



**IN THE MATTER OF the EDUCATION ACT, R.S.O. 1990 E.2, as amended, 57(3)
AND IN THE MATTER OF Ontario Regulation 181/98:
AND IN THE MATTER OF the minor child born in 1988.**

BETWEEN

S. AND S. E.

Appellants

AND

HALTON DISTRICT SCHOOL BOARD

Respondent

Tribunal Members

Paula Barber	Chair
Donna Gracey	Member
Dawn Roper	Member

Appearing for the parties:

Mr. David Baker	Counsel for the Appellants
Nick Bader, Student-at-law	for the Appellants
Mr. Robert G. Keel	Counsel for the Respondent
Ms. Nadya Tymochenko	Counsel for the Respondent

The hearing was held in the Trafalgar A room at the Holiday Inn, 590 Argus Road, Oakville, Ontario, on June 3rd, 4th, and 5th, 2003. A preliminary hearing regarding jurisdiction of the Tribunal was conducted through written submissions prior to the hearing.

INTRODUCTION

The Tribunal scheduled this hearing to determine the placement of the student. The hearing was under the authority of the Education Act RSO 1990, c.E.2, as amended, section 57, and the regulations made there-under, and the Statutory Powers Procedure Act.

The student is 14-years old. According to the mother, the student was diagnosed with autism when four years old. The student lives with the parents and the student's 16-year-old brother in Burlington, Ontario. The family's goals for the student are to foster speech and language development, community socialization, and the development of the capacity to live independently. In recent months the student has obtained a service dog (Millie) that assists in the development of the primary goals of speech and language development and social skill development. The student's mother told us that the student is highly verbal, caring and considerate.

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 has been diagnosed with an anxiety disorder, but this is not part of the student's identification with the Halton District School Board.

The student attended Earl Haig Public School for grades K – 6 in an integrated setting with resource support. For grades 7 and 8, the student attended a Multi-exceptionality class at Sir Ernest Macmillan P.S.

The student's proposed placement for Grade 9, the placement under dispute, was in a Mixed Exceptionality class (Developmental Education Program) at Lord Elgin High School. The parents appealed this placement. A "stay of placement" continued in the Grade 8 setting with modifications to the Grade 8 curriculum. As a result of the student's escalating anxiety in this placement, on the advice of Dr. B. A. Urbanowicz, the parents withdrew the student from the school. During the period of time that the student was not attending school the student obtained the service dog, Millie.

The Appellants' Request

The appellants asked that the placement for the student be an Autism Class under Section 31(f) of Regulation 298 of the Education Act.

The Regulation states:

The maximum enrollment in a special education class shall depend upon the extent of the exceptionalities of the pupils in the class and the special education services that are available to the teacher but in no case shall the enrolment in a self-contained class exceed,

(f) in a class for aphasic or autistic pupils, or for pupils with multiple handicaps for whom no one handicap is dominant, six pupils

The appellants are not appealing the student's identification, which was described on the IPRC form from the Identification Placement and Review Committee (IPRC) Statement of Decision, of June 13, 2002 as:

Primary: Communication – Autism

Secondary: n/a

Respondent's Reply

The respondent's position is that the student's June 13, 2002, IPRC Placement is "Self Contained," and that the "Program" is the Developmental Education Program under the Special Education Plan of the Halton Board. The Developmental Program placement is working for the student. The respondent requests the Tribunal dismiss the appeal.

Witnesses

The Tribunal heard eleven witnesses during the three days of hearings; four for the Appellants; and seven for the Respondent.

For the Appellants

S. E. Parent
Margaret Spoelstra..... Director, Autism Society of Ontario
Tracie Lindblad..... Speech Pathologist, private practice
Dr. B. Alexandra Urbanowicz Psychologist, private practice

For the Respondent

Brenda Kearney Superintendent
Therese Squires Speech Language Pathologist
Deborah Wood Special Education Coordinator – West Area
Joanne Trigg Supervisor of Special Services – North Area
Brenda Hood Curriculum Development Staff
Bev Miller Itinerant Teacher – PDD/Autism
Kevin Ho Young Teacher in Developmental Education Program

Preliminary Matters

Jurisdiction Mr. Keel raised the issue of the jurisdiction of the Tribunal. He states, on behalf of the Board, that the Tribunal has no jurisdiction to order the creation of a class configuration, which is not described in the school board's Special Education Plan.

Completing the Hearing Within Three Days Mr. Baker, on behalf of his clients, the appellants, expressed concern over the anticipated length of the hearing and indicated that he and his clients wanted the hearing to be completed within three days. This matter was resolved between the parties.

Interim Placement This matter was resolved by the parties.

Provision for the Student's Guide Dog in the Interim Placement This matter was resolved by the parties

Number of Witnesses the Board Proposed to Call This matter was resolved by the parties.

Challenges of Documents Proposed to be Submitted into Evidence This matter was resolved during the course of the hearing.

Legal Framework

The following sections from the *Education Act* and the regulations made there-under have been considered in the course of this hearing.

Education Act (R.S.O. 1990, c.E.2), as amended, Subsection 57 (3) Right of Appeal – *Where a parent or a guardian of a pupil has exhausted all rights of appeal under the regulations in respect of the identification or placement of the pupil as an exceptional pupil and is dissatisfied with the decision in respect of the identification or placement, the parent or guardian may appeal to a Special Education Tribunal for a hearing in respect of the identification or placement.*

Subsection 57 (4) Hearing by Special Education Tribunal
the Special Education Tribunal shall hear the appeal and may,

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

Subsection 8(3)

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...

