



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

BETWEEN

C., APPELLANT

and

The SIMCOE COUNTY DISTRICT SCHOOL BOARD, RESPONDENT

Tribunal Members:

Paula Barber, Chair
Sharon Carson, Member
Marilyn Thain, Member

Counsel for the Appellant:

E. Venhola

Counsel for the Respondent:

B. Bowlby

Also in attendance:

Ms. F., SCDSB
Ms. J. S., SCDSB
Mr. H., for the Appellant

The Hearing was held at the Holiday Inn in Barrie in the Oro/Essa Room on June 10, 11, 12 and 16, 17, 2003

Preliminary Matters: Jurisdiction

At the beginning of the hearing, Ms. Bowlby on behalf of the Simcoe the County District School Board, argued that the Tribunal did not have jurisdiction to hear the appeal since the parent was appealing program, not placement.

Respondent's Position

Ms. Bowlby, 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 further argued that the parent is permitted to appeal only the decision of the IPRC related to the identification and appropriateness of the placement of the child, and that there can be no appeal regarding any recommendations that the IPRC makes. She maintains that the Appellant is seeking to have the Simcoe County District School Board provide therapeutic services as a major part or 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 has 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 contends that the Appellant does not dispute the placement but rather the specialized program and services within the program that she wants her child to receive. The Appellant clearly identifies that Intensive Behavioural Intervention (IBI) programming is a specialized behavioural program. The Board is providing specialized behaviour management programming that is directed to children with Autism, but not IBI.

Further the Appellant claims that the Individual Education Plan (IEP) fails to reflect all the accommodations necessary for her child's success. Ms. Bowlby states that the IEP cannot be the subject matter of the appeal.

Appellant's Position

The Appellant argued that the Tribunal does have jurisdiction to hear the case and referenced several previous Tribunal decisions where Tribunals considered program issues. *O. v. Wentworth County District School Board*, 1987, is a decision in which the Tribunal stated that in determining placement, the IPRC must consider the nature and the content of the program and services necessary to develop and implement a placement. The *R. v. Carleton Roman Catholic Separate School Board*, 1988, *L. v. Le Conseil Scholaire de District Catholique*, 2001, and *D. v. Toronto District School Board*, 2002, were also used as support for the Appellant's position that the Tribunal did have jurisdiction to hear the appropriateness of a placement. Ms. Venhola argued that in *R. v. Carleton Roman Catholic Separate School Board* (1988), the Board was ordered to purchase a placement from another School Board if the Board could not offer a placement for the child. In *L. v. Le Conseil Scholaire de District Catholique* (2001), the Tribunal took program and services into account in its decision and recommendations. In *D. v. Toronto District School Board* (2002), the Tribunal stated that program and placement are sometimes intertwined and that the narrow view of placement as a location is not in the best interest of children. Ms. Venhola argued that a placement has to include content and that content has to be program.

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 it may be appropriate to consider services and programs that can be provided in a placement. These are undoubtedly closely interrelated and therefore difficult to separate and deal with individually.

Under the rules of natural justice it would be appropriate to give an opportunity to the Appellant to have her case heard. Therefore in the best interests of the student the Tribunal concludes that it does have the jurisdiction to hear the case.

Due to the intertwining of the placement and program in the Special Education Class ASD/PDD, the Tribunal believes that it is necessary to hear the case on appeal in order to understand the student's needs and to understand the placement proposed for the student in the IPRC decision of June, 2002, in order to make a decision that would be in the best interests of the student. 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. In order to make a decision in the best interests of the student, the Tribunal believes that it has jurisdiction to hear the evidence.

Preliminary matters: Right to cross-examine

The other preliminary matter presented by the Respondent was the issue of the Appellant's document binder and the number of documents in the binder to which the Respondent objected. The Respondent needed time to review the document binder since much of this information had not been produced in advance of the hearing. Ms. Bowlby argued that much of the evidence was being put in front of the Tribunal through documents or letters where some witnesses would not be present and would not be available to be cross-examined. Ms. Bowlby stated that this was a situation in which natural justice was being denied the Respondent.

Ms. Venhola, on behalf of the Appellant, 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 the deliberations.

Decision by the Tribunal

The Tribunal told the Respondent that regarding the admissibility of affidavit evidence, it acknowledged the lack of procedural fairness in not being able to cross-examine witnesses who created a report or document. Nevertheless, the Tribunal decided 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 given the opportunity to cross examine the witnesses.

Introduction

The Appellant described her child as a ten-year-old living with autism. Her child is nonverbal and communicates gesturally through pictures. Her child has severe deficits in communication, life skills, social skills and behaviour. She stated, that "her child lives with autism on the more profound end of the spectrum". Dr. Blacklock in Markham-Stouffville Hospital diagnosed the student at age two and one half years with autism.

