opportunity for peer interaction.

The student had a social skills program that taught behaviours to engage with others and the opportunity to do so. In the IBI environment, the skills were taught in isolation with the opportunity to practise with the adults delivering the program and family members, a far more limited number than in a school environment.

The school had equipment and an environment where the student could develop fine and gross motor skills, prerequisites to the academic work where the student would need to learn to grasp a writing tool or press a computer keyboard.

Both parties acknowledge that communication was the student's primary need and the school had the opportunity to teach the student a communication system using PECS as well as a staff speech pathologist who was a Level 2 trainer in PECS to assist classroom staff in implementing that program. The class had access to computerized programs for communication such as the *Boardmaker* program and the materials for visuals that helped the student in expressing communicating needs.

In contrasting the proposed placement, the parents' request, with the rich classroom environment where the student had a variety of learning opportunities to address the student's emotional, social, physical, and academic needs, the Tribunal does not agree with the idea of an education program being replaced by a therapeutic program if the child is able to profit from the educational program as the Tribunal heard was the case with the student.

## **Issue #2: Education and Training**

The Appellants stated in their testimony that the student's placement in the classroom is not appropriate because the staff were not specifically trained in the area of autism.

The Tribunal heard from Ms. Sheri Smith, who testified as an expert witness, that she was involved in the development of the Special Education Class as an Integration Resource Teacher, and developed the staff training for the Special Education Class.

In developing the Special Education Class, Ms. Smith testified the Board involved all its Integration Resource Teachers, along with the Superintendent of Student Services, the Principal of Special Education, and other Special Education Consultants. They consulted with the Geneva Centre's Case Manager, and staff from the Community Care Access Centre (CCAC), particularly their Augmentative Speech Pathologist and their Occupational Therapist.

The Tribunal heard that there was in-service for teachers that included *Introduction to Autism, Communication, Social Skills Development, Behaviour and Sensory Processing, IEP Development, and Nonviolent Crisis Intervention*. The Board also supported an additional qualification course in Autism, offered by a Faculty of Education and approved by the Ontario College of Teachers, which twenty-five teachers attended. There were five days of specific training in Autism for the EAs, in *An Introduction to Autism Spectrum Disorders, Social Skills Development, Communication, Behaviour Management, Sensory Processing, Writing with Symbols, Boardmaker* (a computerized communication program), *Picture Exchange Communication System (PECS)* and ongoing *Nonviolent Crisis Intervention Training*. The Tribunal was convinced that the level of training and support for the teachers and EA's in the Primary Special Education Class was very appropriate to support the student, a child with autism, to learn.

Teachers in the Special Education Classroom have:

- 1) An undergraduate degree
- 2) A Bachelor of Education degree
- 3) Ontario College of Teachers Certification
- 4) Additional qualification in specialist areas; specifically Special Education
- 5) Additional qualification in Autism
- 6) Training in *Boardmaker, PECS, Writing with Symbols, IEP Programming*
- 7) Support and supervision from Program Support Specialists
- 8) On-site supervision by School Principal
- 9) *Non-Violent Crisis Intervention ( NVCI)* training

Educational Assistants in the Special Education Classroom have:

- 1) A community college diploma or university degree
- 2) Autism training from the Geneva Centre
- 3) *Non-Violent Crisis Intervention (NVCI)* training
- 4) *Introduction to ASD/PDD* workshop
- 5) Training in *Boardmaker* [computer program]
- 6) *Picture Exchange Communication System* training
- 7) *Writing with Symbols 2000* training
- 8) Sensory Behaviour Training

IBI, on the other hand, is a therapy that is conducted by an instructor-therapist and supervised by a psychologist. The instructor-therapist works directly with the child, following a program developed in consultation with a psychologist, and carries out the discrete trials while making careful notes on the child's progress.

