

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL
FOR THE PROVINCE OF ONTARIO)**

B E T W E E N:

THE BRANT COUNTY BOARD OF EDUCATION

**Applicant
(Respondent)**

- and -

CAROL EATON and CLAYTON EATON

**Respondents
(Applicants)**

CASE ON APPEAL

VOLUME IV OF IV

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ONTARIO SPECIAL EDUCATION (ENGLISH) TRIBUNAL

IN THE MATTER OF the Education Act, R.S.O. 1990, c. E.2: IN
THE MATTER OF Ontario Regulation 305 (formerly 554/81) made under
the Education Act, as amended, AND IN THE MATTER OF the minor
EMILY EATON, born 28 February 1984;

between

CAROL AND CLAYTON EATON

Appellants

- and -

THE BRANT COUNTY BOARD OF EDUCATION

Respondent

Tribunal Members:

Ken Weber	Chair
Carol Sanna	Member
Frank Turner	Member

For the Appellants:

Ms A. Molloy, Ms J. Budgell

For the Respondent

Ms B. Bowlby

The hearing was held in Brantford, Ontario on 18 January; 17, 18,
19, 26, 27, 28, 31 May; 1, 2, 3, 4, 14, 15, 21, 23, 24, 25 June;
29, 30, 31 July, 1993.

The Appellants' Request

~~that the determination of the Brant County Board of~~
~~Education Identification, Placement, and Review Committee (IPRC)~~
which directs that Emily Eaton be placed in a special class, be
set aside, and that Emily be placed full time, in a regular,
age-appropriate class at Maple Avenue School, with full
accommodation of her special needs, including provision of a
full-time educational assistant, any necessary assistive devices,
appropriate education materials and resources, and proper
training of all staff.

10

Chair's Note

1. From opening submissions by the appellants' counsel, from
the appellants' statement of request letter to the Secretary of
the Tribunal (11 December 1992) and from exhibits such as Exhibit
A-13, (Minutes of the Appeal Board) the Tribunal inferred that the
parents' request is that a full-time educational assistant be
assigned specifically to respond to Emily's needs. In response
to a request for clarification from the Tribunal, we are told in
reply testimony from Carol Eaton, and from closing submissions by
appellants' counsel, that the request of the parents in the
matter of an educational assistant is that the assistant be
assigned full time to the regular class in which Emily is
enrolled.

20

2. The parents are not appealing Emily's designation by the
IPRC as an exceptional pupil.

Respondent's Reply

That the request of the parents regarding placement be
denied, and that the determination of the IPRC be upheld, on the
grounds that, having regard to Emily Eaton's needs, the best
placement for her is in a special class.

30

Witnesses

For the Appellants

Rochelle Bouchir
Gary Bunch
Kimberley Davis
Carol Eaton
Clayton Eaton
Jennifer Huxley
Malcolm Lock
Murray McCutcheon
Nerida Parkhill
Fiona Robertson
Mara Sapon-Shevin
Harry Silverman
Kathy Vanderheyden
Sue Whittaker
Carolyn Williams
Robert Williams
Cathy Winter

For the Respondent

Donna Bell
Brian Cronkwright
Jackie Ireland
Audrey Lottridge
June Piggott
John Shurvin
Jeffers Toby
Diane Williams

10

20

Rochelle Bouchir

Ms Bouchir is a speech-language pathologist, employed by the Lansdowne Children's Centre since September, 1992. Emily is a client having check-up status, i.e., Ms Bouchir consults with Emily's parents and school personnel. She explains that because Emily is not physically able to sustain eye contact for very long, one looks for other signs of attending behaviour as well, e.g., in Ms Bouchir's words, "...when her body is still and her tone is higher and she may move her head toward a sound, we have a sign then that she's attending" (Vol.5,p.931).

Ms Bouchir asserts that people learn language skills "...through attending and then later imitating and then later speaking on their own" (p.921). She stresses the importance of turn-taking, and feels that Emily shows progress in this skill in the special services at home program. Regarding signs, Ms Bouchir describes Emily's signing as idiosyncratic, stating, "I observed her signing 'more', and what Mrs. Eaton described was Emily's sign for 'drink'" (p.927). "I know I asked her...a yes-no question. ...She made a quick breath in and Mr. and Mrs. Eaton pointed out that she was saying 'yes' at that point" (p.938).

With reference to a small doll that was new to Emily, Ms Bouchir asserts, "I asked her to point to eyes, hands, feet and the doll's stomach, I used the word tummy, and she pointed to all of them" (p.928). She explains the importance of symbolic object representation for an augmentative communication system.

Ms Bouchir delineates the rationale for a number of the communication goals in Emily's current program. Regarding Emily's response to sounds Ms Bouchir states, "I've seen her recognize people's voices...and it was reported to me at school that Emily enjoys music and interesting sounds..." (p.937). In Emily's home Ms Bouchir says she observed Emily imitating her mother's vocal intonation or stress patterns.

Gary Owen Bunch

Dr. Bunch is an Associate Professor of Education and Psychology at York University, and is accepted to give opinion evidence as an expert in the field of education of children with exceptionalities.

