

CITATION: KOZAK v. TORONTO DISTRICT SCHOOL BOARD, 2010 ONSC 2588  
TORONTO DIVISIONAL COURT FILE NO.: 523/09  
DATE: 2010-07-27

ONTARIO  
SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT

LEDERMAN, WILTON-SIEGEL, RAY JJ

BETWEEN:

Jared Kozak, by his Litigation Guardian, R.  
Julietta Kozak

Applicant

)  
)  
)  
) *David Baker and Zahra Binbreck, for the*  
) *Applicant*

- and -

TORONTO DISTRICT SCHOOL BOARD  
and ONTARIO SPECIAL EDUCATION  
(ENGLISH) TRIBUNAL

Respondents

)  
)  
) *J. Paul R. Howard and Megan H. Marrie,*  
) *for the Respondent Toronto District School*  
) *Board*

) *Lise G. Favreau, for the Respondent Ontario*  
) *Special Education (English) Tribunal*

- and -

THE ATTORNEY-GENERAL OF  
ONTARIO

Intervenor

)  
)  
) *Robert E. Charney, for the Intervener,*  
) *Ministry of the Attorney-General*

)  
)  
)  
)  
) **HEARD AT TORONTO:** April 26, 2010  
) at Toronto

## REASONS FOR JUDGMENT

### THE COURT

[1] The applicant, through his mother, seeks judicial review of the decision of the Ontario Special Education (English) Tribunal (the "Tribunal") dated March 12, 2009, which dismissed an appeal from the decision of a Special Education Appeal Board (the "SEAB") dated January 23, 2008, and confirmed an earlier decision of an Identification, Placement and Review Committee dated June 13, 2007 (the "IPRC") to place the applicant in a class designated by the Toronto District School Board (the "TDSB") as a Special Education Class: Intensive Support Program.

### Background

[2] The applicant was born on May 16, 1999. He was diagnosed with autism in March 2003. In June, 2003, an earlier identification, placement and review committee identified the applicant as exceptional and placed him in a special education class for half days. However, his mother enrolled him in a child care centre for the period of September, 2003 to June, 2004. Another identification, placement and review committee confirmed the identification of the applicant in May, 2004.

[3] During the period September 2004 to June 2006, for senior kindergarten and grade one, he was placed in a special education class for developmentally delayed students. In March 2005, he began to receive intensive behaviour intervention ("IBI"), being a form of applied behaviour analysis ("ABA") that consists of the delivery of highly structured one-on-one learning sessions by an instructor therapist. The applicant received four to five hours of IBI at home every weekday from a company that provides services and programs to children with autism.

[4] During the period from September 2006 to June 2008, the applicant continued to receive IBI in the afternoon at home. However, in September, 2006, for grade two, the applicant's mother enrolled the applicant in his home school, where he attended for half days. He was placed in a regular class with 50% withdrawal to the home school program ("HSP") for students achieving below curriculum guidelines where he received one-on-one teaching. During grade three, he continued in a regular class with 75% withdrawal to the HSP.

[5] During this period, having exhibited various disruptive behaviours which were of concern to the school staff and to the applicant's mother, the school staff consulted the Pervasive Developmental Disorder/Autism Spectrum Disorder Team (the "PDD/ASD team") of the TDSB to assist with the applicant's problem behaviours.

[6] On May 17, 2007, the Ministry of Education issued *Policy/Program Memorandum No.140, Incorporating Methods of Applied Behaviour Analysis (ABA) Into Programs for Students with Autism Spectrum Disorders (ASD)* ("P/PM 140"). P/PM 140 requires school boards to offer students with autism spectrum disorder ("ASD") special education programs and services including special education programs using ABA methods where appropriate. It also requires staff to plan for the transition between various activities and settings involving students with ASD.

[7] On June 13, 2007, at the end of his first year in a regular class, the IPRC referred to above conducted its review. The IPRC identified the applicant as 'Communication: Autism' and 'Intellectual Development Disability'; the IPRC recommended placement in a 'Special Education Class: Intensive Support Program'. The applicant appealed this decision to the SEAB. The majority report of the SEAB, dated January 23, 2008, disagreed with the identification finding of the IPRC (no longer relevant in these proceedings), but agreed with its placement decision. On February 21, 2008, the TDSB approved the majority report of the SEAB.