Regulation 181/98, Identification and Placement of Exceptional Pupils, governs the identification and placement of exceptional pupils, IPRC reviews, appeal procedures and the role of parents/guardians in these proceedings.

Regulation 298 Section 31, *The maximum enrollment in a special education class shall depend upon the extent of the exceptionalities of the pupils in the class and the special education services that are available to the teacher but in no case shall the enrolment in a self-contained class exceed*

(f) in a class for aphasic or autistic pupils, or for pupils with multiple handicaps for whom no one handicap is dominant, six pupils

Regulation 464/97, Subsection 11(1), *A special education advisory committee of a board may make recommendations to the board in respect of any matter affecting the establishment, development and delivery of special education programs and services for exceptional pupils of the board.*

Regulation 306 [2001] Subsection 2 (2), *Every board shall maintain the special education plan in respect of the board and ensure that the special education plan is amended from time to time to meet the current needs of the exceptional pupils of the board.*

The Education Act, Section 25, School Attendance Counselor Provisions,

The Education Act, Section 265 (1) (m), Access to school or class, *subject to an appeal to the board, to refuse to admit to the school or classroom a person whose presence in the school or classroom would in the principal's judgment be detrimental to the physical or mental well-being of the pupils;*

Other Statutes Referenced:

The Canadian Charter of Rights and Freedoms , Part 1, *Constitution Act*, 1982

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

Case Law:

E. v. Brant County Board of Education, (1997) 1 S.C.R. 241, 31 O.R. (34) 574; 43 D.L.R. (4th)385

Slaight Communications Inc. v. Davidson, (1989) 1 S.C.R. 1038, 59 D.L.R. (4th) 416

D. et al. and Muskoka Board of Education et. Al. (1985), 49 O.R. (2d) 546; 15D.L.R. (Y) 741; 6 D.A.L.389

R. v. York District Board of Education, (1986), (unreported)

Y. v. X.X. District School Board, (2002), (unreported)

R. v. Carleton Roman Catholic Separate School Board, (1998), (unreported)

A. v. Halton District School Board,(2002), (unreported)

L.-A. v. Halton District School Board (2000) (unreported)

B. v. Ottawa-Carleton District School Board, (2003), 170 O.A.C. 248; 64 O.R. (3rd) 454

B. v. Upper Canada District School Board, (2001), (unreported)

Other Documents Referenced

Ministry of Education, *Standards for School Board Special Education Plans*,(2000)

Issues

Two primary issues were addressed in this tribunal hearing.

Has the Halton Board of Education provided the student, a student identified with Autism, with an appropriate placement?

Does the Tribunal have the jurisdiction to order a Board to place a student in a class that does not currently exist within their Special Education Plan?

PLACEMENT ISSUE

Background

1. The appellant stated that the student is 14 years old and has mild Autism, diagnosed at age four. The student has excellent speech skills, is highly verbal, and enjoys community outings, some of them independently. The student interacts responsibly and well with the companion dog Millie.
2. The appellant stated that the student was integrated in a regular class with resource support for grades K - 6. The appellants understood that the student's identification would lead to a self-contained class in Grade 7 and 8, and did not object to the placement in this self-contained, Multi-exceptionality, Life Skills class though the student was the only student with Autism. The appellants provided the teacher, Mrs. Hawkins, with a reading program for the student, and

encouraged Mrs. Hawkins to consult with professional experts at the family's expense.

3. The proposed Grade 9 placement presented a seemingly insurmountable dilemma for the student. Many of the student's peers from the Elementary Life Skills class went into a Life Skills class at General Brock High School. The student had already demonstrated within Mrs. Hawkins' class that, like many students with Autism, the student was very anxious about the transitions required by students within a Rotary Classroom System. This left only one other option available within the Halton District School Board, the DEP (Developmental Education Program) at Lord Elgin High School.
4. The appellant related she had reservations about the appropriateness of this program from the beginning, but was willing to take the student for a tour of the school to see how it might work. The student reacted with dismay and agitation almost immediately, stating that most of the students in the Developmental Education Program could not talk. The student indicated [the student] did not want to go there.
5. The appellants rejected that placement and sought a "stay of placement" pending the outcome of a Special Education Appeal Board Hearing. This was done, and the student remained with Mrs. Hawkins class in the Grade 7/8 setting. For reasons the appellants did not fully understand or accept however, the student was required to continue with the Grade 8 curriculum, causing the student great distress. Further, the appellants did not believe Mrs. Hawkins had adequate resource support, as she was asked to keep the student at home during teacher absences. The student's anxiety grew, and the appellants removed the student from the school on the advice of the student's psychologist, Dr. Urbanowitz.
6. Following the outcome of the Special Education Appeal Board Hearing, which upheld the IPRC placement decision to place the student in the Developmental Education Program, the appellants met with the Board on February 28th, 2003 to discuss the student's placement at Lord Elgin High School in the DEP Unit. In the interim, the student had obtained a companion dog, Millie, which would attend with the student at school. During the initial meeting there was concern raised by the Board that one of the teachers and some of the other students in the Unit had animal allergies. The resolution devised by the Board was the classroom, Room 106, a small adjunct classroom to the DEP Unit, with Mr. Ho-Young as teacher

To address the issues of animal allergies among staff (13 people) and students (24 pupils) in the Developmental Education Program "Unit," a small grouping of five students, one teacher and two educational assistants were relocated to a classroom (Room 106) near the Developmental Education Program, and still part of the Developmental Unit. At the time of this hearing, the student had been in this classroom setting for three and a half weeks.