Compared to the education and training for the teachers and educational assistants in the Special Education Class, Ms. C., Senior Area Coordinator for Leaps and Bounds, testifying for the Appellants, said that the instructor-therapists who work for Leaps and Bounds and conduct IBI:

- 1) have experience with autism
- 2) receive on-the-job training
- 3) are supervised by a psychologist
- 4) receive instructor-therapist training ranging from one to two days to up to three weeks

Ms. C. testified neither of the two psychologists who provide consultation services to Leaps and Bounds is actually employed by Leaps and Bounds. The Tribunal found that there was no evidence of certification or consistent clinical supervision for IBI instructor-therapists, and there is no governing college of instructor-therapists for IBI. The Tribunal heard no evidence that the psychologist who provides supervision to the IBI therapy through Leaps and Bounds or Kinark is ever on-site to supervise the therapy.

The limited training and supervision of staff delivering the home-based IBI program added to the concerns of the Tribunal. Inconsistencies in delivery of IBI noted by Ms. Hunt, the instructor-therapist training described by Ms. C., and the testimony by Ms. B. that the student's IBI instruction in toileting was conducted while the student was clothed in underwear, raise questions around the appropriateness of using IBI therapy within a school setting.

Teachers in their pre-service education program and in subsequent additional qualification programs are well versed in many learning theories including behavioural theories and principles. When it is deemed that a child learns a specific aspect of the child's program, the teachers can plan on which learning approach to use. If a child needs an applied behavioural approach, then teachers know about behavioural learning, including the "discrete trial" that is used in IBI. In addition to being able to use behavioural theories, teachers can as well use their knowledge about child development theories and cognitive theories to determine when to introduce a new concept. Teachers can adapt and change a program if it is not working or make decisions on when to continue to reinforce learning. Teachers have used a variety of learning approaches over the years to best help children. There is no question that behavioural approaches are effective in classrooms and the Tribunal heard about the use of behavioural techniques used in the student's class and with the student.

The Tribunal was convinced that the program content in the current placement was appropriate in meeting the student's learning needs.

The Tribunal is of the opinion that the Simcoe County District School Board has placed appropriately trained staff in the Special Education Class, and continues to provide additional training for staff within the program. The education and training and supervision of the staff in the current placement is superior to the limited training and supervision of the IBI instructor-therapists.

### **Issue #3: Therapy in a School Setting**

The Appellants argued that even if IBI is seen as a therapy, it should not prevent the Board from delivering IBI to the student. The Appellants noted the Board has hired a psychologist, and has two staff that are trained and experienced IBI instructor-therapists. The Appellants noted there

are other therapists, notably physiotherapists and occupational therapists, who come into the classroom on a regular basis to deliver supports to children in the class. They maintain a classroom teacher or EA could adopt IBI practices including discrete trial training.

The Tribunal has no authority to order a school board to deliver a therapy in a classroom. Under Program Policy Memorandum No. 81 (issued by the Ministry of Education and describing the respective roles of the three ministries with respect to health related services provided to children in schools), the Ministry of Health and Long-Term Care and the Ministry of Community and Family Services provide therapy to students with special needs. This memorandum (No. 81) describes the responsibilities of the Ministry of Education, Health and the Ministry of Child and Youth Services in providing services to children with special needs.

The Tribunal accepted testimony that physiotherapists, occupational therapists and speech therapists who come into the classroom do not work directly with the children or provide hands-on therapy to them. These therapists provide consultation and recommendations to the teacher.

The Tribunal heard that if students' therapy needs supersede their educational needs at a particular time, those needs could be met through a care and treatment program. Such a program is described in Program Policy Memorandum No. 85 (issued by the Ministry of Education) and commonly called a "Section 20" program. [The General Legislative Grant Regulation, in Section 20, outlines the funding for therapy programs conducted in facilities for children needing a care and treatment program.] The Tribunal heard that even though a teacher can be provided for the care and treatment program, as a support to such a program, the child placed in that program is not a registered student within the Board.

The Tribunal believes the setting desired by the Appellants and described in the Appellant's testimony has more elements of a Section 20 placement than of a traditional educational placement for a child with special needs.

The Tribunal is of the opinion, however, that the student's needs can be met in the current placement and that the student does not need a treatment facility placement to learn effectively.

The Tribunal is convinced the staff members in the Special Education Class have a good understanding of how to break down the tasks the student must learn and how to build on success to achieve the goals established in the student's IEP.