[8] The evidence suggests that the applicant experienced less anxiety and fewer behavioural issues at home with his IBI therapist than he experienced at school during, at least, his regular class placement where incidents of aggression in particular were significantly more numerous. More positively, the applicant appeared to be making considerable improvement in both social behaviour and academic achievement in his one-on-one IBI sessions. Consequently, with the encouragement of his IBI therapist, the applicant's mother wished to place the applicant in a school environment in which he could generalize his acquired skills. Both the applicant's IBI therapist and his mother believed that he was ready to be integrated into a regular class where he would have more opportunities to develop his social skills and have more educational demands placed on him.

[9] Accordingly, the applicant appealed the TDSB decision to the Tribunal under section 57(3) of the *Education Act*, R.S.O. 1990, c. E.2, as amended, (the "Act"). As mentioned, the applicant sought a regular class placement with withdrawal to the home school program in the applicant's home school as had occurred during grades two and three. The Tribunal dismissed the applicant's appeal and upheld the IPRC decision.

### **Statutory Background**

[10] The following provisions of the Act and regulations thereunder are relevant to the matters at issue in this application.

[11] The Tribunal fulfils a specialized role under the *Education Act* as the last stage of appeal in respect of the identification and placement of children with "exceptionalities" within the Ontario education system. Section 1(1) of the Act defines "exceptional pupil" as a "pupil whose behavioural, communicational, intellectual, physical or multiple exceptionalities are such that he or she is considered to need a placement in a special education program".

[12] Under section 8(3), the Minister is required to ensure that appropriate special education programs and services are provided to exceptional children in accordance with the Act. To this end, section 170(1)7 requires school boards to provide or purchase special education programs and services for exceptional students, in accordance with the regulations. Section 8(3) of the Act requires the Minister of Education to define the exceptionalities of pupils and to describe classes, groups or categories of exceptional pupils for use by school boards.

[13] The Act and the *Regulation re Identification and Placement of Exceptional Pupils*, O.Reg. 181/98 made under the Act (the "Regulation") sets out the process for resolving disputes between parents and school boards in relation to the identification and placement of exceptional pupils. This three-step process comprises a review by an identification, placement and review

committee, an appeal to a special education appeal board, and a final appeal to the Tribunal pursuant to section 57(3) of the Act.

[14] An IPRC is established pursuant to section 10 of the Regulation and comprised of school and school board personnel. An IPRC makes decisions upon the request of a parent or a principal pursuant to section 14(1) of the Regulation regarding the identification of a student as an exceptional pupil, the category of the exceptionality, and the appropriate classroom placement.

[15] Pursuant to section 26(1) of the Act, a parent who disagrees with the identification and placement decision of the IPRC may request a hearing by a special education appeal board.

[16] When such a request is made, section 27(1) of the Regulation requires the school board to establish a special education appeal board comprised of three persons who are to arrange a meeting within 30 days. The special education appeal board receives the material reviewed by the IPRC and, pursuant to section 28(4) of the Regulation, may invite to its meeting any person who can contribute information about the matter under appeal. Following the meeting, the special education appeal board must provide a recommendation with reasons in writing regarding the identification and placement of the student.

[17] Pursuant to section 30 of the Regulation, the school board can accept or reject the recommendations of the special education appeal board, or it can come to a different decision.

[18] When the parent of a pupil has exhausted all rights of appeal under the Regulation 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 may appeal to the Tribunal pursuant to section 57(3) of the Act.

[19] An appeal before the Tribunal proceeds as a *de novo* hearing. The Tribunal is empowered under section 57(4) of the Act to dismiss the appeal or grant the appeal and make any other orders it considers necessary with respect to the identification or placement of the student. Section 57(5) of the Act provides that the decision of the Tribunal is final and binding on the parties to the decision. The Tribunal applies the definitions, and categories, of exceptionalities established by the Ministry pursuant to section 8(3) for the use of school boards when considering a student's identification as exceptional.

[20] Lastly, section 6 of the Regulation requires that, when a school board implements a placement decision, the principal of the school at which the special education program is to be provided must develop an individual education plan (an "IEP") for the student in consultation with the parent. The IEP must include, among other things, specific educational expectations for the student and an outline of the special program and services to be received by the pupil. In developing the IEP, the principal is required to take into consideration any recommendations made by an IPRC or the Tribunal.