7. The classroom had six students and different activity areas for the students. This appeared to witnesses for both parties to work well for the student, except that from the perspective of the parents, it was still part of the larger DEP Unit and the students went back into the larger space for various periods during the day. This procedure caused the student distress, and the student typically chooses to remain in the smaller classroom, Room 106 whenever there is a choice.
8. The appellant, a member of the Halton Board's Autism Task Force in 2000, believed its recommendation for an Autism Class at the high school level, if established, could be devised to meet the student's needs. This is the core remedy the appellants are seeking from the Tribunal.

Appellant's Arguments

The appellants are fearful that should the student not receive the appropriate education the student needs as a person identified with Autism/Communication Disorder, the student will be unable to achieve the high quality of life they envision for the student, including independence in the community as an adult. The appellants expressed fear that the student could easily become increasingly isolated in a program that causes the student anxiety, and thus undermine the student's capacity to learn and to grow in the student's relationships with typical peers. The appellants expressed the belief that the student needs the specialized and direct teaching that would be provided in an Autism Class, and the belief that such education is not possible for the student in a Life Skills Class or within the Developmental Education Program.

Mr. Baker, in arguing on behalf of the appellants, outlined his arguments around three specific issues: the student, autism, and whether the Halton DSB is able to provide the student with an appropriate education.

The student

Mr. Baker related that the student is a highly motivated learner, who is able to interact effectively with peers. He indicated that regardless of the reason for the student ending up in the current classroom, 106, it is an improvement for all the pupils in that class, and a particularly important development for the student.

Mr. Baker related that the student's timetable has been changed to prevent the student having to spend long periods of time in the larger DEP Unit, so the student is not distracted or upset by the vocalizations of non-verbal students, is able to function, converse, and socialize with others in the class. The student is also able to choose a partner at lunch in the cafeteria. The student, said Mr. Baker, wants to be learning what the student needs to know and master it to get back with the kids the student has been in school with up until now. In spite of the positive changes that have occurred over the past few weeks that the student has been back in school in the newly designed classroom, Room 106, this is not the security that is available to parents that a placement determined by an IPRC provides. Mr. Baker argued that the student is

entitled to be offered a place in an autism class as a part of a range of placements the Board provides to its pupils.

Autism

Mr. Baker used the evidence presented by the Board's expert witnesses in the field of autism, Ms. Spoelstra, Ms. Lindblad and Dr. Urbanowicz in his arguments.

Mr. Baker pointed out that from Ms. Spoelstra's evidence that the Halton Board's number of high-school-age students with autism is low, and that children with autism with the student's profile are the ones most likely to be withdrawn for home or private schooling because the public education system is not meeting their needs. Mr. Baker argued that there would be enough students for a high school level autistic class; although he reminded the Tribunal that he was arguing on behalf of his clients for the student, not for all the children with autism within the Halton District School Board catchment areas.

In questioning the need for the autism class within the Halton DSB, Mr. Baker used Ms. Lindblad's testimony that other boards with which she consults have high-school-level autism classes, that they have waiting lists, and that there are parents of children with autism who are moving around the province seeking such placements.

In arguing for the autism class as opposed to a Developmental Education Program Placement, Mr. Baker used Dr. Urbanowicz' testimony that "autism" is the student's primary educational need, with "anxiety" as a secondary need.

Mr. Baker pointed out that this view was supported by the Board's identification of the student, which is Autism/Communication, and not Developmental Disability.

Mr. Baker addressed the issue of integration vs. segregation within the Halton Board, and questioned why 92.5% of children with autism are integrated with resource support in elementary school, but that in high school, only 45.5% are integrated, with 54.5% in self-contained or congregated settings. Mr. Baker used the Halton DSB's Autism Task Force Report of 2000, which pointed to the difficulty students with autism face adapting to the rotary system in high school, that the modified regular curriculum becomes less relevant, and that problems emerge with respect to socialization, all of which substantiate the difficulty that the student would encounter in either of the placements offered by the board.

Mr. Baker further stressed the conclusions of the Autism Task Force, quoting several of its key points, including number three, "That we develop a range of specialized P.D.D. classes spanning three critical grade ranges: Kindergarten to Grade 2; Grades 6 to 8; and Grades 9 to 12. In keeping with the Ministry of Education policy, each P.D.D. class would consist of six students, one teacher and a minimum of two instructional assistants. More educational assistants (EAs) could be assigned to the class based on individual students needs. Even in a small class, some P.D.D. children will need one-to-

one assistance." Mr. Baker argued that if these recommendations by the Autism Task Force had been implemented, there would be an appropriate placement for the student within the Halton District School Board.

Mr. Baker said the appellants and the Board share the view that the student can and will progress, but argues that in order for the student to do so, the student must have social-practice opportunities, a chance to develop community interaction skills, a chance to go out and about with one-to-one support practising the skills that are being worked on in the classroom, and as Mr. Baker pointed out the appellants' witnesses testified, the student requires an Autism Class in order to do these things.

Mr. Baker argued that money is not an issue, referencing Board witnesses Ms. Kearney's and Ms. Trigg's testimony on this point. The issue, he said, comes down to the appellant saying the student needs an autism class to obtain the education program and supports the student needs, and the respondent saying those supports can be offered with an individualized program within the D.E.P. Unit.