His expressed understanding from a review of literature is that it, in his words, "...does not speak clearly to any social and academic gains particularly resident in special education as we presently structure it. ...within the past ten or 12 years...we've come to an understanding of literature that in some cases says there is a beneficial effect of some types of regular education placements and other literature that says there is a neutral effect of special education placements and other literature that says that placement in a regular classroom has at least equal effect to placement in special education classrooms. ...we cannot consistently and concretely prove that [a separate structure] has had the effect that we wished. ...it has had some less than positive effects on the relationships of children and the acceptance of children within the school systems and within community generally" (Vol.6, pp.1043&1044).

He refers to the deinstitutionalization movement and the trend to integrate children diagnosed as mildly or moderately challenged in their learning. Regarding integrated vis a vis special class placement, Dr. Bunch asserts, "I consider the parents the most informed people to make a decision on placement" (p.1048). He speaks of the Contact Hypothesis, "That children who have been labelled, through interaction with regular children...will benefit from seeing normal behaviour...laughter...anger...abilities, exceptional abilities" (p.1051). Decisions on where to draw the line with respect to regular class placement are determined through the IPRC process, but, he says, "...the regular classroom teacher, with appropriate support and encouragement, can effectively accept responsibility for almost any student..." (p.1054).

Dr. Bunch states that standardized tests tend to become weaker as the subject to be tested becomes more distant from the average population. Determining a child's potential for learning is, in his words, "...best approached through a multidisciplinary, multiperson discussive functionally oriented type of approach" (p.1061). The educational situation is formal, and parents, according to Dr. Bunch, "...just see a heck of a lot that teachers will never see" (p.1062).

10 In a qualitative, three-year research study, Dr. Bunch studied 32 pupils whom he described as "...severely and profoundly challenged in their learning" (p.1067). These pupils were fully integrated into regular classes for the first time at the beginning of the study, and were enrolled at that time in Kindergarten to Grade 9 by three separate school boards. The changes in a child were evaluated through assessing the changes in stated objectives for the child. Dr. Bunch's conclusion is that "...inclusion of pretty well all children in a regular classroom is a very possible, pragmatic, and practicable educational dynamic" (p.1071).

20 In reply to a question, Dr. Bunch expresses the view that students with the kinds of needs he understands Emily Eaton to have can be taught by average classroom teachers "...with the support of qualified specialist personnel" (p.1081). His research study finds that special education resource personnel consult and plan with regular classroom teachers and administrators, "Sometimes directly teaching a number of children, most often in the regular classroom... Being the person...who would...make sure that things were moving well...responding to any particular glitches that came up on a day to day basis" (p.1085).

30 In Dr. Bunch's opinion, a teaching assistant "...is most appropriately assigned to a class...or...in a variety of classes...as a resource to the total program of a school. ...when a person is assigned one-on-one...there is a chance of a

dependency relationship...to the exclusion of interaction with other children and...the classroom teacher..." (pp.1088&1089).

Dr. Bunch describes the Circle of Friends peer support system, "...stimulating, initiating, eliciting the volunteer support of peers...to...befriend...support...assist...any child who is in the classroom" (p.1091). His opinion is that the effect of Circle of Friends would be limited in situations where an educational assistant takes care of any needs which arise with respect to a particular pupil.

10 From a one-year study, Dr. Bunch concludes, using an attitude scale of his own design, that whereas teachers' attitudes about inclusionary education were congruent in the absence of experience in either inclusionary or special education roles. Attitudes change after a year of such experience. Teachers who took a special education course and became special education teachers had become, quoting Dr. Bunch, "...more reserved in their approbation of inclusionary education. People who had taught in the inclusionary system...by and large liked it more...[but] there were concerns [about]...teacher/resource teacher relationships, administrative support" (p.1102). In 20 cross-examination, Dr. Bunch reveals that there was a total of 32 teachers in the study, and that those in the inclusionary group did not necessarily have any profoundly challenged pupils in their classes, nor indeed necessarily any exceptional pupils at all. He states, "I think a variety of situations could be hypothesized" (p.1143).

30 Dr. Bunch says he would not integrate into a regular classroom a child who is dangerous to self or others. This is where he draws the line on integration. But for a child as severely challenged as Emily appears to be, Dr. Bunch says, "My experience is that regular classroom teachers if they have some good in-service preparation, teacher training...support of colleagues, resource teachers, leadership...good interaction with parents, appropriate in-class support systems, can work to the

benefit of children...more effective than what the child would receive in a special education setting" (p.1106).

Dr. Bunch is Chair of the Board of the Centre for Integrated Education and Community, which advocates for, consults on, and advises on inclusionary education, but he does not view himself as an advocate.

Without appropriate support in the regular classroom the exceptional pupil will not necessarily experience increased social interaction or social acceptance, according to Dr. Bunch, but the child will imitate the behaviours of normal children. He agrees that there has to be some comparability in terms of social, intellectual level for mainstreaming to work.

In a discussion about the Ministry of Education and Training Consultation Paper on the Integration of Exceptional Pupils attention was drawn to the statement that the wishes and preferences of the parents are as important as are the opinions of educators in the process of making placement decisions. Dr. Bunch asserts, "In instances where educators and parents disagree it is my position that the position of the parents is the one that should hold" (p.1121).