From 1996 to 1999, the student attended a pre-school program where the student received support from a speech-language pathologist, an occupational therapist, and a behavior management specialist with monitoring from Dr. Trevor Hunt, a pediatrician. At age four, the results of a psychologist's assessment indicated that the student was functioning below a one-year developmental level. Assessment reports indicated that the student requires constant supervision, and care for both life skills and behaviour management. The student is unable to perform simple tasks and the student displays substantial anxiety and can at times exhibit physical aggression as a result of [the student's] inability to communicate.

In September 1999, at the age of six, the student entered a community school that [the student] attended until the end of the school year, 2000/2001. At school, the student was identified as an exceptional pupil with autism and had a modified individualized school program with Educational Assistant (EA) support. When an IPRC recommended a placement in a Developmental Skills Program, the Appellant began an appeal process.

The student was placed in the Special Education Class at an elementary school for the school year, 2001/2002. During this school year, the student had a modified school day, an individualized program, EA support and support from the Integration Resource Support teacher, a Speech Language Pathologist and an Occupational Therapist. The student was integrated with a Grade 3 class at times and two medication trials were attempted. The student began the school year 2002-2003 in the same placement. The Appellant then appealed the IPRC decision of the Simcoe County District School Board that placed the student in the Special Education Class for the school year, 2002-2003, citing that "the Simcoe County District School Board failed to provide an educational placement (with program and services) which meets the student's needs as required under the Education Act and its regulations." The student continued at the elementary school for the school year 2002-2003 as a "stay of placement." The IPRC decision of the Simcoe Country District School Board (SCDSB) of June 18, 2002, is the decision under appeal.

The Special Education Appeal Board of September 2002, agreed with the placement decision of the June 2002, IPRC. During the third week in September, the student's behaviors at school began to escalate and after numerous conversations and meetings, in November, the student was excluded from school. The Appellant requested a Special Education Tribunal hearing, along with two other parents with children in the same placement.

The student returned to this placement in May 2003 with two EAs to assist the student in the class of six children and one teacher and at times, three EAs to support the student. The student was now attending school for a full day.

On June 10 2003, the Tribunal began the hearing.

Legal Framework

- **Statutes**

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

Charter of Rights and Freedoms S15 (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**

Education Act, Subsection 1 (1) Definitions

Section 1.1 Defines exceptional pupil, special education program and special education services.

‘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 of 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 evaluations and that includes a plan containing specific objectives and an outline of educational services that meets the needs of the exceptional pupil.

‘special education service’ means facilities and resources, including support personnel and equipment necessary for developing and implementing a special education program.

Subsection 8(3) Powers of the Minister of Education

“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:

- *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,*

Section 57 Special Education Tribunals

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.

- **Regulations**

Regulation 181/98: Identification and Placement of Exceptional Pupils

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.

Section 5(5)

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.

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.*

Regulation 474/00: Access to School Premises Subsection 3(1)

A person is not permitted to remain on school premises if his or her presence is detrimental to the safety or well-being of a person on the premises, in the judgment of the principal, a vice-principal or another person authorized by the board to make such a determination.

- **Other Documents**

Policy/Program Memorandum No. 81, Ministry of Education

Memorandum No. 81 outlines the respective responsibilities of the school boards and Ministries of Health and Long Term Care and of Family, Community and Social Services for ensuring that students with special needs receive the health services they require in order to benefit from an educational program.

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, Ministry of Education

Memorandum No. 85 “*outlines Ministry policy for the development of educational programs that recognize the primacy of care and/or treatment needs of the children/youth who have been admitted to government- approved facilities*”.

- **Case Law**

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. (4th) 385.

L. v. York Region Board of Education, October 9, 1985 (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. (4th) 201; 220 D.L.R. (4th) 411 (B.C.C.A.).

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

Innisfel (Township) v. Vespra (Township) (1981), 123 O.L.R. (3d) 530 S.C.C

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

The Appellant's Request

The Appellant is appealing the appropriateness of the placement decision dated June 2002, of the Simcoe County District School Board placing her child in the Communications-Autism Program class. The Appellant feels that her child's special intensive needs are not being met in this placement and as a result the child's education is currently inadequate within this particular placement.

The Appellant is asking the Tribunal to make an order granting the appeal and an order directing the Respondent to place the student in a special education class for pupils with autism, which includes Intensive Behavior Intervention (IBI).

