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## **“A special person with special needs”: Divisional Court upholds placement of child in special education class**

In a judgment issued on June 19, 2006, the Ontario Divisional Court upheld a decision by the Special Education Tribunal confirming the placement of a 14 year-old child in a special education class. At issue in *Ismail v. Toronto District School Board*, was the basis on which the Board's Identification Placement Review Committee (IPRC) may exercise its power to place exceptional students in special education classes, instead of a regular classroom.

The child in the case had Down's Syndrome. At the request of his mother, the child had been placed in a regular class throughout his education, with some additional support.

In 2002, a psychological evaluation revealed that when compared to his 4<sup>th</sup> Grade peers, the child's scores were rated below the first percentile. His broad independence was rated at the 0.1 percentile. An educational psychologist concluded that these results meant that the child could not cope with the challenges of daily life in an age-appropriate manner.

After reviewing his Student Record in 2004, and discussing his educational strengths and needs with his educators, the IPRC expressed the initial view that his needs would be best served by placement in a special education class. However, because the IPRC knew that the child's mother wanted her son in a regular class setting, the IPRC decided on a half-day placement in a special education class with the remainder of the day in the regular class setting.

The mother appealed the decision of the IPRC, and her appeal ultimately ended up before the Special Education Tribunal. The Tribunal heard evidence indicating that although the child was enrolled in Grade 7, his reading ability was at a Grade 4 level. He required a counter to add four plus one, and could not use words such as “cat”, “play” and “fun” to make a proper sentence. In general, the evidence indicated that he could not function at the Grade 7 level and that it was not realistic to expect him to learn the Grade 7 curriculum.

On the issue of identification, the Tribunal concluded that the psychological testing of the child was no longer reliable, and that new tests should be conducted to determine his exceptionality. However, the Tribunal upheld the decision with respect to placement and ordered that the child be placed in a special education class for mathematics and language. The Tribunal ordered that he be placed in the regular class for at least 50 percent of the day, with assistance as necessary. The mother then applied to the Divisional Court to review the Tribunal's decision.

### **COURT: PLACEMENT IN BEST INTEREST OF THE CHILD**

In upholding the Tribunal's decision, the Court noted that the applicable test in determining the appropriate placement of an exceptional pupil is whether the placement is in the best interests of the child. The Tribunal had concluded that a regular class placement was not in the child's best interests, expressing concern that he had been in regular classes for ten years and continued to have difficulty with the meaning of what he was reading. It had also concluded that at 14 years of age, the child was at a stage where preparation for his future education was necessary. Full integration into regular classes, without the opportunity to learn specific skills could cost him the opportunity to learn the basic skills that lead to independence.

Regarding the mother's wish that the child receive one-to-one support throughout the school day, the Tribunal heard evidence that such support would not help him to achieve the necessary level of independence. Providing such support would deny him the opportunity to learn to work cooperatively and independently and to develop a social relationship with his peers.

The Court found the Tribunal's conclusions to be reasonable and supported by the evidence before it.

### REGULATION ON PLACEMENT NOT VIOLATED

The Court had to consider s. 17 of Regulation 181/98 under the *Education Act*, which provides as follows:

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

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

(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. [emphasis added]

The Court expressed the view that the Board and Tribunal had not violated this provision. The Board considered whether the child's needs could be met within a regular class with appropriate services and in doing so, considered his mother's preference. Her preference was to have the child remain in a regular class, which is why the IPRC altered its original recommendation to place him in a special education class full-time. The Tribunal found evidence to indicate that it was not in the child's best interests to have him receive one-to-one support throughout the day, as his mother wished.

In the result, the Court held that the Tribunal had recognized that for the child, total integration would work to his disadvantage because he needed the special education recommended by those responsible for his placement. The Tribunal's decision recognized him as a special person with special needs.

### In Our View

In *Eaton v. Brant County Board of Education*, a 1997 decision of the Supreme Court of Canada, the Court noted that disability differs from other prohibited grounds of discrimination, such as race or sex, because there is no individual variation with respect to these grounds. However, disability means vastly different things, depending upon the individual and the context. This produces, *inter alia*, the "difference dilemma" whereby segregation can both protect and violate equality, depending upon the person and the state of disability. Evidently, the Tribunal and Divisional Court in this case found that segregation was ultimately more protective of the child's equality than integration would have been.

For further information, please contact [Paul Marshall](#) at (613) 940-2754.

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