Asked in cross-examination whether there are data to support the Contact Hypothesis, Dr. Bunch replies, "...without being able to cite a particular study...[he] would think there is data to support the hypothesis" (p.1133).

In a discussion about the qualitative research studies of pupils and teachers undertaken by Dr. Bunch, he disagrees that assessing the progress of pupils by means of examining changes in teachers' goals is unduly subjective. He says, "...I wouldn't use the term subjectivity in that context" (p.1153). He acknowledges that two of the three inclusionary school boards in which he conducted his studies did have pupils in segregated special education classes.

Dr. Bunch agrees that in his study of the 32 children his intent was not to demonstrate that educating children in a fully integrated classroom is necessarily superior to educating such children in a segregated setting. He states, "I had no comparative intent...inclusion is a challenging concept; people have to think hard about it; people have to be willing to be flexible and regear themselves to some degree" (pp.1173&1174).

Kimberley Davis

10 Mrs. Davis states that her daughter was in the same class as Emily in kindergarten, Grade 1 and Grade 2. Mrs. Davis feels that her daughter's exposure to Emily, a physically disabled person, enabled her to be comfortable with wheelchairs and handicapped persons in general.

Carol Eaton

20 Mrs. Eaton describes circumstances surrounding Emily's birth, February 28, 1984. Twenty-four to thirty hours after birth Emily had a grand mal seizure, after which she was placed in the McMaster Neonatal Intensive Care Unit. After Emily had been in McMaster for five weeks, Mrs. Eaton says she and her husband were told, "...if we really wanted...take her home and love her, but...she would never feed herself...would be very lucky if she wasn't tube-fed for the rest of her life. She was having 40 to 50 seizures every day that we were witnessing" (Vol.2,p.110). "She was on oxygen 24 hours a day" (p.115). At 18 months Emily was no longer on oxygen, bottles, or apnea monitor, and, according to Mrs. Eaton, "She was totally breast feeding" (p.116).

30 Mrs. Eaton explains, "Emily was extremely sensitive to any kind of stimulation...could tolerate almost no stimulation in the beginning" (p.120). Mrs. Eaton says, "It took a long time to get a label of cerebral palsy from any medical profession" (p.124).

When Emily was born, her siblings, Peter, Mark, and Brian were five, three, and twenty-one months respectively. They eventually were told that Emily had cerebral palsy, and Mrs. Eaton asserts, "They were taught to watch for her seizures...mainly just facial grimaces" (p.127). "...we had been specifically told by the doctor at Mac...she would be...I believe his exact words were 'but a vegetable'. We told them [Emily's brothers] that we were absolutely not willing to accept that diagnosis...we believed Emily had more potential than that...she was demonstrating it through her ability to learn to suck" (p.128).

Mrs. Eaton indicates that Emily's condition is such that she is hypotonic, i.e., "floppy rather than being rigid" (p.120). "...we will constantly look for methods to assist her to develop the full potential that she has...now she is able to eat table food, usually with a spoon...to eat all finger foods easily...to pick up a glass...and give herself a drink...to weight bear and...with minimal assistance to walk using a...walker...to make sounds but not articulate. She uses very little communication, but...a lot more than we were given notice that she would" (p.131). Mrs. Eaton continues, "She's been signing a limited number of signs since she was approximately three and a half years old" (p.142). "We started working with her on signs when she was about two or two and a half years old...it was particularly difficult to get her to look at what we were trying to have her look at and listen at the same time" (p.148). "She gradually built the ability to look at it when...having the sign made with her hands, hand over hand, by us" (p.149). "The limiting disability...does make some of the signs...difficult to make...signs such as 'eat' and 'drink'. She was making quite a few animal signs. Most of the ones she makes now are fairly clear..." (p.150).

Mrs. Eaton explains that without ankle/foot orthoses (AFO's) Emily has limited ability to stand unsupported. AFO's, Mrs. Eaton explains, "...cover the bottom of her foot, go up behind her heel and cover the entire back of her leg up to her knee level" (p.155).

Mrs. Eaton affirms that Emily uses a walker in the house, outside, and at school for walking to the bathroom. "Initially," says Mrs. Eaton, "she [Emily] was very resistant to touch it... She actively resisted being in it in the beginning" (p.157).
10 "She is still touch sensitive...at times she needs to be verbally cued to keep her hands on it" (p.158). "...she mouths a lot of things...has eaten sand as have all of her brothers... We are working particularly on looking at things with her eyes rather than her hands. Children who are very tactile...like to reassure themselves with mouthing" (p.159).

Mrs. Eaton says that Carolyn Williams, a special services worker, works with Emily at the Eaton home from 3:30 to 5:30 Monday to Friday. Carolyn was shown on videotape facilitating sit-ups, tall kneels, and using a peg-board to reinforce pincer grasp, visual focus, and turn-taking. Mrs. Eaton says that
20 Emily's "...improvements for long lengths of time tend to be quality rather than quantity changes" (p.170). "The specific goals are set by the therapists, physiotherapist, occupational therapist, and speech therapist" (p.171). The therapists are said to receive input from the parents and the school. The special services worker contacts the therapists every six weeks, or more frequently if necessary.