The Respondent's Reply

The Board's position is that the most appropriate educational placement for the student is the elementary Special Education Class ASD/PDD at the elementary school. In that placement a special education program will be designed to meet the student's special needs. The program will be developed and delivered by a teacher with Special Education qualifications who has additional training in teaching children with autism. The teacher will have the assistance of an educational assistant and if required two or three educational assistants will be available. The educational assistants have received significant and ongoing training in working with students with autism.

Ms Bowlby, Counsel for the Board stated that the Appellant is arguing for a therapeutic placement in which Intensive Behaviour Intervention (IBI) can be delivered. The Board's position is there is no role for a teacher in delivering a therapeutic program.

Witnesses

Tribunal heard the following witnesses during the Hearing

For the Appellant

The Appellant	Parent, the student's mother
Mrs. T.	Parent of a child with autism
Mrs. W.	Parent of a child with autism
Ms. C.	Co-coordinator for Leaps and Bounds

For the Respondent

Ms. S.	Integration Resource Teacher, SCDSB
Ms. M.	Senior Special Education Consultant
Mr. L.	Principal, SCDSB
Ms. T.	Educational Assistant, SCDSB
Ms. F.	Superintendent, SCDSB

The Issues

This decision addresses three main issues:

- Was the placement decision of June 17, 2002 by the Simcoe County Board of Education, placing the student in the Special Education Class ASD/PDD, an appropriate placement?
- How should the student's aggressive behaviours be managed?
- Should the School Board provide IBI in its educational setting?

Issue 1: The Appropriateness of the Placement

Appellant's Arguments

According to the parent, the student did not progress during the school year 2002/2003. The Appellant stated that her child initially has to be able to focus, make eye contact and acquire listening skills. She reiterated that in "the current program being provided the student has made minimal if actually no progress whatsoever" (Transcript, pages 125, lines 8, 9). The Appellant also stated that she has not been given a lot of information about her child's program and that the best program for her child would be IBI. The Appellant indicated that the year was not successful as her child's behaviours escalated to a level, which resulted in her child being excluded from school for six months.

The Appellant described her child's Grade two school year (2000/2001) at the elementary school. Initially, she said, the student's program was walking the halls, going to the playground, having a different Educational Assistant (EA) every day and attending on a modified day. The student displayed significant behavior problems due to lack of services and support. Through a process with a lawyer she approached the school to provide an IBI program. The Board brought in the Geneva Centre for a day of consulting and the behaviourist from the Barrie and District Association for Community Living. After some months of investigation, a three-month trial period of IBI was implemented. Dr. Arnold Rincover, a psychologist with Bartimaeus, assessed the student. Dr. Rincover provided a plan for implementation of the IBI therapy but initially the therapist had to deal with the student's behaviour. A restraint policy was put in place. Ms. C., from Bartimaeus, came into the school and she and Ms. T. (the student's EA) worked with the student. They worked for 28 hours a week at school and some sessions at home. The parent provided evidence that her child did gain skills and the problematic behaviors were reduced to zero. At the end of the IBI program, the student returned to the special education class with the same EA, Ms. T. The Appellant stated there was regression in the student's behaviors over the summer. In July the Appellant retained "Leaps and Bounds" to provide two - on - one programming for her child at home so her child would have some success in re-entry into school. The student did receive some benefits during this school year.

The following year had many changes. The student traveled to school by bus to a different setting and the student's elevated anxiety level was evident. Ms. T. was the student's EA again. In addition, two medication trials were attempted but were unsuccessful.

Respondent's Arguments

Ms. S., Integration Resource Teacher, stated that she helped to develop the criteria and the in-service for teachers for the Special Education Class. She described the placement as one designed specifically for children with a diagnosis of ASD or PDD. These students have issues of self-stimulation, weak social skills, no functional language, self-regulation and minimal awareness of the environment. An extensive training program for the education assistants and teachers was provided. The class has six students, one teacher and five Educational Assistants but since the student's return in April 2003 there have been an additional two EAs.

This class is supported by the Principal, a special education consultant, an integration resource teacher, the Principal of Special Education and the Superintendent of Special Education.

Ms. S. described the program in detail stating that the program included support for students transitioning including the use of the Picture Exchange Communication System (PECS), support for sensory needs including a state of the art Snoezelen Room and an intensive program focusing on communication, life skills, social skills, numeracy and literacy. She indicated that the staff is using behaviour management procedures, essentially reinforcers. She stated that programming included an occupational therapist and speech pathologist from the Community Care Access Centre (CCAC), and behaviour management and self-regulation support from Kerry's Place [autistic resources]. Ms S. stated that the student is receiving more support than any other student in the School Board.

Ms. F., Superintendent of Special Education, indicated that Applied Behaviour Analysis (ABA) principles are used in delivering this program, not Intensive Behavioural Intervention (IBI) therapy.