#### **Issue # 4: The student's Communication Needs**

The Tribunal acknowledges that the student's physical safety, academic, social, self-regulation, sensory and emotional needs are addressed in the placement, however, the Tribunal heard that the focus in this placement is on the student's communication needs.

The Tribunal is of the opinion that the communication program delivered in the special Education Class, which includes the PECS system, was more appropriate than the

communication program offered in IBI, because in the school setting the staff assisted the student to generalize the skills the student was learning in a naturalistic environment.

The Tribunal found that the educational placement in the Elementary Special Education Class, determined by the Board to be the best placement for the student, included use of the principles of applied behavioural analysis to support teaching the skills that would benefit the student. In addition, the staff in the Elementary Special Education Class was able to adapt or change the student's program as the student made gains, developed other interests or was unable to progress on a particular day.

The Tribunal believes that the student's need for a communication program, specifically PECS, as defined by the Appellant and the Respondent's witnesses, is being met within the Special Education Class at Elementary School, but would not be met if the school program were substituted for a program based solely on IBI therapy.

The Tribunal noted that Ms. Hunt, Speech Language Pathologist for the Board, has expertise in providing training for school staff and parents in the use of PECS as a result of her Level 2 Certification as a PECS trainer.

#### **Issue #5: Communication between Home and School**

The Tribunal believes, based on the evidence, that there is deep misunderstanding between the Board and the family regarding the student's progress as reflected on the student's report cards and IEP.

The Tribunal believes communication differences in the use of terms between the parties may have contributed to polarized views on the most appropriate educational placement for the student.

#### **Reasons**

Having reviewed all the evidence, the Tribunal found, as in *C. v. Simcoe County District School Board* September 15, 2003 (unreported), that IBI is a therapy. As such, the Tribunal does not have the authority to order the Board to implement a program of IBI therapy for the student. Even if the Tribunal were to have that authority, the Tribunal would be unlikely to do so. The Tribunal believes the Special Education Class is the best educational placement for the student for the following reasons. The Special Education Class meets all the student's needs as outlined in the IEP. The Tribunal heard during the course of the Hearing, the student's communication needs, sensory needs, life skills needs, social needs, and need to be with typical peers during the integration into the Grade 2 class for Music and Gym are met in the student's current placement that is under appeal.

The Tribunal believes that the Appellants failed to prove that a placement in the Elementary Special Education Class would not be appropriate for the student. The Tribunal was unable to

find concrete evidence that the placement proposed by the Appellants would be more beneficial to the student than the placement in the Special Education Class.

In arriving at its decision on the appropriate placement for the student the Tribunal used the standard of review that the Tribunal used in the *E. v. Brant County Board of Education [1997]* case in determining appeals on placement, that is, which placement meets the pupil's best interests. In determining the "best interests" of the student, the Tribunal used the reasoning from the Supreme Court's decision on *Eaton*, which said, "*For older children and those who are able to communicate their wishes and needs, their own views will play an important role in the determination of best interest. For younger children, and those like Emily, who are either incapable of making a choice or have a very limited means of communicating their wishes, the decision maker must make this determination on the basis of other evidence before it.*"

The evidence before the Tribunal showed that the student was happy in the Special Education Class, in comparison to the student's experiences in the integrated Kindergarten classes. In the Appellant's testimony she said, "The [Special Education Class] was definitely a step in the right direction for [the student]. When [the student] was at Alcona Glen [the student] was integrated into a Junior Kindergarten and then a Senior Kindergarten and that experience was absolutely dreadful for [the student]. I was called almost on a daily basis to come and pick [the student] up because [the student] was crying and tantruming all the time and they could not calm [the student] down. And when [the student] was at school, [the student] would walk the halls or go play in the gym. So to get [the student] into a classroom where there was only six other students, the noise level went down, [the student] was happy to be there, there were toys everywhere, it was the ideal place for [the student] as far as [the student] could see, so [the student] was happy there."