### **The Decision of the Tribunal**

[21] The Tribunal held a five-day hearing in December 2008 during which it considered the evidence of twelve witnesses, including various professionals involved with the applicant and an expert in the treatment and instructional programming for children with autism, Dr. Joel Hundert,

who was called on behalf of the applicant. The Tribunal heard evidence regarding the applicant's development in the areas of behaviour, social development and academic functioning, as well as considerations relevant to the placement decision. After carefully summarizing the evidence, the Tribunal made a number of findings that informed its placement decision.

***Relevant Findings of the Tribunal***

[22] In respect of the applicant's behaviour, the Tribunal accepted the evidence of the TDSB witnesses that his behaviour posed a safety concern for the student, other students and staff. The Tribunal also proceeded on the basis that the triggers and functions of the applicant's problem behaviours were not well understood by either the applicant's IBI therapist or the school, although the purpose appeared to be an escape from situations in which the applicant was anxious or frustrated.

[23] In respect of social development, the Tribunal accepted the testimony of Dr. Hundert that physical proximity to his peers would result in little spontaneous improvement in social adjustment and that systemic programming is required for any improvement to occur in social behaviour or academic skills. The Tribunal found that, while the applicant needs opportunities in his placement to generalize skills developed through the IBI therapy, socializing is not a compelling reason to place the student in a regular class because his social adjustment will be inhibited and his academic progress will be hampered until his problem behaviours are brought under control.

[24] In respect of academic functioning, the Tribunal concluded that the applicant's level of academic achievement placed him approximately two to five years behind his expected grade level. It recommended that an academic assessment be conducted as soon as possible to put in place an academic programme for the applicant.

[25] There was ample evidence for each of these conclusions and the applicant does not directly challenge any of them.

***Findings regarding Implementation of ABA at the Applicant's School***

[26] A significant issue in the hearing before the Tribunal was the extent to which the applicant had access to appropriate ABA programs at his current school.

[27] In connection with the Tribunal hearing, Dr. Hundert submitted a written report dated September 16, 2008. The report canvassed the central issues in Dr. Hundert's opinion pertaining to a resolution of the applicant's placement.

[28] A central theme of Dr. Hundert's report is that, for the applicant, ABA is not separate from his education but is the means by which it will occur. In this connection, he observed that much of the work done with the use of ABA in schools has occurred in special education classrooms and that methods for supporting autistic children in general education classrooms are less well developed although there are strategies that have been developed that he considers to be effective.

[29] Another central theme of Dr. Hundert's testimony is that, in his opinion, at least in several respects, a systematic ABA approach had not been implemented by the applicant's school. In answer to a question as to whether he saw "quality ABA" in place at the school, he said that he saw aspects of ABA but did not see a program that had all the components he would want to see in an ABA type of environment. He mentioned, in particular, the absence of sufficiently sophisticated data collection and a functional assessment to address the applicant's problem behaviours, and the absence of a fully developed plan to deal with them. In Dr. Hundert's view, the applicant had not received adequate implementation of ABA to address his needs.

[30] Dr. Hundert set out conclusions and recommendations in four areas, of which two are relevant for this application.

[31] With respect to the applicant's capacity for learning and the conditions that would produce optimal learning for the applicant, Dr. Hundert concluded that he was capable of learning but he needs an environment in which teaching is based on ABA programs with defined features.

[32] With respect to inclusion, Dr. Hundert was more guarded. He stated that it was unclear to what extent the applicant would profit from being educated with age-peers but considered that, by not being educated with his peers, the applicant will be limited in his ability to learn interpersonal skills, to learn how to function in a classroom and to learn more age-typical academic skills. He observed that the obstacles raised by the school for the applicant, primarily safety concerns and the need for more support, are real and "one should proceed with caution". Dr. Hundert recommended the adoption of an incremental approach to placement in a general education class by putting a plan in place within the 2008-2009 school year to allow the applicant to transition into a general education classroom for numeracy, which plan would be supported by ABA programs. Dr. Hundert's perspective was that the school's lack of provision of the amount and quality of interventions to reduce the applicant's aggression and to teach him social behaviours should not be a reason to deny him an opportunity to learn with his age peers.