In the 2001/2002 school year, the student has spent [the student's] first year in the Special Education Class. Exhibit 13(c), the Report Card for 2001/2002, indicated that the student had a successful year. The student made gains during the year and one gain that stood out was the student's overall comfort and happiness with the group. Supply teachers mentioned, as well, how much the student had changed and how eye-contact had improved. This was a successful year for the student, even though the student's medication trials did provide some disruption.

Exhibit 13(b) indicates progress in all key program areas. The Tribunal heard that the Appellant also indicated she was pleased with the progress.

Mr. L., Principal at the elementary school, indicated that the student had a very successful year in 2001/2002. The student made strong gains and at the end of the year was attending to tasks that the student never would have been able to do before.

Ms. M. prepared a chart, which demonstrated that progress was made by the students in the Special Education Class in specific areas of the program during the two school years (2001/2002 and 2002/2003).

Ms. T., EA for the student, remarked on the increase in the student's communication skills. The student would wave in response to 'hello' or 'good-bye'. She stated that self-help skills continue to progress and toileting skills were progressing rapidly at one point. Ms. T. stated that she believed that this placement worked for the student.

Ms. Bowlby challenged Ms. C.'s testimony that she didn't feel the special education program being provided to the student would meet the student's needs. She stated that Ms. C., who is a therapist with Leaps and Bounds, simply isn't qualified to make an assessment about special education programs. Secondly, there is no evidence that she had been in the classroom, or that she fully reviewed the IEP or the Report Card. She was not fully apprised of what was going on.

Ms. Bowlby described the following year, 2002/2003, the student's second year at the elementary school, as an aberration through circumstances that nobody could have controlled or could foresee; it was not a successful year, but the fault is not in the program. At the beginning of the school year the classroom teacher died and a temporary teacher was in the classroom. The student began to have significant behaviour problems. By October the student was excluded from school and did not re-enter until April 28, 2003. Since this reentry, it was reported that gains have already been noted. Ms. S. stated, "The student will be successful in the program [the student] is in. It will take time. The student's been back in the program since April 28 and we've already seen some success." (Transcript, page 365)

Ms. Bowlby said that the placement can work and has worked; the 2002/2003 year, (the year that the teacher died in September), ought not to be the measure of whether the program is working. Also during Ms. S.'s testimony it was indicated that since the student's return to the school there was evidence again of progress being made.

Issue 2: Managing The Student's Behaviours

Appellant's Arguments

The parent stated that her child communicates through touch, as her child doesn't have any alternative means of communication. Her child has limited cognitive ability to decipher between a light touch and a hard touch. There is no malice in the child's intent. The parent does not think that her child's behavior is "aggressive" but is "assertive" and the inadequacy in programming is the child's reason for communicating [the child's] frustration and [the child's] inability to learn.

The Appellant provided a Consultation Report from Dr. Arnold Rincover, Feb. 24, 2001, an assessment of the student and a second report dated Feb, 17, 2001 that contained the consultation recommendations. The Appellant indicated that Dr. Rincover had recommended a discrete trial format of teaching. This is the basis of IBI and "it consists of a number of components of behavioral management as well as Learning Skills" (page 158, lines 8-10)

When the program was initiated it was determined that the behaviors had to be alleviated before discrete trial training could occur. The Appellant agreed to a restraint protocol that was being implemented and overseen by the psychologist and performed by a qualified person.

Ms. C., a Child and Youth Worker, supervises all instructor therapists for Leaps and Bounds. She described the need for restraints "because the student was quite aggressive and at times was out of control" (page 470, lines 5-6) She stated that Dr. Rincover "had to see it being done and authorize it" (page 469 lines 8-9). He was available if there were any problems and was contacted once every two or three weeks. Ms. C. described the method of restraint and stated that it was quite an intrusive procedure. Initially, it might have been used 15 times a day and then after the first month there were days where it was never used (page 470 lines 19 -21). Ms. C. provided a description of the student's program while she was at the school. The student did "discrete trials" for 15 minutes and then would have a few minutes break. The student also had

gym and lunch periods. The discrete trials were done in a special chair, described as enclosed around the student, similar to a baby's high chair, in a separate room. Ms. C. also indicated in a letter written September 3, 2002 that the student's self-injurious behaviors were reduced to zero. Ms. C. said that although they had been working with the student between May and September 2001, the amount of time was not as much as when the student was at school. Ms. C. reviewed the student's school schedule and said she did not believe it met the student's special needs.