Mrs. Eaton asserts that Emily "...likes...stories about children or animals which, I guess, is pretty typical of kids that age" (p.180). "If I've got a lot of time I spend as much as
30 two or three hours with her looking at books, reading stories, augmenting it with story tapes on and off" (pp.185&186). Mrs. Eaton says that Emily will vocalize if she is discontent or not interested and that Emily also indicates when she is happy

and content. "She giggles, does a lot of smiling...uses full body activity to let us know that she is really involved in what she's hearing" (p.186). "...she does have her own library card and she does check her own books out of the library" (p.189).

A videotape shows Emily's birthday party in February, 1993. Asked to comment on Emily's action of mouthing a box, Mrs. Eaton replies, "...she uses the oral method of checking in the same way that babies often mouth a lot of things...reverts to checking orally to make sure that she understands what she is getting in a visual or tactile method" (p.204). "For the most part we ask her not to put things in her mouth, but to use her vision..." (p.205). "...we don't make a thing out of it because...if you accent the negative behaviour...it only makes the negative behaviour become worse" (p.206).

Mrs. Eaton describes the slow progress of teaching Emily to use a pincer grasp. Of the videotape, Mrs. Eaton remarks, "I think it's a pretty good picture of the way the kids interact with her...when we're at home. It's also...indicative of Emily's enjoyment level of the normal activities with children her age" (p.213).

Mrs. Eaton says, "...music and food are the two incredible motivators for her" (p.222).

At about 18 months, according to Mrs. Eaton, Emily "...started...to lift herself up and sit a little bit unsupported... She gained more trunk strength...more balance" (p.226). Visual tracking activities were used with Emily, as well as auditory stimulation designed to elicit a visual focus. At three and a half or four, Emily was strapped to a standing frame to get a feeling of weight-bearing. By age four she was doing what Mrs. Eaton describes as "...a very intensive physio program...four hours per day" (p.231). When Emily was four and a half she broke her leg.

Mrs. Eaton describes Emily's acquisition of eating skills -- learning to keep food in her mouth and swallow, and learning to use a spoon, which involves overcoming her reluctance to grasp the spoon in her extremely touch-sensitive hands.

Mrs. Eaton explains that Emily has learned to roll over. "She uses rolling mainly to move herself from one place to another... Now she can get down off her bed" (p.244). "We're working on the reverse... The getting back on is very slow" (p.245). "She certainly lets us know when she is happy...not happy...if her pants are wet...if she wants to eat or drink...if she wants the radio on... Sometimes the Communication is still a little bit iffy for us" (p.246). "She will 'uh-huh' or turn her head away to indicate 'no' for an answer" (p.247).

Emily attended a developmental day centre, the Andrew Donaldson Centre, for a year before she started to school.

Mrs. Eaton describes Emily's toilet-training protocol and the regression which occurred when Emily broke her leg, and Mrs. Eaton goes on to summarize the areas of physical development currently under way: gross motor activities involving the trunk and arms; correct walking posture; body movement; fine motor skills such as grasp, release, palmer grip, pincer grasp, use of a spoon; strengthening neck muscles; kneeling. Mrs. Eaton asserts, "Most things she can do now. She can sit. She can walk. She can stand. It's building the quality of how she does it that we're working on now" (p.255).

Emily is described as having had a very strong startle reflex as an infant. Originally, Mrs. Eaton explains, Emily did not look at sounds, and then, "We started noticing that with certain sounds, Clayton and I and the boys or music, she would become quiet. Then she started looking..." (p.264). Mrs. Eaton says that Emily now "...will make and maintain eye contact...will respond yes or no in various ways" (p.267). She indicates that Emily shows preferences, "...prefers to listen to music than do physio" (p.268).

Mrs. Eaton affirms of Emily, "She's known the meaning of words like mom and dad and dog and cat and bird and fish and brothers and girl...drink, food, toilet, since she was probably around three, three and a half" (p.269). "In terms of spoken language she only has one word and that's 'mom'... (p.271). "She attempts -- she will do a lot of signs when we ask her; they're not always coming close to what we would recognize even as signs, but she is physically moving her body, we feel, in an attempt to make the signs" (pp.270&271). Mrs. Eaton describes working with Emily on colours and shapes. "Initially she would have to be told what the colours were" (p.269). "She recognizes the shape triangle, circle, and square every time that she is asked at home" (p.293).

The Eatons went to Dufferin School in Brantford to register Emily for kindergarten. Mrs. Eaton explains, "So that would still have been our first choice, to have her in a school where she could be exposed to the constant French language... Then as a second choice...we looked to our neighbourhood school" (p.296). Mrs. Eaton states that she and her husband wanted Emily to have the opportunity to learn in the same school environment as other children. "We felt...that there was very limited opportunity for her to learn academically in the contained classes...we have no way of proving that she is learning academically, neither does anybody have any way of proving that she does not learn academically (p.300). "I think the major point is that she has got to live in our world and not we in hers" (p.301).