Tribunal members heard no evidence that the student was exhibiting any of the behaviours that the student demonstrated in the Kindergarten classes before beginning the Elementary Special Education Class at the time of the hearing. From a pedagogical perspective, the placement in the Elementary Special Education Class addresses the student's needs and there was no evidence to suggest that the student would be better served in the therapeutic placement that the parents proposed. The Tribunal believes that from a child-centred perspective, and in the best interest of the student, the placement in the Special Education Class is the best placement for the student.

### **Decision**

The Tribunal unanimously denies the requests of the parents and affirms the determination of the June 17, 2002 IPRC decision placing the student in the Special Education Class.

The appeal is denied.

### **Decision on Preliminary Matter of Jurisdiction**

- 1) On the matter of the jurisdiction to hear the appeal, the Tribunal, as in the reasons given in *C. v. Simcoe County District School Board*, September 15, 2003 (unreported), stated that due to the intertwining of the placement and the program in the Special Education Class that it is necessary to hear the evidence in the case on appeal in order to understand the student's needs and to understand if the placement in the Special Education Class would be an appropriate placement to meet the student's exceptional learning needs. In keeping with the principles of natural justice and fairness, the Tribunal believes that it needed to give the Appellants the opportunity as the Tribunal did in *C. v. SCDSB* to present the evidence related to the student so the Tribunal could determine if the placement proposed was in fact an appropriate placement for the student.
- 2) The Tribunal accepted the argument of the counsel for the Appellants. The three families had jointly appealed the educational placement of their children with autism. Having already heard the appeal of *C. v. SCDSB*, it would not be in keeping with the principles of procedural fairness, the right to be heard, and the principles of natural justice to deny that same opportunity to the other two families. The Tribunal therefore decided to hear the appeal. The Tribunal is of the opinion that it had the responsibility to hear the appeal in order to make a decision in the best interest of the child from an educational perspective.

### **Decision on Jurisdiction**

- 1) At the beginning of the hearing the Appellants argued that the placement in the Elementary Special Education Class was inappropriate to meet the student's exceptional needs. The Tribunal stated that it needed to hear the merits of the case to determine if it had jurisdiction to hear the appeal, dismiss the appeal, or accept the appeal. During closing, counsel for the Appellants stated that parents for the child believe that a placement with IBI is the most appropriate placement for the student. The parents reiterated that a placement with an IBI program and the Special Education services that support the program is the appropriate placement for their child. The Appellants requested that the Tribunal order the Board to provide a placement that included IBI at a level for the student that is consistent with the IBI program that the student currently receives [outside regular school].

### **Decision on the Matter of Jurisdiction Raised During Closing Arguments**

- 1) In closing argument on jurisdiction counsel for the Appellants, Ms. Venhola, presented an alternative request. She argued that the "title" is not important; rather it is the instruction that is important. She requested that the Tribunal order the Board to require the teacher to incorporate IBI principles into her instruction.
- 2) With respect to this request that was raised by Ms. Venhola in closing - the option that the Tribunal order the teacher to use IBI principles in her teaching - the Tribunal believes that it does not have jurisdiction to act on the request for that order. The Tribunal does not have jurisdiction to direct a Board to require staff to use a particular method or

strategy for teaching and therefore will not address this request. The Tribunal accepts the argument provided by Ms. Bowlby in her reply to the closing statements of Ms. Venhola on behalf of the Appellants that teaching strategies are not a placement. Just as in the *C. v. Dufferin-Peel Catholic School Board*, September 18, 2003 (unreported), where the Tribunal ruled that it did not have jurisdiction to hear the matter under appeal because the parents were requesting a teaching strategy to address the child's learning style, the Tribunal in the case presently before it, believes that it does not have jurisdiction to address the alternative argument to have the teacher use IBI as a teaching strategy. The Tribunal therefore dismisses the alternative request on the grounds that the use of a particular method or strategy is not within the jurisdiction of a Special Education Tribunal.

Paula Barber, Tribunal Chair \_\_\_\_\_

Sharon Carson, Tribunal Member \_\_\_\_\_

Dawn Roper, Tribunal Member \_\_\_\_\_

May 27, 2004