During the summer of 2002, the student received IBI programming. The appeal was heard in the second week of September which necessitated the teacher being absent from the class and, along with her death, followed by significant emotions, may have been a factor in the escalation of the student's behavior

The Appellant stated that Ms. C. had written a letter dated September 3, 2002 stating that the discontinuation of the IBI program had resulted in her child's regression. A letter written by Ms. P. who had supervised Ms. C., outlined the student's progress with the discrete trials. Ms. P. stated they were using a behavioral approach to managing the student's aggression, which has reduced the student's behaviors. They were using a discrete trial format to teach the student new skills. Dr. Rincover sent a letter to the School Board stating that cornering restraint procedures should not be used unless there is expert consultation.

The Appellant stated that during that time period, the student had been restrained 107 times over two days. A meeting was arranged that included Mr. P. from Kerry's Place, Ms. S. from the Board, the Principal, Vice-principal and the parent. A non-violent crisis intervention plan was discussed. The following day, the Principal informed the parent of a five-restraint protocol. After the student had been restrained five times, the student's parent would be called to take the student home. This was followed by a one-day suspension and the Appellant withdrew her consent to restrain her child.

A meeting for October 5th was arranged but did not take place. A letter written by Mr. L. dated November 4th, 2002 informed the Appellant that the student had been excluded from school due to the student's behavior. The school reported the student's behaviors had escalated since they were not allowed to use restraints and staff had initiated a refusal to work under the Occupational Health and Safety Act.

A meeting was held on November 11th, to discuss the student's re-entry to school but no resolution to the issues occurred.

On March 3rd there was a meeting regarding the student. The Appellant and the Board came to a mutual agreement. The Appellant stated that the restraint protocol that was agreed upon is a "proactive basis" (page 190, line 19). She stated that she believes that [the restraint protocol developed for the student's re-entry to school] "involved a progression of dealing with the student's behavior on what I believe to be a pro-active basis." This is a provisional protocol that the Appellant believed "is cognizant of [the student's] disability, and that restraint is not a behavior management tool" (page 190, lines 22 - 24).

Respondent's Arguments

In Ms. Bowlby's cross-examination of the Appellant, the Appellant stated that the Board was concerned about her child's behaviours and found it difficult to deliver programs because of the safety concerns.

There was agreement between the parties that the student's aggressive behaviour has to be reduced in order for the student to be able to benefit from the program in the placement. The student's behaviours reached the point where they became a significant concern to the safety of other students and staff in the class. The Appellant described the behaviour as pinching, biting, hitting, pulling hair and kicking.

During the Appellant's testimony she indicated that in 2000/2001, the student's second year at the elementary school, Dr. Rincover, Psychologist with Bartimaeus, devised a plan to help reduce the student's aggressive behaviour. Dr. Rincover recommended the use of restraints, restraints which were much more aggressive in nature than those which the Board used in its non-violent intervention protocol. These included cornering restraints. Dr. Rincover said that before discrete trials could start, the student's aggressive behaviour had to be reduced because these behaviours would interfere with discrete trials. The Appellant indicated that she signed an agreement regarding the use of restraints for the discrete trials. These restraints significantly reduced the student's aggressive behaviour. Ms. C., a Bartimaeus worker along with Ms. T., EA, used a discrete trial approach once the behaviours were under control. The experience of using the very aggressive form of restraint recommended by Dr. Rincover resulted in a reduction of aggressions and the program could be then delivered.

When Ms. C. was cross-examined she agreed that she would sometimes estimate the results of the discrete trials. Ms. T. stated that Ms. C.'s written estimates were usually higher than the results of the student's discrete trials. Exhibit 1 Tab 4 indicated no aggression had occurred, but after questioning, Ms. C. agreed that her records might be an exaggeration of the student's success.

When the Bartimaeus staff left the school, the Appellant forbade the staff to use restraints. The staff was put in the position of having to back away when the student hit. According to the Board witnesses, the student's behaviour had a significant impact on the class, creating an atmosphere of tension.

The student's Report Card for this year (2002/2003) indicated that the student still has anxious days and moments and at these times the student will use physical aggression as a communicative function, but these continue to decrease. Also during this year, (2002/2003) medication trials were used to help the student with [the student's] anxiety. The student's physical aggression and anxiety appeared to escalate with some medications. Ms. S. indicated that the student did not want to hurt anybody but it is the student's means of communication when the student becomes anxious.

Ms. T., an Educational Assistant, (EA) had worked with the student the previous year. She testified that she underwent training to learn about working with children with autism and she was transferred to the Special Education Class. The Appellant specifically asked to have Ms. T. to work with her child.

During this first year in the Special Education Class Ms. T. implemented discrete trials with the student. By the end of the year the student was able to sit independently and do up to three tasks without being upset. Ms. T. testified the student's progress was up and down but by the end of the year the student had made many gains.