Pending a decision by an IPRC, the Eatons agreed to let Emily attend Jane Laycock School in Brantford, where she was placed in a T.M.R. class in September, 1989. An IPRC meeting, convened in November, 1989, identified Emily as exceptional and determined that she would be placed on a trial basis in a regular grade in the neighbourhood school. Mrs. Eaton asserts, "It was agreed that Emily would need an Educational Assistant" (p.319). "Her first day [at Maple Avenue School] was April 30, 1990" (p.323).

Mrs. Eaton describes the method of communication between home and school. "We...communicate in a book which...goes back and forth in Emily's bag every day" (p.327).

An IPRC in June, 1990, determined, according to Mrs. Eaton, "...that she [Emily] would be maintained...in the regular grade with the support in place" (p.328). "Emily had a tendency to fall asleep during her first year at school and has continued to do that on occasion... Primarily we feel that's a mechanism that Emily uses when she's overstimulated" (p.329). Emily continued in kindergarten in September, 1990. The class was organized as a full-day program on alternate days. Mrs. Eaton states, "The desire to increase her physical stamina, to stay awake, to keep her chin dry, to walk like the other girls, to increase her toileting abilities were things that we felt were happening there" (p.334). "At the last meeting with school people [before the IPRC meeting of May 28, 1991] ...it was felt by the entire team...that it would be appropriate for her to remain with the peer group...and move on into the Grade 1 class..." (p.343). "On more than one occasion parents would tell me how valuable they found it to have Emily in the community school...that their children loved having Emily there..." (p.346). The IPRC determined that Emily be in the Grade 1 class at Maple Avenue School for 1991-92. Mrs. Eaton outlines a number of concerns which arose during 1991-92 regarding Emily's school experience, e.g., her falling asleep in class, her biting other pupils, her mouthing her clothing and hair, her being afforded opportunities for activities which were parallel to those of other pupils and at the appropriate level, and her vocalizing at inappropriate times.

The Eatons were notified of an IPRC meeting to be held on February 4, 1992. Mrs. Eaton delineates her disagreement with a number of written assessments about Emily contained in a conference report of the same date: "What it appeared to us they did was show all the negatives of Emily's present placement in

order to justify changing her placement" (p.374). Issues cited include the difficulty of measuring Emily's academic and social growth and of assessing her level of contentment; the under-responsiveness of the peer group to Emily; Emily's responses to auditory and visual stimuli; her co-ordination and difficulty in signing; her laughing and giggling at inappropriate times; the difficulty of assessing her receptive language; concern about Emily's placing objects in her mouth, about her social interaction with peers, and about the absence of a means of communication between Emily and her peers. The meeting is said to have confirmed Emily's identification as an exceptional pupil, and, Mrs. Eaton says, "The placement decision would be made at a later date" (p.389). The determination of the IPRC was to place Emily in a special education class.

The Eatons requested that a review meeting take place before the Board of Education be notified of the IPRC determination. Mrs. Eaton summarizes the reasons for wanting Emily in a neighbourhood school: opportunities for increased communication ability, for academic growth, for peer interaction and consequent age-appropriate development. She adds, "It is important that we normalize as many of the physical activities as possible in order to encourage Emily to be physically more able" (p.397).

The review confirmed the determination to place Emily in a special class, whereupon, in the words of Mrs. Eaton, "...we commenced the appeal of the decision" (p.401). "The Appeal Board hearing was May the 11th" (p.403). The Eatons submitted to the Appeal Board a Statement of Disagreement, With Reasons. Mrs. Eaton explains, "Because we stated that we would be going to appeal the decision of the Appeal Board to the Tribunal we anticipated that Emily would remain a student at Maple Avenue School under the stay of proceedings" (p.414). "We were offered a placement at Maple Avenue School half-time or a full-time placement in the special ed. classroom which would probably be at Banbury Heights School" (p.415). "We felt that she was entitled

to stay in the regular grade classroom full time..." (p.418).

Mrs. Eaton states that alternative special education placements mentioned following the special education appeal were Agnes Hodge, Greenbrier, and Prince Charles, none of which were considered by the Eatons to be in Emily's best interest.

Mrs. Eaton describes having "...had to go to court to resolve the issue and get Emily back into school full days" (p.423).

"Immediately after the injunction [granted September 11, 1992, by Mr. Justice Borins of the Ontario Court - General Division] Emily has attended full days with full support at Maple Avenue School in the Grade 2 class..." (p.427). Mrs. Eaton states that Emily's school experience during 1992-93 "...appears very positive" (p.428).

Emily is described by Mrs. Eaton as having a "...remarkable sense of humour. ...She has always liked to tease" (p.431).

Asked to comment about the effect on Emily of moving to a new school, Mrs. Eaton replies, "I think it would be a major step backwards. I think we would see negative behaviours developing. I think that she would not progress in the manner that she is able to now. I think she would lose in a lot of ways. She would lose the community. She would lose the opportunity for academics. She would lose the role modelling of peers. She would lose the opportunity to interact in the classroom with children. I think that she would become upset. I assume that the travel distance would add fatigue to her which would interrupt her opportunity to learn in the classroom. I think that it would just be an entirely negative experience for her to move" (pp.434&435).