The appellant stated she participated as a member of the Halton Board's Autism Task Force in 2000, and believed its recommendation for an Autism Class at the high school level, if established, could be devised to meet the student's needs. This is the core remedy the appellants are seeking from the Tribunal.

The appellant is fearful that should the student not receive the appropriate education the student needs as a person identified with a Communication: Autism Disorder, the student will be unable to achieve the high quality of life she envisions for the student, including independence in the community as an adult. She expressed fear that the student could easily become increasingly isolated in a program that causes the student anxiety, and thus undermine the student's capacity to learn and to grow in the student's relationships with typical peers. She expressed her belief that the student needs the specialized and direct teaching that would be provided in an Autism Class, and her belief that such education is not possible for the student in a Life Skills Class or within the Developmental Education Program.

Mr. Baker, on behalf of the appellants, argued that it is not enough to put the student in a self-contained class and call it a placement when there are no supports related to the student's "communication-autism" identification. There is no assurance that Room 106 will be there over the long term, in a placement designated "developmental," when the only other option is integration with resource withdrawal, an option that cannot be supported due to the student's autism.

Mr. Baker submits that Room 106, the student's current placement within the D.E.P. Unit, is in fact an Autism Class.

Mr. Baker argued that the appellants seek security for the student within the Halton DSB by having the classroom currently taught by Mr. Ho-Young at Lord Elgin High School identified as an Autism Class to prevent potential erosion of the supports the student

currently enjoys, and to enhance those supports with others more particular to students with similar educational needs and skills, and in particular, students whose primary exceptionality is Autism.

The Respondent's Position

Mr. Keel, on behalf of the HDSB requests that the Tribunal deny the appeal and confirm that the placement, the Developmental Education Program (DEP) placement is the appropriate placement for the student and that the placement is meeting the student's needs. Mr. Keel also asks the Tribunal to find that if a placement is not included in the Board's Special Education Plan (SEP), that a Tribunal cannot order the Board to create a placement. He maintains that the student's needs can be met within the placement options within the Halton District School Board's Special Education Plan and within the two possible options for the student, the Developmental Education Program or the Life Skills, Multi-exceptionality Program placement at Vincent Massey Secondary School.

The Respondent's Arguments

Mr. Keel indicated that his case would be divided into four parts, as outlined herein.

Legal Issues

Mr. Keel contends that the development of a School Board's SEP is the result of a logical plan set out in the *Education Act*, in which the S.E.P. is developed with the involvement of the community, SEAC, Board, parents, teachers, and support staff. It deals with the interests of all students. An order by the Tribunal to create an Autism Class, which is not a part of the S.E.P., would have placement and program implications for other students.

Pedagogical Issues

Mr. Keel said that the respondent's witnesses indicated, as did Tracy Lindblad and Dr. Urbanowicz, the appellants' witnesses that there is no research supporting a one to six class at the secondary level, but that research does support the need for consistency in meeting the needs and profiles of those students. While the original task force in 2000 recommended an Autistic class of one to six, it did not specify which children with autism would be in it or what the needs of those children should be. The recommendation was dropped in favour of increasing training for teachers. The current S.E.P. is based on the needs and profiles of the students, and supersedes the Task Force.

The Stay of Placement

Mr. Keel stated that a "stay of placement" is automatic when there is an appeal of placement and that is why the student remained in the Grade 8 placement at Sir Ernest Macmillan P.S. The current placement for the student, [Classroom 106, the adjunct

room for the D.E.P. program,] is a “without prejudice placement”, pending the decision of this tribunal.

The student

Mr. Keel indicated that the student’s placement is self-contained and will continue in the D.E.P. program, but in a separate classroom. While the identification is Autism, the student has as well an anxiety disorder and a mild developmental delay, and has a profile that is similar to that of the other students in the class.

Ms. Kearney, Superintendent of Special Education for the HDSB, outlined the process that led to the development of the S.E.P. and in particular the formation of the D.E.P. She indicated that she had had no other requests for an Autism class, and felt that such a class wasn't justified in the research. She also testified that to the best of her knowledge there were only four self-contained secondary autism classes in Ontario. She described the Life Skills and Satellite programs available at Lord Elgin H.S. She also described the amalgamation of the General Brock secondary school, a vocational school with Lord Elgin H.S., which will occur in 2004. She believes that the amalgamated school will create many more opportunities for students like the student.

Brenda Hood, who has written curriculum documents and taught courses for teachers of children with developmental delays at the Ontario Institute for Studies in Education (OISE) described the range of placements available at Lord Elgin H.S. Theresa Squires, a speech and language pathologist had visited the student in the student’s classroom. She indicated that she had witnessed many of the "best practice" strategies for teaching children with Autism in the student’s classroom.

Deborah Wood, a Special Education Resource Teacher, also spoke of the benefits of the amalgamated schools in 2004 at which time, General Brock and Lord Elgin school populations would be amalgamated and the Life Skills program at General Brock H.S. will be available to students currently at Lord Elgin H.S.

Joanne Trigg, a teacher and registered psychological associate, and the supervisor of Special Education for the north service area feels that the school is providing the services recommended in Dr. Urbanowicz's report.

Bev Miller, teacher, member of the Halton DSB’s Autism Spectrum Disorder Team, and itinerant teacher, provides support for programming and staff training.