2002/2003 was an anomalous year significantly affected by the sudden death of the teacher. The student's aggressive behaviour increased. The student's aggressions took the form of biting, punching, pulling hair, hitting, leaving injuries.

Mr. L., Principal of the elementary school implemented a protocol of restraint to be used for each severe aggression. If five restraints needed to be used in a day, the Appellant would be called to remove her child from school. It was Mr. L.'s understanding that the Appellant was in agreement with this protocol. According to Mr. L., the protocol was succeeding and the student's number of aggressive behaviours reduced significantly over a short period of time. Mr. L. testified that when he called the Appellant to share the good news of how the implementation of restraints was having a positive effect on the student's behaviour, she indicated that she did not want restraints used. As soon as the restraints were suspended, the aggressive behaviours again increased. Mr. L. went on to say that the student's outbursts were injuring the adults who worked with the student and the other students. The student was then excluded from school under Reg. 474/00 of the Education Act.

Ms. S. indicated that the behaviour incidents have been documented. (Exhibit 34) The evidence indicated a significant decrease in aggressions when restraint protocol was used and when the restraints were stopped the aggressions again increased. This decision had an impact on the staff as they became concerned and discouraged noting the student's significant regression.

Since the student's re-entry to school, an improvement was noticed in that incidents of aggression were reduced and the student is making better transitions. The student now goes to the gym on [the student's] own and this provides the student with the opportunity for mobility within the school.

Ms. S. testified that many of the student's behaviours are aggressive but that they are part of the student's communication needs.

Ms. Bowlby concluded that the use of restraints is a demonstrated method to reduce the student's aggressions without IBI. The Board can deal with the student's behaviour using behavioural principles so that the student's educational program can be delivered.

Issue 3: The Provision of IBI in a School Board

Appellant's Arguments

The Appellant stated that IBI is a necessary, integral component of an educational placement for her child. The parent described IBI as a program delivered by experienced qualified personnel, overseen by senior personnel and expert psychologists. It is very intense and repetitious in nature. She stated that she believes IBI is a medical treatment and an educational program. Ms. Venhola directed the parent to an affidavit from Dr. Mary Konstantareas that was prepared in October 2002 for another hearing.

The affidavit gives an overview of IBI and states that it is a medical treatment and a critical learning program. She posited that although research points out the benefits to younger children ages three to six years she believes that children of any age may also benefit. In addition, Dr. Mary Konstantareas' affidavit noted that IBI is not offered by the Ministry of Education and that Dr. Konstantareas believes that lower functioning children are in need of the intervention until

age 18. Later in Dr. Mary Konstantareas' report there is the statement, 'unless there is available service provision for IBI programming, the best researched and proven effective therapy and stimulation for the child with ASD [Autism Spectrum Disorder], there is little that he/she can gain from attending school.'

The Appellant arranged for IBI therapy for her child at home and presented a letter from Ms. J. dated February 28, 2003. Ms. J. is the student's IBI therapist and she outlined some of the student's progress. The Appellant stated the discrete trial teaching at school is not the same discrete trials that are done during IBI. The student is not progressing at school and when the student has a difficult day at school it has an impact on the student's IBI session at home. During the summer of 2002, the parent provided IBI programming. In September 2002, the student was in Grade four in the Special Education Class ASD/PDD.

The Appellant wrote to the Board in a response to a questionnaire regarding the Special Education Class's strengths and weaknesses. In her letter, she noted that she believed the pilot provided one on one support for her child, and an ABA based program. She also noted that on the whole the program was good but not the best. The key weaknesses were the lack of IBI and that it was geared to primary children. Five EAs for six students did not provide support when the students had breaks and lunch.

Two parents, Mrs. T. and Mrs. W. have children in the Special Education Class. Mrs. T. stated that Dr. Baxter had prescribed an IBI program for her child. She had initiated a part time program of IBI at home, which began in March 2002. Her child receives six to nine hours a week and she stated that her child has benefited from IBI.

Mrs. W. stated she had visited the classroom of the Special Education Class. She said that her child had started with Kinark [autism resource] full time in June 2002. This resource centre provided 25 hours of IBI services at home, withdrawing her child from school two afternoons a week until the end of January 2003. She noted that her child had mastered a number of programs working with IBI through Kinark [autism resource] and her child's "self-stimming" had been reduced. Mrs. W. indicated on a questionnaire that the Board provided "I would like to see more IBI since it has been proven that autistic children learn best this way" (page 314, lines 13-14.)

The parent stated the Board has agreed to purchase service from an autism expert either from Geneva Centre or Kerry's Place and to provide support to the classroom along with consultation with Ms. S. This has given the student significant support in class to help with the transition back into school since the student's re-entry in April, 2003. She said that she was satisfied with the plan "to the degree of programming that's in place in school" (page 192, lines 19-20), but still believes IBI is the appropriate program for both behavioral and learning of children with autism.