Under cross-examination Mrs. Eaton says that Emily was probably two and a half or three years old when Doctor McIntyre, a pediatrician on the Board at Lansdowne Treatment Centre, confirmed Emily's diagnosis as cerebral palsy. Mrs. Eaton goes on to name several physicians and other medical practitioners who have treated Emily. The family physician is Dr. Lock. Emily has

not been taken to the Hugh McMillan Centre. Mrs. Eaton expresses the view that "...Hugh McMillan Centre covers basically the same treatment approach as the Lansdowne Children's Centre which is in our area" (p.446). Mrs. Eaton describes Emily's visual problems: "...eyes which both turn in and turn out...jump, do a fluttering kind of motion. She has a tendency to not use her vision or to use her peripheral vision" (pp.446&447).

10 Asked why medical reports were not given to the Board, Mrs. Eaton responds, "...we...have been able, we felt, to provide the information that the reports may contain to School Board officials" (p.448).

Mrs. Eaton says that Emily has been observed in the classroom by two psychologists, Dr. Toby and Dr. Silverman.

Mrs. Eaton agrees that Emily, with appropriate support including the walker, can walk about 200 metres, not 2000 as she had earlier stated. Mrs. Eaton describes the activities in which Emily is involved with the home services worker, Carolyn Williams; activities having physio, occupational, and speech therapy goals.

20 Mrs. Eaton asserts that Emily "...had full bowel control and had pretty close to full bladder control...at approximately age four, four and a half" (p.465). She has regressed since breaking her leg; however, bowel training at home is said to be virtually 100 percent successful, and bladder training to be at the 50 percent level. There was regression in using signs, too, after Emily started attending school. Mrs. Eaton says, "There were a lot of new people who were not seeing the signs that she made or not interpreting them. It appeared that she just quit trying" (p.467).

30 Mrs. Eaton cites her dissatisfaction with the school program for Emily when she was enrolled in Jane Laycock School, and she clarifies that socialization is not the primary concern for her wanting Emily in a regular class. She says, "...it was important for her to be exposed to the academics and the normalization" (p.473).

In kindergarten, according to Mrs. Eaton, Emily "...was learning correctness of movement, correctness of body position. She was learning appropriateness" (p.478). "She was communicating on a much more involved level than she ever had before" (p.479).

According to Mrs. Eaton, Emily tested negative for hepatitis B when there was concern about her biting of other pupils.

Mrs. Eaton affirms her and Emily's preference for dresses over slacks notwithstanding Emily's tendency to lift her dress to bite and chew it.

10 Regarding the priority which should be given to finding a communication system for Emily, Mrs. Eaton agrees that communication is very important, but Mrs. Eaton says she "...would not agree that it is the only way for her to be able to learn or for her to be able to express herself" (p.499). Mrs. Eaton expresses the view that if Emily were removed from Maple Avenue School, "...she would be seen as less worthy" (p.500). Asked about communication between the Eatons and the Board of Education, and about the communication books which have always accompanied Emily to school and back to her home, Mrs. Eaton states, "I would be willing to see that the most recent pages are photocopied by us, but I'm not prepared to give permission to the Board to copy. ...I am uncomfortable with originals, that I believe belong to me, going out of my possession" (p.512).

20 Under re-examination Mrs. Eaton says that she has no recollection of the Board requesting medical reports. She indicates that Emily has been referred to the Hugh McMillan Centre for a global communication assessment.

30 In reply to a question about the proposed placement of Emily in Prince Charles School, Mrs. Eaton says that there was not any discussion about a total communication program to be provided there. She says she was informed that the transportation to and from Prince Charles School would take an hour each way.

Mrs. Eaton clarifies her method of determining that Emily can identify colours and says, "It would probably be in the 75 to 80 percent range that she would identify the correct colour..." (p.549). Regarding Emily's signing her need for toileting, Mrs. Eaton explains, "The sounds and the face is what makes us aware that she does have to use the bathroom" (p.522). Hypotonia is said by Mrs. Eaton to affect Emily's fingers and hands significantly. Whether Emily can control the strabismus which was apparent in the videotape, Mrs. Eaton is not certain.

10 Emily has not taken anticonvulsant medication since she was 18 to 20 months old. Her response to overstimulation, asserts Mrs. Eaton, is "...that she goes through that process of...shutting down" (p.559). "...it is, at least to us, apparent, the difference between this shutting down due to stimulation and the shutting down due to need of sleep because of physical fatigue or illness" (p.560).

Whether Emily has startle seizures is not clear, but in view of that possibility Mrs. Eaton feels that it is inappropriate to leave Emily unattended.

20 Mrs. Eaton indicates that use of the Wolfe Communication System, which was tried with Emily for about four months during the latter part of 1989, was discontinued because it was unreliable, was not used consistently, and was considered inappropriate at that time.

30 Mrs. Eaton clarifies the details surrounding Emily's referral to the Hugh McMillan Centre, and she states that medical and other health care specialists have not been able definitively to determine whether Emily's inability to communicate verbally involves a cognitive or developmental source. Mrs. Eaton says that she has tested Emily's understanding of speech at various times using nonsense syllables and other such techniques: "...it is something that I tend to do with her a lot..." (p.787).