Mr. Keel noted that from her testimony the program designed for the student met the recommendations of Tracie Lindblad's report, and that Bev Miller did not see any advantage to the student in an autistic class.

Through the testimony of Mr. Ho Young, the student’s current teacher, Mr. Keel demonstrated that within the DEP placement an individualized program has been designed for the student. Mr. Ho-Young meets with the Autism Spectrum Disorder

Team biweekly and is able to access resources to meet the student's special needs within the placement.

JURISDICTION OF TRIBUNAL TO HEAR THE APPEAL

Respondent's position

Mr. Keel, on behalf of the HDSB argued that the Tribunal should not hear the appeal because the Appellants were requesting that the Tribunal place the student in an Autism Class, a placement that did not exist within the Special Education Plan of the HDSB. On April 16, 2003, Mr. Keel submitted these arguments on behalf of the school board.

Appellants' position

Mr. Baker, on behalf of the Appellants, argued that neither of the placement options available within the HDSB were appropriate for the student, and that the Tribunal is required to make a decision and an order regarding an appropriate placement for the student whether such a placement existed within the Board or not. The Appellants are seeking a class for students identified as having autism, at the secondary level

Respondent's Arguments

Mr. Keel argued that the Special Education Appeal Board on Jan. 8, 2003 confirmed the placement of the student in a self-contained special education program placement.

Mr. Keel argued that the Special Education Plan developed and approved by the Board and with the approval of the Special Education Advisory Committee was a plan that considered the needs of all the exceptional students within the HDSB. Ms. Kearney testified that the Board has responded to the suggestions by the Ministry concerning the plan with the exception of one that applied to all boards.

He stated that the Respondent does not have a program placement for "Autism" nor does the Board operate either a program placement, or any self-contained class for students with autism at the secondary level.

The Board argues that the Tribunal does not have the jurisdiction to order the Board to amend its Special Education Plan in order to create a special program placement consistent with the request of the Appellant for "a specialized class for autistic students."

The Board submits that Section 57 (4) is not sufficient to give the Tribunal the authority to order the Board to amend its plan to create a specialized placement that the parents are requesting.

The Board submits the Tribunal's jurisdiction is limited to those placements set out by the Board in its Special Education Plan, which was created under Regulation 306, Special Education Programs and Services.

The Board further argues that under subsection 12(2), of Regulation 181, The Identification, and Placement and Review Committee Regulation, the IPRC must make placement decisions in keeping with the placements described in the Board's Special Education Plan.

The Board submits that the right of appeal under Section 57 of the Act does not expand the right of appeal to include decisions regarding the program placement options beyond those set out in the School Board's Special Education Plan.

The Board believes that the Board or the Ministry of Education may only amend the Special Education Plan.

The Board submits that the public consultation process ensures that the needs of all exceptional pupils will be addressed in the Special Education Plan and the program placement options offered therein. The Tribunal, by amending the plan to create a special education placement option without hearing from other parents with students within the jurisdiction of the Board, cannot ensure that their needs will not be impacted adversely by the Tribunal's decision.

The Board further argues that a decision by the Tribunal regarding the establishment of a placement not offered by the Board would affect the program placement options available to other students, staffing decisions, accommodation decisions and Board revenues.

The Board submits that if it was the intention of the Ministry to permit parents to appeal the program placement options available to their child to the Tribunal that such an option would be set out explicitly in the Standards for the School Board Plans document.

The Board submits that if the parents wanted the Board to create a new placement option in the Special Education Plan, then the proper forum to make such a request would be the Special Education Advisory Committee, not a Tribunal.

The Board argues from the Divisional Court decision, D. v. Muskoka Board of Education (1985) "To recommend the placement of a child in a non-existent placement would be absurd."

Appellant's Arguments

Mr. Baker argued that the Board's Special Education Plan for 2003-04 refers to only two types of self-contained classes at the secondary level, 'mixed exceptionalities' and "developmental education"

The Board originally proposed that the student be placed at a vocational school in a class of mixed exceptionalities, a placement that would not have been possible for the student because that program placement is based on a rotary system that requires many transitions, a situation not possible for the student due to the student's needs as a student with autism.

The other option that the Board offered, the placement under appeal, is the Developmental Education Program, a class with 24 pupils in it with approximately 13 Educational assistants and three teachers. Most of the 24 students in that placement have severe developmental disabilities and have limited verbal communication skills. According to the SEP, the developmental education program is only for "students with developmental disabilities". The student had not been identified with a developmental disability. The parents maintain that this placement is totally inappropriate and cannot meet the student's best interests academically, behaviorally or socially.

The Autism Task Force presented its report to the Board in March, 2000, and highlighted a major conclusion: "If only one message is conveyed from our task force it is the following: "the current situation for students with autism is urgent, the need is immediate and without change and intervention, we expect the situation to reach crisis proportions."

The school board passed a motion to begin to implement the Task Force recommendations, subject to budget approval with the report to be reviewed and amended annually should the need arise.

This task force report included the recommendation to open a self-contained class for students with autism at the secondary level in September 2003. The Board has never repealed this recommendation nor amended its Special Education Plan to reflect this recommendation.

Subsequent to the finalization of the school board plan for 2002-03, the Board received an increase in funding for Special Education.

The HDSB's Special Education Plan for 2002-03 had not been approved by the Ministry of Education. Mr. Baker submitted that the previous recommendations of the Ministry concerning the HDSB's SEP have not been carried out.