[33] In his oral testimony, Dr. Hundert summarized his conclusion regarding placement as follows:

"... Jared's case my impressions, given what he is able to do now and his history, he has more potential than he is showing. He has, in my opinion, the right to have a chance to show what he is able to do but I don't know the extent to which he is going to be able to perform and, more importantly, it will take a toll on the school board's capacity to provide the support."

[34] While accepting much of the evidence of Dr. Hundert concerning ABA programs and the applicant's capacities, the Tribunal rejected his evidence that ABA was not being implemented adequately in the applicant's school.

[35] The Tribunal's finding on this issue is as follows:

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

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

By implication, therefore, the Tribunal found that ABA was being implemented adequately in the applicant's school and, by extension, by the TDSB in respect of exceptional students with ASD. In our view there was a reasonable basis in the evidence for the Tribunal's conclusion. We deal with the significance of this finding below.

#### *The Tribunal's Placement Decision*

[36] The Tribunal then turned to the placement of the applicant. The Tribunal first referred to the test of the best interests of the child, having previously referred to section 17(1) of the Regulation. It then considered, in order, a regular class placement, an HSP class placement and an ISP class placement.

[37] The Tribunal summarized the relevant considerations regarding a regular class placement as follows:

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

[38] With respect to an HSP class placement, the Tribunal noted that a class of sixteen students would have numerous distractions and multiple transitions which would create difficulties for the applicant that would interfere with his learning.

[39] With respect to an ISP class placement, the Tribunal concluded that an ISP class would provide a more structured environment with fewer students, less noise, fewer distractions and a peer group of students working on similar goals.

[40] The Tribunal stated that for each of these placements, it considered the problem behaviours as well as the need to acquire academic skills. It noted improvement as a consequence of both the IBI therapy and the ISP class placement in kindergarten and grade one. It also concluded that the applicant's behaviour worsened when he was enrolled in a regular class in grade 2. On the basis of the evidence before it, the Tribunal considered that "[t]he benefits of the Regular Class placement *with the services provided* were minimal" (emphasis added). It also concluded that the applicant made gains in language, behaviour and social skills in the special education class and that, despite his absences, was able to learn in that class.

[41] The Tribunal then held that an ISP placement was appropriate on the following basis.

The Tribunal heard testimony about the student's previous and current placements from the witnesses presented by the appellant and the respondent. The benefits of the Regular Class placement with the services provided were minimal. While the student was in the Special Education Class, there was evidence that the student made gains in language, behaviour, and social skills. Despite the appellant's dissatisfaction with this placement, and the student's absences, the student was able to learn while in that class. It is the view of the Tribunal that an ISP placement is appropriate and would be of significant benefit to the student, until the issues related to the student's behaviour, socialization, and academic program can be addressed. This placement will offer the student stability and reduce the number of transitions because of the more controlled environment. There should be a significant reduction in anxiety and frustration leading to fewer behaviour incidents. A smaller class will provide for a lower student-to-staff ratio, resulting in more attention and opportunities for direct supports for the student. Given the progress that the student made in the self-contained class during Grades 1 and 2, the Tribunal believes that this is the best option for the student at this time. This placement should be full time.

[42] In summary, after analysing the applicant's needs and experiences, the Tribunal concluded that the benefits of placement in the regular class with the services provided were minimal, and that full time placement in a special education class was in his best interests. The Tribunal reached this decision on the basis of its assessment of the likelihood that anxiety and frustration experienced by the applicant in a regular class situation, even with the assistance of ABA programs and services reasonably likely to be available to him, would trigger problematic behaviour thereby hindering social as well as academic progress as well as creating a safety risk for himself, other students and staff. The Tribunal concluded that, pending control over the applicant's problem behaviours, among other things, a special class environment would minimize the anxiety and frustration experienced by the applicant and thereby increase the likelihood of positive social and academic development. The Tribunal considered that the applicant's prior experience in both a special education class and the regular class allowed a reasonable comparison of the learning environments and persuasively supported a placement in a special education class.

### **Standard of Review**

[43] In *Ismail v Toronto District School Board* [2006] O.J. No. 2470, the Divisional Court held that one of the areas of the Tribunal's expertise is its knowledge of special education. In that decision, the Divisional Court held that the appropriate standard of review was reasonableness. On this application, all parties are agreed that this is the correct standard of review.