Mrs. Eaton says she was unaware of instructions during the past year to the educational assistant about not putting negative information in the communication book. She states that she did not know about the second record kept by the educational assistant nor of the extent of Emily's crying, vocalizing, and sleeping at school until the Tribunal hearings.

10 Mrs. Eaton asserts that Emily recognizes her brothers by name. She explains that the Eatons have a large variety of specialized materials for Emily, which they have offered for use at school. She says it is all right for Emily to have a nap at school, that Emily could be toileted three times per day instead of hourly at school, and that the one-to-one intervention could be reduced.

Mrs. Eaton acknowledges having received a February, 1993, letter from the principal describing Emily's increased tendency to sleep and her disruptive crying. She agrees that at the one meeting which she attended at the school during the past year, she did not offer to bring in pieces of equipment or material.

20 Mrs. Eaton clarifies her expectations regarding the educational assistant, indicating that the latter's assistance is not necessarily needed by Emily 100 percent of the time.

Clayton Eaton

Mr. Eaton is a teacher employed by the W. Ross Macdonald School in Brantford.

30 Mr. Eaton testifies, "We want Emily to be a part of our community, of her community... I think society, in its enlightenment, and provincial governments, in their attempt to save money, have decided that Emily should be integrated with our family now, with our family within the community. I think our community includes her neighbourhood school" (Vol.4,p.613).

Mr. Eaton states, "What she really needs at this point is a program in sensory integration where she needs to be able to use all of her senses at the same time... A program of sensory

10 integration can be offered in an integrated setting, one that
would perfectly adequately meet her needs. Once that's in place
then the communication goals can be met. And I don't know of any
communication programs that could not be used within an
integrated setting" (pp.614&615). During Tribunal questioning
Mr. Eaton states, "In a school setting it most likely would be
carried out by the classroom assistant... To set up a proper
program there would probably need to be some expert advice from
people trained in that field... These types of programs are used
extensively for deaf/blind children who are integrated into the
regular classroom and the expertise is provided to the
interveners and they are the ones who carry out the program:
(p.747).

20 When speaking about his own career choice (to teach in a
special school) and what he chooses for Emily he states, "They're
at opposite ends of that continuum, but the philosophy is that
the parents should have all the choices within that continuum.
And my position at Ross Macdonald offers parents one of those
choices" (p.615). "The general purpose of the program was to
bring the students in and provide them with basic literacy
skills...and to provide the children with a way of accessing
printed material so that they can go back to their home community
in their home setting and complete their education there"
(pp.616&617).

30 Mr. Eaton testifies that since breakfast and lunch are
therapy sessions for Emily they try to keep supper as a meal to
enjoy. He says he has "been working on a program to help her
lift her elbow off the plate" (p.621). Mr. Eaton states "...when
my coffee comes out Emily usually decides that she's finished her
meal time... She turns around with her body and physically looks
at the radio and gives her big smile to me and that's my cue to
go and turn on the radio because now she knows supper is over
and...she quite enjoys the program that comes on after supper"
(p.623). Mr. Eaton says it takes Emily about twenty minutes to

complete her meal.

Mr. Eaton testifies, "Emily understands everything that we tell her as long as it's within the context of her life. ...she understands the words we say and she responds to them appropriately; not the same response that another eight year old might have, but an appropriate response" (p.628).

With regard to Emily's being influenced by her peers Mr. Eaton testifies, "At her birthday party we had a paper tablecloth. Emily was trying to bring the paper tablecloth up to her mouth to get a bite of the tablecloth, I guess, or maybe she was trying to get the feel of the texture and hear it rattle and crinkle. But I was trying to get her to leave it down and I was giving her the stop sign and asking her to stop lifting the crinkle. But I was trying to get her to leave it down and I was giving her the stop sign and asking her to stop lifting the tablecloth up and she wasn't listening to me... So, I said 'well she's not listening to me, why don't you girls give her the stop sign?' So, all the girls around the table...made the stop sign for Emily. And from that point on Emily didn't lift the tablecloth any more" (pp.637&638).

Mr. Eaton feels that Emily needs to be taught the appropriate times to vocalize and that people need to look at why she is vocalizing when she is.

He says Emily tried to use a Wolfe Board as a method of speech output. "She could make the choices in a situation where she was motivated...with the crackers and juice...she never got to the point where she would spontaneously use the board to make the choice on her own. But...if you prompted her and asked her to make the choice she would use it for that and that would be the one where she would have the most success... I think that the choice not to use it was more that, at that point, it wasn't a useful thing for Emily in her life either as a therapy tool or useful for her to use in her daily life" (pp.647&648&649).

Mr. Eaton comments on Exhibit A2 (a video tape). He says, "Emily reacts to the Little Rabbit Foo-Foo even before the other children...she is clearly involved with what's going on with the other children" (pp.652&653). Mr. Eaton also testifies, "She was opening the gifts at that point and when she finished the gifts and was holding it up I was asking her to look at the camera and smile while she was holding the next gift. And she was paying attention to what I was saying and responding appropriately" (p.653). He says she was not being tickled at the time.