Mr. Baker argued that the Tribunal has broad powers under Section 57 of the *Education Act* and the powers are not subject to any statutory limitations.

He quoted Section 8(3) of the Education Act as follows: "The Minister shall ensure that all exceptional children in Ontario have available to them, in accordance with this Act and regulations, appropriate special education program and services without payment of fees by parents or guardians resident in Ontario, and shall provide for parents or guardians to appeal the appropriateness of the special education placement,"

Mr. Baker argued that under the *Education Act* subsection (2) of Section 57 the Tribunal's broad jurisdiction cannot be limited by regulation.

Mr. Baker used *D. v. Muskoka* (1985) in his arguments noting the court's decision that it was the Tribunal's responsibility to make an appropriate placement.

As well he used *R. v. Carlton Roman Catholic Separate School Board* (1988) and *E. v. Brant County Board of Education* [1997] and quoted, "...the decision making body must further ensure that its determination of the appropriate accommodations for an exceptional child must be from a subjective, child-centred perspective, one which attempts to make equality meaningful from the child's point of view as opposed to that of the adults in his or her life. As a means of achieving this aim, it must also determine that the form of accommodation chosen is in the child's best interests".

Mr. Baker quoted from *A. v. Halton District School Board* {2000} that as well confirmed a tribunal's responsibility to make decision in the best interests of the child.

Mr. Baker stated that if the Tribunal did not decide that it had jurisdiction to hear the appeal, the Tribunal would violate both the Charter of Rights and Freedoms and the Ontario Human Rights Code.

Mr. Baker argued that Regulation 181 limits the placement options to those available in the Board's plan, but argues that this refers to the members of an IPRC, not a Tribunal.

Mr. Baker argues that the Tribunal's jurisdiction was prescribed by statute. He further states that regulations are subordinate to statutes. A regulation cannot amend a statute. The enactment of Regulation 181/98, many years after Bill 82 was enacted, cannot have the effect claimed by the Respondent.

He argued that the Canadian Charter of Rights and Freedoms requires that the language of the Education Act and regulations be interpreted in a manner that avoids results that are discriminatory. According to Mr. Baker, the interpretation urged by Mr. Keel on behalf of the Board would violate the student's rights under the Charter.

Mr. Baker argued that the Ministry has very limited objectives in its review of Board plans. He referred to the *Standards for School Board' Special Education Plans, 2000*. In that document, the Ministry requires Boards to "describe" the placements the Board is offering and states that the Ministry "may" inspect the plan.

Mr. Baker referred to the placement ordered to the Y.v.XX District School Board (2000), in which the Tribunal relied on the reasoning in the Task Force on gifted education as a basis for its order to place the student in a placement that didn't exist within the Board.

Mr. Baker finally argued that according to Reg. 298, no self-contained placement can have 24 students and even if such a placement were legal, then that placement is for

students who have been identified as having a developmental disability, and the student has never been identified as having an intellectual disability. In reply, Mr. Keel pointed out that this placement is legal because there is one teacher for ten students as required under Regulation 298, for a class of students with a developmental disability.

Mr. Baker argued that the Respondent's motion should be dismissed.

DECISION ON THE MATTER OF JURISDICTION

The Tribunal dismissed the respondent's motion and allowed the appeal to proceed.

The Tribunal is of the opinion that it has jurisdiction to hear the appeal.

The Tribunal does not accept Mr. Keel's arguments that the Tribunal cannot order the Board to place the student in a placement that does not exist within the School Board Special Education Plan.

The Tribunal agrees with Mr. Baker that the authority of the Education Act, a statute supercedes the authority of a regulation [in this case, Regulation 181/98] and a Ministry Policy Document, *Standards for Special's Education Plans*, [2000].

It is the Tribunal's view that Regulation 181/98, including subsection 12(2) and other sections referenced by Mr. Keel, applies to IPRCs, but does not apply to Tribunals. The Tribunal's mandate is set out in the Education Act, section 57 and not in Regulation 181/98. The Tribunal's mandate is to make a placement decision in the best interests of the pupil, whether the placement is described in the school board's SEP or not.

The Tribunal has the authority and responsibility to make orders that are in the best interests of a student and to order "appropriate" placements that will meet the needs of students.

There has been case law created by previous tribunals and court decisions as well that have supported tribunal decisions that ordered Boards to place students in placements that did not exist within the Board's Special Education Plan.

In D., which Mr. Keel quoted, that 1984 tribunal and subsequent court reviews dealt with a situation in which the Board had not yet developed a range of placements. The Special Education legislation was in the process of being implemented and therefore, leniency was granted during the implementation of such significant legislation.

The following Tribunal decisions all ordered Boards to provide placements where none existed at the time of the hearing:

R. v. Carleton Roman Catholic Separate School Board, [1998];

A. v. Halton "District School Board, [2000];

B. Y v. XX County Board of Education (2002) and

B. v. Upper Canada District School Board (2001)

B. v. North York Board of Education (1984) stated, “in determining what placement involves, the following matters are considered:

- (a) The identification process required under Ontario Regulation 554/81 [now 181/98] will by its process clarify and indicate the pupil requirements or needs;
- (b) Appropriate placement must by logical extension in some way answer, provide, or meet the pupil requirements or needs. When determining appropriate placement, therefore, one must decide what factors are required to meet the needs of the pupil;
- (c) In order to arrive at an appropriate definition of placement, for a particular exceptional pupil, the location, philosophy of education, objectives for the pupil, curriculum or program of students, are factors which may be considered (pages 11 and 12)

R. v. York Region Board of Education (1986) held that “to order a placement, which it considers, is not in the best interests of the child regardless of who wants that placement is contrary to good judgment and responsible decision-making”.