### **Positions of the Parties**

#### ***The Applicant***

[44] The applicant submits that the Tribunal decision is unreasonable in two major respects that constitute errors of law. First, the applicant says that the Tribunal failed to address itself correctly to the test set out in section 17(1) of the Regulation. Second, the applicant says that the Tribunal failed to order a placement with sufficient particulars to satisfy the requirements of the Act. The applicant also submits that the Tribunal failed to take into consideration the duty of the TDSB to accommodate his disability under applicable human rights and equality legislation to the point of undue hardship, although this argument was ultimately treated as informing the two principal grounds of the application for judicial review rather than as constituting a separate ground of the application.

[45] It is important to address the applicant's objective in the hearing before the Tribunal as it informs the nature of the applicant's objections to the Tribunal's decision. As mentioned, the applicant seeks a placement in a regular class with resource withdrawal assistance in the home school program in the applicant's home school. The opinion of the applicant's expert, Dr. Hundert, was that this could only be accomplished if he received substantially upgraded ABA services from the school. Therefore, the hearing before the Tribunal was complicated by the implicit argument of the applicant that the TDSB was not adequately implementing P/PM 140, which argument was resisted by the TDSB, and the absence of authority on the part of the Tribunal to order additional ABA services in favour of the applicant regardless of its finding on this issue.

#### ***The TDSB***

[46] The TDSB's position is that the test for the placement of the applicant is "the best interests of the child" in reliance *Eaton v Brant County Board of Education* [1996] S.C.J. No 98 (S.C.C.). The TDSB submits that the applicant has failed to demonstrate that the Tribunal's decision was unreasonable on either of the grounds alleged by the applicant set out above.

#### ***The Attorney-General***

[47] The Attorney-General of Ontario, as intervenor, also takes the position that the Tribunal is to be guided in its decision-making by the standard of the "best interests of the child". It also argues that there is no *Charter* presumption in favour of a placement in a regular class and that the "undue hardship" standard used by the Ontario Human Rights Tribunal in cases of alleged discrimination under Section 1 of the *Human Rights Code*, R.S.O. 1990, c. H-19, as amended, (the "Code") is not appropriate for decisions of the Tribunal.

***The Tribunal***

[48] The Tribunal took no position on this application.

**Issues on this Application**

[49] Accordingly, the two issues raised by the applicant on this application are the following:

1. The respondents failed to apply s. 17 of the Regulation, which the applicant submits would result in placing him presumptively in a regular class, rather than a special education class, with appropriate special education services.
2. By failing to define its placement of the applicant in language that included the programs and services to be utilized, the Tribunal decision failed to satisfy the requirement of the *Education Act* for a "placement".

We will address each of these issues in turn.

***I. Alleged Failure to Apply Section 17(1) of the Regulation***

[50] The applicant says that the Tribunal failed to apply section 17(1) of the Regulation.

***Applicable Law***

[51] Section 17 reads as follows:

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

***Applicant's Position***

[52] The applicant says that section 17(1) requires that the Tribunal first identify appropriate special education services for the applicant and then address whether a regular class placement with these services would meet the child's needs. He says that the Tribunal failed to consider the first issue and thereby failed to comply with the requirements of section 17(1).

[53] The applicant argues that, on the evidence before it, the Tribunal should have concluded that the applicant required special education services in the form of ABA programs and services that had not been provided to him by the TDSB, including but not limited to support in respect of transitions provided by his IBI therapist, and that, with such services, placement in a regular class would meet his needs.

*Analysis and Conclusion*

[54] We are satisfied that the Tribunal did not make any error in its application of section 17(1) of the Regulation to the respondent's circumstances for the following four reasons.

[55] First, to the extent that the applicant is arguing that section 17(1) creates a presumption in favour of a regular class placement, we are satisfied that no such presumption exists at law under section 17(1).

[56] In *Eaton, supra*, the Supreme Court concluded that a test designed to secure what is in the best interests of the child best achieves that objective if the test is unencumbered by a presumption in favour of integration. In reaching this conclusion, Sopinka J. on behalf of the Court found that, while integration should be recognized as the norm of general application, it did not constitute a legal presumption because of the possibility that, in some circumstances, it would disadvantage students who require special education to achieve equality. On this basis, Sopinka J. held that section 8(3) of the *Education Act* did not infringe section 15(1) of the *Canadian Charter of Rights and Freedoms*. In reaching this conclusion, Sopinka J. observed at paragraph 67 that, in the case of disability, it is the failure to make reasonable accommodation which results in discrimination. It is therefore the recognition of the actual characteristics, and reasonable accommodation to those characteristics, which is the central purpose of section 15(1) of the *Charter* in relation to disability.