The parent believes the staff requires training. The Appellant stated "there was a lack of appropriate training for staff in the program delivery". (page 203, lines 24-25). The Board's use of descriptive words such as aggressive and that the student masturbates, is disrespectful to her child, her child's disability and herself.

As safety concerns for staff and students were raised, the Appellant agreed to a consultation with Geneva Centre. Geneva Centre provided a report but not IBI therapy. The Appellant also agreed to have Bartimaeus approached. Dr. Rincover, the psychologist from Bartimaeus, indicated that the student's behavior had to be under control before IBI therapy could begin and the Appellant then agreed to restraints beyond the Board's normal practice.

The Appellant stated that there was not good communication between home and school.

At the I.P.R.C. towards the end of the student's first year (Grade one) the Appellant stated that she was unaware of the problems with her child's behavior. The only notice she had had was from the teacher, citing scratching incidents and requesting she keep the student's nails shorter than normal." (page 47, lines 12-13).

The Appellant stated that even now, "I also feel that there was a significant lack of communication and parent involvement in this pilot project" (page 204, lines 19-20) "there was restricted classroom access to parents and....not an approach to making it the most successful for our children between home and school" (page 204, lines 25-26). At present, the Appellant stated, that "I have not been given a lot of information as to the actual program delivered to [the student]. It changes frequently and I am not provided with a daily schedule of what exactly they are doing" (pages 120-121, lines 28-32). "I have no idea what they do during the job sequence, I haven't been told and that's been provided usually when I ask for it, rather than in advance" (page 121, lines 6-8).

The Appellant believes her child needs IBI in order to learn. Under cross-examination, the Appellant agreed that her request was that she wanted her child, for her child's entire time at school to receive IBI therapy in a special chair, in a separate room, delivered by a qualified therapist and supervised by a psychologist. The Appellant investigated two firms that would provide IBI in Simcoe County and believes it would cost \$60,000.00 for year-round services. The program, for three months, would be between \$25,000.00 and \$30,000.00.

Respondent's Arguments

Ms. Bowlby began by stating that IBI is a behavioural modification program, which is delivered by a trained therapist not somebody who needs to have educational qualifications. She said the question is whether the student gets an education planned and delivered by a special education teacher with special education resources and supports based on a curriculum designed by teachers or whether the student spends [the student's] days receiving IBI therapy delivered by a therapist who is not recognized by the Education Act, and under the direction of the psychologist.

Dr. Konstantareas' affidavit appears to make clear a distinction between therapy and education. The thrust of the affidavit is that IBI is a therapy – a medical therapy [*refer to affidavit P. 471 – Paragraph 25; 477 (40)*] She talks about a behaviorally based education and makes the distinction between IBI therapy and education.

Dr. Hunt wrote a prescription for IBI therapy. When a doctor prescribes something, that prescription is a medical therapy. Ms. Bowlby concludes that IBI therapy is being presented as a medically necessary intervention.

During Ms. Bowlby's cross examination of the Appellant it was clear that behavioural modification principles were being used to implement the communication skills plan, expressive language skills and the use of a Picture Exchange Communication System (PECS)

The Appellant also agreed that, in respect to all other parts of the program, behaviour modification principles are used – not IBI. She indicated preference of IBI delivered 40 hours per week although she acknowledges the hours of school do not equate to 40 hours.

The British Columbia Court of Appeal found that IBI therapy is a medically necessary treatment for youngsters of a young age having been diagnosed with Autism.

Ms Bowlby explained that the Education Act is set up to provide an education for students, not therapy for students. The Education Act does require that special education programs and services be provided in an appropriate special education placement.

She stated that the Tribunal does not have jurisdiction to require that a Board provide therapy in lieu of an educational program

IBI is delivered by a therapist under the direction of a psychologist, whereas under the Education Act a behaviour management program would be planned and delivered by a special education teacher.

Analysis and Reasons

The Tribunal sought to determine the placement that would be in the best interests of the student from the standpoint of receiving the benefits that an education could provide.

The Tribunal weighed the evidence that was presented by both parties concerning IBI, its benefits to children with autism and the potential of having it delivered in a classroom.