In O. v. Wentworth Board of Education (1986), the Tribunal ordered a placement that neither the Board nor the parent requested and was not part of the Board’s range of placements.

In conclusion, the Tribunal has the legislative authority to order the Board to place a child in an appropriate placement even though that placement does not exist within the Board’s Special Education Plan and as stated in R. v. York Region, it would be contrary to good judgment and irresponsible decision making to order a placement which is not in the best interests of the child. Therefore in the best interests of the student, the Tribunal determined that it had jurisdiction to hear the appeal and dismissed the motion.

CONSTITUTIONAL QUESTION RAISED BY THE APPELLANTS

In a written submission from Mr. Baker, dated April 14, 2003, Mr. Baker gave notice that he intended to raise a constitutional issue, arguing that the decisions of the Halton District School Board are discriminatory and contrary to the best interests of the student and therefore in violation of the student’s equality rights.

As well Mr. Baker indicated that he intended to argue that the Tribunal does have jurisdiction to make orders that are not restricted to placements within the Board’s Special Education Plan.

The Tribunal’s Response to the Constitutional Issue

These questions are moot given the decision of the Tribunal to hear the appeal and having heard the appeal, agreed with the parent that the placement decision,

Developmental Education Program, was not appropriate for the student, and subsequently issued an order placing the student in a special class placement, Communication, a placement that does not exist within the Halton District School Board's Special Education Plan.

Decision on the matter of placement

The Tribunal is upholding the appeal, in part, in that the Tribunal agrees with the parent that the Developmental Education Program placement by the June, 2002 Identification, Placement and Review Committee of the Halton District School Board is not an appropriate placement for the student. We are not granting the placement remedy requested by the parents of placement in an "Autism" class, because the range of needs and abilities for children within the Autism Spectrum Disorder is very broad and a class with that name alone might not meet the student's needs.

Order

The Tribunal orders the Halton District School Board to place the student in a class, identified as "Communication." This is to be a small, separate class where the student's unique communication needs may be met. The focus of the learning in that class will be on developing language skills and the pragmatics of social interaction.

Recommendations

1. That the "Communication" class placement focus on language development as the primary need of students placed in the class.
 - a. It is expected that those students identified with "autism" who have developed oral language skills, will be placed in this class.
 - b. As well, however, there may be other students who have not been identified with autism, who have language development as a significant learning need, who also may be placed within the class.
 - c. The Autism Spectrum Disorder team can continue to provide consultation and service to the students in this placement
2. That during the school year, 2003-04, the student continue to develop social skills and transition skills (comfort in managing the transitions in a secondary school). The Tribunal is of the opinion that when the student has developed transitioning skills and is familiar with that school setting that the student's anxiety will decrease.
3. It is the opinion of the Tribunal, that given the student's intellectual potential, the student should receive a school program that will, in years subsequent to 2003-04, allow the student to participate in classes and courses that will help the student develop the skills to be an active participant in the community. Co-operative education programs, life skills classes, courses that develop literacy

and numeracy as well as the “Essential Courses” that the Board offers at the secondary level should be considered in the student’s Transition Plan.

Analysis and Reasons for the Placement Decision

The Tribunal is upholding the appeal, in part, in that we agree with the parents that the Developmental Education Program is not an appropriate placement for their child. The DEP is an appropriate placement for students who are identified with developmental disabilities, but it is not an appropriate placement for students with a diagnosis of autism, a communication disorder, which is the student’s diagnosis and identification. The student needs a class with others who have similar needs and profiles.

The Board initially recommended the Multi-exceptionality placement at General Brock H.S. in a Life Skills program, a placement that was a rotary placement where students moved from class to class throughout the school day. The Tribunal, hearing about the difficulties that the student with the primary diagnosis of Autism, has with transitions compounded by the secondary diagnosis of an anxiety disorder, agrees with the parent that this proposed placement would not meet the student’s needs since the student would not be able to benefit from an educational program in that placement due to the student’s inability to manage the transitions and anxieties about those transitions.

The Tribunal agrees with the parents that the Developmental Education Program is also not appropriate for the student since the student is a highly verbal student with good oral language and speech and with the profile of a student with a mild developmental disability. A placement with students with severe developmental disabilities is not appropriate for the student who needs the to opportunity to develop pragmatic language skills with a peer group and who needs an academic program at [the student’s] level.

The Developmental Education Program has 25 students in it and approximately 16 adults [teachers and educational assistants]. There are certainly considerable human resources and a low pupil adult ratio in that placement. In the student’s case, however, as a student with autism, the student can become agitated in a large group setting with noise, stimulation and the unpredictability that would occur with that number of people in a room. As a student with autism, the student needs a small group setting where the student can focus on learning without the distractions that a room with 40 people would generate. The Ministry ratio of six students to one adult for students with autism was designed to provide a small setting, relatively free from distractions, where students with autism can learn without unnecessary distractions.