[57] Section 17(1) was enacted after the decision in *Eaton, supra*. There is, however, no indication that the Legislature intended to displace the "best interests of the child" test in *Eaton, supra*, in enacting section 17(1). To do so, one would have expected an amendment to the Act rather than enactment of a regulation under that statute. Moreover, the plain and ordinary meaning of the language of section 17(1) does not establish a presumption in favour of a regular class placement. Instead, we think section 17(1) was intended to further the approach contemplated in *Eaton, supra*, by providing a road map for the Tribunal in its decision-making.

[58] Under section 17(1), in accordance with *Eaton, supra*, the Tribunal must first identify the actual characteristics of the exceptional student and the appropriate special educational needs required by the student. Based on that determination, the Tribunal must then address whether integration in regular class is in the best interests of the student in that it will "enable [the exceptional student] access to the learning environment [the student] need[s] in order to have an equal opportunity in education" (see para. 69 in *Eaton, supra*). If the Tribunal determines that integration will not have this effect, then the Tribunal must address the other placement options that will best satisfy this standard. Such an approach may provide a "decision-tree" but it does not create a presumption at law in favour of integration in a regular class.

[59] Second, we are satisfied that the Tribunal reached its decision in accordance with the principle in *Eaton, supra*, and the approach mandated by section 17(1) of the Regulation.

[60] As described above, the Tribunal carefully identified the relevant characteristics of the applicant for purposes of the placement decision. It addressed the applicant's problem behaviours and the best available evidence regarding the trigger and purposes of the behaviour. It found that the applicant's level of academic achievement was significantly behind the expected grade level. It also found that the applicant's behaviour posed a safety concern for the applicant, as well as other students and the staff. It concluded that social learning as well as academic learning will be hampered until such behaviours are brought under control.

[61] The Tribunal also identified the appropriate special education services for the applicant as ABA programs and services. This is clear from the last sentence of its finding set out above as well as its reference to past ABA services provided while the applicant was in the regular class, the benefits of which placement it found to have been minimal.

[62] Based on these findings, the Tribunal then considered placement options for the applicant. In doing so, it clearly addressed first a regular class placement option with ABA services and resource withdrawal. While it is not made explicit, it is clear that the Tribunal concluded that there was no evidence to suggest that such a placement would result in a different experience from the applicant's experience in grades three and four, which as mentioned, the Tribunal found to have been of minimal benefit. Only after making this finding did the Tribunal consider the HSP and ISP placement options. The Tribunal then addressed the test in *Eaton, supra*, and found that an ISP placement "would be of significant benefit to the student".

[63] In proceeding in this manner, the Tribunal addressed the issues required of it in the manner mandated by *Eaton, supra*, and section 17(1) of the Regulation even if it did not adopt the approach of the Tribunal, or the result, in the decision in *Ms. I v. the Toronto District School Board*, File 46c, 2005-11-17 (Ontario Special Education Tribunal) upon which the applicant relies.

[64] Third, although not expressed clearly, the applicant's position is essentially that the programs and services provided to him by the TDSB do not satisfy the requirements of P/PM140 as ABA programs and services and that any consideration of placement in a regular class with access only to such services as are currently provided, rather than services that can be properly characterized as ABA programs and services, is inherently flawed. The applicant argues that to apply section 17(1) correctly, the Tribunal must assume that programs and services that can be so characterized are available to him, in which event he says the evidence demonstrates that a regular class with resource withdrawal would satisfy his needs.

[65] This argument relies on Dr. Hundert's evidence that, in his opinion, ABA was not being implemented adequately at the school. On the basis of this evidence of Dr. Hundert, the applicant asserts that the Tribunal could not find that he was receiving ABA programs and services whose benefit could be taken into consideration in reaching its placement decision.

[66] However, from the excerpt of the Tribunal's decision set out above, it is clear that, in rejecting Dr. Hundert's assertion, the Tribunal implicitly found that ABA was being

implemented adequately at the school. The Tribunal accepted the evidence that school staff were well versed in ABA, were continuing to receive assistance from the PDD/ASD team at the TDSB and would continue to be provided with opportunities to learn about ABA instructional strategies, which, as the Tribunal noted, was formally being implemented pursuant to P/PM 140 only after May 17, 2007.