First the Tribunal is unable to find evidence that clearly demonstrated that IBI is more effective to address the student's aggressive behaviours than any behaviour program developed and implemented by the special education teacher. Evidence showed that the school personnel have implemented a behavioural program with behaviour management techniques similar to the Intensive Behavioral Intervention (IBI) but without the same intensity and duration. This behavioural program did have a positive effect on the student's behaviour, which was demonstrated in the Report Cards that were written during the student's time in the Special Education Class. Although the witness, Ms. C., showed data sheets which recorded results of the student's compliance to demands made of [the student], Ms. Bowlby convincingly showed that Ms. C.'s data may not have the integrity it should have in order to draw conclusions about the success of IBI. The Appellant clearly stated that she wanted IBI implemented for her child but the Tribunal received no convincing evidence that the student's improved behaviour resulted directly from IBI. There was evidence as well that the program in general had been successful not only for the student but for the other students in the class.

After hearing the evidence presented by witnesses and through the affidavit evidence, the Tribunal concludes that a special education program is intended to be educational not therapeutic. The therapeutic program sought by the Appellant for her child falls outside education. In Auton v British Columbia, the Court of Appeal upheld the finding of the lower Court that IBI therapy is a medically necessary therapy for young children with an early diagnosis of autism and that the British Columbia Ministry of Health was obliged to make the therapy available. The Court found the therapy was in the nature of medical treatment.

The Tribunal heard evidence that showed the Appellant refused to allow staff to use restraints as set out in the protocol established by the school personnel in collaboration with her. We feel

that she has failed to appreciate the extent to which her child's aggressive behaviours threaten the safety of students and staff.

The Tribunal is of the opinion that much of the success attributed to IBI by the parent was as a result of the restraint procedures used by the therapist prior to working with the student on the discrete trials. The Appellant refused to allow the Board to use restraint procedures during the time period when the student was in the 2002/2003 placement when the student's behaviors were escalating and the student was removed from school. With the parent's agreement that the Board personnel use a restraint protocol, the Tribunal expects that the student's behaviors will continue to be reduced and that will allow the student to focus on the task that is being taught. The Tribunal has recommended that a Board psychologist become involved in the student's behavior management program and with that added level of expertise, the Tribunal believes that the Appellant's concerns about the use of restraints will be ameliorated.

The Tribunal believes that the Appellant has failed to prove that a placement in the Elementary Special Education ASS/PDD class would not be appropriate.

The Tribunal concludes that the placement in the Elementary Special Education ASS/PDD class is appropriate for the student and that the Simcoe County District School Board is providing an appropriate placement for the student.

Decision

The Tribunal unanimously denies the request of the Appellant and affirms the determination of the June 17, 2002 IPRC placing the student in the Elementary Special Education Class (ASD/PDD.)

The case is dismissed.

Recommendations

1. The Tribunal recommends that a School Board psychologist oversee the student's behavior management program and have direct contact with the programs designed to meet the student's needs. The Tribunal heard that the Appellant is seeking a psychologist with experience with autism. The Tribunal is of the opinion that there is an urgent need to have a Board psychologist oversee the student's behavior management program immediately, prior to school entry and that a Psychologist with certification by the Ontario College of Psychologists would have the necessary training and knowledge to oversee a behaviour management program developed for the student. Recognizing that there have been several community support personnel involved in developing programs for the student over the years, the Board psychologist assigned to oversee the student's program should be the primary communicator between the Board, the parent and the community support personnel.

The Tribunal further recommends that the psychologist liaise with the parent and the school so that there is consistency between the home and the school regarding the student's behavior management program.

2. The Tribunal encourages the parent to support the school in the implementation of the revised behavior management protocol, which included the use of restraints. It was demonstrated that the aggressive behaviors would be reduced significantly with the use of restraints, which would allow the Board to present an educational program to address the student's learning needs. The School Board psychologist would develop and oversee the restraint protocol.

3. The Tribunal was encouraged to hear of the student's success in the Special Education Class that has occurred since April 2003. With a Board psychologist to oversee the behavior management program, the Tribunal believes that the student will be successful in meeting [the student's] potential within the placement offered by the Simcoe County District School Board. Should the situation arise, however, where the student's needs for treatment supersede the student's need for an educational program provided in a special education class, the Tribunal suggests that the parent and the Board consider placement in a care/and or treatment facility. A Care and Treatment setting (Section 20) under the auspices of Ministry of Education Policy Program Memorandum No. 85, provides for the development of programs that recognize the primacy of care and treatment needs of the children and youth who have been admitted to these facilities. The Tribunal acknowledges that it is beyond the scope of the Tribunals' jurisdiction to direct the Board and the parent to consider this option should the student's placement within the Simcoe County Board of Education not be successful at some time in the future. Nevertheless, the Tribunal is of the opinion that this option may need to be considered at some point.

Paula Barber, Tribunal Chair _____

Sharon Carson, Tribunal Member _____

Marilyn Thain, Tribunal Member _____

September 15, 2003