It may seem paradoxical, but in order for the student to meet the ultimate goal of participating in the mainstream of society, the student needs a small group segregated setting at this point in [the student’s] education. However, for the student to learn the pragmatics of language and social interaction or be successful in society, the student will need to learn those skills in a small class setting where the student will have the opportunity to practise these skills with peers of similar intellectual capability. The Tribunal expects that as the student learns those communication skills and after the

student has the opportunity to practise transitioning skills that the student will be better able to manage the anxieties that the student experiences and in time will be able to access some regular classes as the student progresses through high school. The service dog, Millie will assist in developing the capacity to interact with students in other programs.

Just as younger students with autism need the Boardmaker program and Symbols, the resources available from the Autism Team, adolescent students with autism need the opportunity to role-play and practise transitioning and social skills in a stress free environment.

The Tribunal is of the opinion that neither the Multi-exceptionality program at General Brock with 16 students in the Life Skills program, a grouping that would be too large for the student, or the Developmental Education Program, the placement under appeal, is an appropriate placement for the student.

The program described as the satellite class in the Developmental Education Program that the student has been participating for three weeks, appeared, according to witnesses, to be meeting the student's needs.

In fact, this class appears to be an Autism class with a teacher/student ratio of 1:6 and an environment where there is individualization based on students' needs and access to resources to provide a social skills program, as an essential component of an autism class. The placement however is still described as a developmental placement and language shapes expectations. Staff in a program named "Developmental Education Program" tend to gear the program towards the descriptors of that exceptionality. Students in a developmental class have different education and life goals than students in a Communication/Autism class.

Witnesses stated that the student has the potential to profit from a regular class with supports at some future point in the student's high school career and that the student has the potential for independent living. It is essential that the student be given the necessary skills, now, to develop those potentials.

The Tribunal reiterates its decision that the proposed placement is not suitable for the reasons outlined. The only alternate placement that currently exists at General Brock H.S., the Life Skills program in the Multi-exceptionality placement is also not suitable for the reasons outlined above.

The small class where the student is currently placed appears to be suitable, but still bears the name, "Developmental Education Program", an unsuitable term for a placement for the student. Therefore the Tribunal has ordered the Board to place the student in a Communications Placement, where the student's needs as a student with autism can be met. The Tribunal believes that with the range of abilities and needs of students within the autism spectrum, there is a danger that the student may be placed with students who do not have a similar profile and therefore the communication

program that the student needs could not be delivered if the class is titled, "Autistic Class". The student needs to be placed with students who have a similar profile whether they are identified with Autism or not. The Tribunal heard that the Halton District School Board does not have as many students identified as "autistic" at the secondary level as incidence rates would suggest, and perhaps students with a language disorder could benefit from the class the Tribunal is describing for the student.

The best placement for the student is to continue in the small class (Room 106) where witnesses agreed the student is functioning well. In this class the student is receiving the benefit of "best practice" strategies as outlined by the Halton Board's Autism Spectrum Disorder Team as described by Bev Miller. (Respondent's Tab 3)

1. Visual daily schedule
2. Visual behavioural prompts
3. Visual choice boards
4. Well-demarcated environments within the classroom
5. Colour-coding of subject folders and classroom/student areas
6. Clearly stated and designed expectations within activities and tasks
7. Social stories where appropriate
8. Pre-teaching strategies
9. Modeling
10. Direct instruction
11. Programming for social and communication impairments and resources such as those described by Therese Squires, Speech-Language Pathologist with the Halton Board's Autism Spectrum Disorder Team;

1. Boardmaker
2. Writing With Symbols
3. Essential Skills Series-selected titles
4. Reading Milestones
5. Kidspiration
6. Teach Me Language
7. Room 14: A Social Language Program
8. Adolescent Social Skills Lessons for P.D.D. and Autism
9. Selected lessons from Pragmatics
10. Selected resources created by Darlene Mannix
11. Social skills games

These strategies meet the needs of pupils who fall under the "Communication" category as described in the *Special Education Handbook for Teachers*.

A severe learning disorder that is characterized by:

- (a) disturbances in:
 - rate of educational development;
 - ability to relate to the environment;
 - mobility - perception, speech, and language;

(b) lack of the representational symbolic behaviour that precedes language.

Such a classroom should provide transitional strategies to allow the student to benefit from typical classes with an adaptive or modified curriculum in areas of individual strengths.

The amalgamation of General Brock and Lord Elgin High Schools will provide increased opportunities for social and academic integration for the student. As the student progresses through the grades in high school, the student should also have access to co-operative work placement as recommended by Dr. Urbanowicz. The Tribunal is of the opinion that the student could be working towards a Certificate of Education using strategies for success courses and essential courses, where possible. These opportunities will assist the student in meeting long-term goals of independent living in the community.

The Tribunal is reluctant to order creation of an Autism" class under Regulation 298, section 31(f), because such a class could have a limiting rather than a beneficial effect for the student. Every student with autism has unique needs and skills, within a range from very limited to very capable. An identified autism class could have the effect of limiting the student's participation in other opportunities, such as Life Skills Classes.

Commentary

The Halton Board has struggled to maintain an individualized approach toward program development. The Board is to be commended for this, and encouraged to continue. The Autism Spectrum Disorder Team has amassed tremendous knowledge of how to support students with autism, their teachers and support personnel. It is wise to recall the language from the Autism Task Force that, "If only one message is conveyed from our task force it is the following: *the current situation for students with autism is urgent, the need immediate and without change or intervention, we expect the situation to reach a crisis proportion*".

Paula Barber, Chair_____

Donna Gracey, Member_____

Dawn Roper, Member_____

September 19, 2003