[67] To a certain extent, the difference of opinion between Dr. Hundert and the Tribunal may be one of degree — the degree of sophistication of the methods and strategies used that qualify as ABA programs and services. In any event, however, based on the evidence before the Tribunal, we are unable to conclude that the Tribunal's decision was unreasonable in concluding that ABA was being implemented adequately in the school.

[68] On the basis of this finding, in defining the appropriate special educational services for the applicant for the purpose of its analysis under section 17(1), the Tribunal was therefore entitled to take into consideration the ABA services actually being provided at the school and available to the applicant. The Tribunal was not required to assume that additional or enhanced ABA services were being provided. In this connection, we note as well that the Tribunal has no authority to order the TDSB to provide special education programs or services in rendering its decision, except perhaps indirectly to the extent it were to find that the school was not offering ABA programs and services mandated under P/PM140.

[69] Lastly, we also conclude that section 1 of the Code does not mandate that, in applying section 17(1), the Tribunal was required to take into consideration additional or enhanced ABA programs and services. Section 1 of the Code provides that every person has a right to equal treatment with respect to services, goods and facilities without discrimination. This submission of the applicant presumes that section 17(1) establishes a presumption in favour of a regular class placement up to the point at which special education services required to accommodate the student in a regular class placement would constitute undue hardship to the particular school board. Given the finding above that section 17(1) does not establish a presumption in favour of a regular class placement, this submission must fail. As a related submission, the applicant appears to argue that, even if the requirements of section 17(1) of the Regulation are satisfied, section 1 of the Code requires that additional or enhanced ABA programs and services be offered to him in the context of a duty of the TDSB to accommodate unless to do so would cause undue hardship.

[70] As *Eaton, supra*, makes clear, the issue of accommodation of students with disabilities in order to facilitate their equal access to educational services is subsumed in the "best interests of child test". In our view, given the Tribunal's findings that the school was implementing ABA programs and services, there is no remaining argument available to the applicant. The school board is complying with its duty to accommodate by providing ABA programs and services. The applicant has not identified any other services that could be provided in furtherance of the TDSB's duty to accommodate without undue hardship. In particular, Dr. Hundert acknowledged that IBI services are not appropriately delivered by the school in a regular class setting.

## ***II. Alleged Failure to Comply with Requirements of a Placement***

### *Positions of the Parties*

[71] The applicant also argues that the Tribunal's decision was unreasonable in interpreting the term "placement" to permit it to determine placement in a special education class without determining a specific special education class at a specific school into which it intended that the applicant was to be placed.

[72] As an aspect of this argument, the applicant submitted that the Tribunal could not properly apply the test in *Eaton, supra*, by relying solely on the applicant's experience in a regular class and without any information regarding the proposed special education class. He argues that, in making the placement, the Tribunal effectively delegated the placement function to the TDSB.

[73] The TDSB submits that nothing in the Act or the regulations under the Act prohibits the TDSB from proceeding on the basis that decisions regarding the actual class within a placement category are taken at the principal and teacher level after consultation with the student's parents. The TDSB's position is that, given the number of exceptional students in the system and the number of different special education classes run by the TDSB, special education services and programs must, as a practical matter, be determined on a very fluid basis, having regard to the changing needs of the student and the availability of staff and services.

### *Analysis and Conclusion*

[74] While the Act contemplates that the Tribunal shall address issues of identification and placement, it does not include a definition of placement. Section 8(3) of the Act requires the Minister to provide for the parents or guardians of exceptional children to appeal "the appropriateness of the special education placement" of an exceptional child. It therefore provides no guidance as to the level of specificity contemplated for a "special education placement".

[75] At the policy level, in a document entitled "Identifying the Needs of Exceptional Students", the Ontario Ministry of Education has, however, identified five special education placement options available to students whose educational needs cannot be met entirely in the classroom. These options include:

1. *A regular class with indirect support* where the student is placed in a regular class for the entire day, and the teacher receives specialized consultative services.
2. *A regular class with resource assistance* where the student is placed in a regular class for most or all of the day and receives specialized instruction, individually or in a small group, within the regular classroom from a qualified special education teacher.
3. *A regular class with withdrawal assistance* where the student is placed in a regular class and receives instruction outside the classroom, for less than 50 per cent of the school day, from a qualified special education teacher.

4. *A special education class with partial integration* where the student is placed by the IPRC in a special education class in which the student-teacher ratio conforms to Regulation 298, section 31, for at least 50 per cent of the school day, but is integrated with a regular class for at least one instructional period daily.
5. *A full-time special education class* where the student-teacher ratio conforms to Regulation 298, section 31, for the entire school day.

[76] In our view, in the absence of any other evidence of Legislative intent, the Tribunal did not reach an unreasonable conclusion in making a placement that referred to one of the five categories in that policy statement, without further detail regarding the specific special education class or the school at which the class would be offered.

[77] The Tribunal does not have authority under the Act to order that the applicant attend any particular school of the TDSB. We accept that the Tribunal has, in at least one other case identified by the applicant involving another school board ordered a placement of a pupil with autism in a pre-existing special education class. Nevertheless, we also see nothing in the Act, the Regulation or these decisions that requires the Tribunal to identify a particular special education class for placement purposes.

[78] We note that section 16 of the Regulation provides that an identification, placement and review committee may make recommendations regarding special education programs and special education services but shall not make any actual decisions regarding such programs and services. There is no evidence of a Legislative intent that the Tribunal's mandate or authority is to extend beyond that of an identification, placement and review committee. On this basis, the approach of the Tribunal to the placement of the applicant is also consistent with the scope of its authority under the Act.

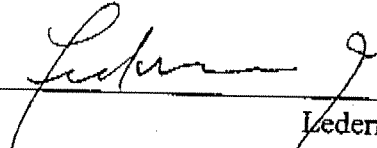
[79] In addition, the Act requires that an IEP be developed for the applicant following the Tribunal's decision taking into consideration a consultation with the parent. The Act and the Regulation also provide for an entitlement of the applicant to seek a further review of his placement on a continuing basis by another identification, placement and review committee. Such provisions are consistent with a more general oversight role for the Tribunal and generic rather than specific placement decisions by that body.

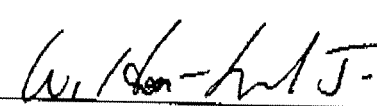
[80] Nor do we accept the applicant's suggestion that it is necessary to compare a specific special education class offered by the school board against the regular class option. In the present case, the Tribunal could reasonably conclude on the evidence that a regular class placement with the services provided to the applicant was of minimal benefit to him. It could also reasonably conclude on the evidence, without information regarding the specific education class into which he would be placed but on the understanding that he would receive the ABA services mandated pursuant to P/PM140, that a full-time special class placement would be of significant benefit to him until the issues related to his problem behaviours, socialization and academic program can be addressed.


[81] We would also observe that the duty to accommodate the applicant's disabilities does not turn on whether the applicant is placed in a regular class or a special education class. Among other sources, as mentioned above, section 8(3) of the Act establishes the principle that school boards must provide appropriate special education programs and services to exceptional students. Given the applicant's disability, there can be no doubt that this requires the TDSB to provide the applicant with appropriate ABA programs and services in accordance with P/PM 140 regardless of whether he is placed in a regular class or a special education class and regardless of the particular special education class in which he is placed as a result of the Tribunal's decision.

**Conclusion**

[82] Based on the foregoing, it is our view that the Tribunal's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. Accordingly, the application must be dismissed. The parties were canvassed at the conclusion of argument concerning costs. Since neither the respondents nor the intervenor are seeking costs, there is no order as to costs.

  
 \_\_\_\_\_  
 Lederman J.

  
 \_\_\_\_\_  
 Wilton-Siegel J.

  
 \_\_\_\_\_  
 Ray J.

**CITATION: KOZAK v. TORONTO DISTRICT SCHOOL BOARD, 2010 ONSC  
No.: 2588**

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**DIVISIONAL COURT**

**LEDERMAN, WILTON-SIEGEL, RAY JJ**

**BETWEEN:**

Jared Kozak, by his litigation Guardian, R. Julietta  
Kozak

Applicant

And

Toronto District School Board and Ontario Special  
Education (English) Tribunal

Respondents

And

The Attorney-General of Ontario

Intervenor

---

**REASONS FOR JUDGMENT**

---

**The Court**

Released: July 27, 2010