10 Mr. Eaton testifies that when Emily was first placed at Maple Avenue School, "We were told that she would be placed there in a pilot project to evaluate how she could be accommodated, how she would adapt to the program" (p.660). But by the end of Grade 1 it had become his "...understanding that that was her placement. It didn't appear to be a pilot project at that point" (p.661). He further states, "We weren't given any specifics about what the [special education] program would offer to Emily other than that it would be conducted by qualified and caring teachers who would be capable of meeting Emily's needs... That was during the original IPRC. I believe it would have been in February [1992]" (pp.661&662).

20 Mr. Eaton testifies, "I think throughout the kindergarten year we had no indication that they were having any difficulties and they seemed quite pleased with their success" (pp.672&673). He further states, "This past year has been a generally positive year for the most part. Mrs. Williams has an excellent relationship with Emily and she has some excellent skills with providing programming for Emily, adapting the program that Mrs. Lottridge presents to Emily and providing appropriate materials that relate to what's going on in the classroom" (pp.673&674). When asked to compare Emily's Grade 1 year with her Grade 2 year he says "This year is more positive... She's really quite enjoying this year, but I'm not sure that for Emily last year was a negative year" (p.674).

When questioned about directing the educational assistant to include only positives in the communication book Mr. Eaton states "I can't recall that specific incident" (p.703).

During cross examination Mr. Eaton agrees that his position about a regular class placement has become stronger and firmer.

Mr. Eaton visited the special class at Prince Charles School for about an hour and states "...we saw what went on for that hour...specific programs for Emily were not discussed" (p.708). Mr. Eaton is aware an Individual Program Plan is created once the child is in a placement. He states "It makes it awfully difficult for parents to choose a program when they don't know what it is" (p.708).

Jennifer Huxley

Jennifer Huxley is an occupational therapist at Lansdowne Children's Centre.

She states that Emily is working on fine motor skills relating to grasp and release. When asked if she noticed any progress in the development of her grasping over the last year Ms Huxley replies, "I can't say" (Vol.5,p.883).

In a document dated 26 January 1993 Ms Huxley reports that Emily eats in her classroom with other children. She says Emily watches other children and therefore eats most of her food after they leave the classroom. With regard to chewing Ms Huxley states that "Once she has the food in her mouth she can manoeuvre it around to chew it...before she swallows (p.887). When asked about a subheading referencing choking she testifies "Carol provided...information to me that she would generally only choke if she was ill (p.888).

Ms Huxley states, "I was very impressed with the educational assistant. She works very closely and comfortably with Emily...[they]...sort of work as one when she is working hand-over-hand with Emily" (p.891).

During Tribunal questioning Ms Huxley is asked questions relating to the appropriateness of specific goals within a grade 2/3 class. Specifically, clarification is requested relating to pulling off plastic container lids independently once the lid had been started and to place five objects through a cut out top into a container independently. Ms Huxley responds "I don't see that as totally inappropriate...maybe that some variance of the activities can be done on the part of the teacher, but these are just general ideas of...types of activities that can be used to develop those skills" (pp.902&903).

Malcolm S. Lock

Dr. Lock is a physician in family practice. He says that he was in attendance at Emily's birth, and she has been one of his patients ever since. Dr. Lock confirms that Emily has cerebral palsy, and he describes this as an umbrella type of diagnosis with a collection of symptoms. He thinks it is not possible to completely predict what any child's abilities are, and he cites his experience concerning a child at whose birth he assisted 12 to 13 years ago.

This child, he explains, was born with basically half a brain and multiple disabilities. Dr. Lock says he did not expect the child to develop to be a functioning member of society, but the child is now communicating by means of a Bliss board and shows quite remarkable abilities in some academic areas. Dr. Lock asserts, "...I've altered my perceptions of what handicapped children can do" (Vol.8,p.1474). He acknowledges that the child attended a special class.

Dr. Lock asserts that Emily is not a fragile patient.

Murray McCutcheon

Murray McCutcheon is a chiropractor who sees Emily approximately once every three or four weeks to adjust her spine in the upper cervical area in an attempt to "improve the mobility

and the function of the motor units of the spine" (Vol.5,p.832). Each session lasts about five minutes.

Dr. McCutcheon states that Emily has been his patient since 1986 but did not seem to be aware of him or responsive to him until 1990. He says this awareness, along with physical gains seems to have increased with each subsequent year.

Nerida Parkhill

10 Ms Parkhill is employed as a physiotherapist by the Lansdowne Children's Centre. She has been treating Emily Eaton since the fall of 1984. Ms Parkhill describes Emily's condition when she first started working with her: "She just was a very floppy, nonresponsive baby" (Vol.4,p.967). Ms Parkhill further describes hypotonia and the type of physiotherapy program needed for a hypotonic client. She points out that because gravity pulls one down, one must develop enough muscle strength to resist gravity and to hold joints in place in order to be able to achieve and maintain an upright position.

20 Ms Parkhill designs Emily's program, and she meets regularly with Emily's parents, special services at home worker, and school personnel. She states Emily's need to feel confident doing what she is doing, and adds, "We know, and it is obvious, that she is more confident with her dad than anybody else when it comes to standing alone..." (p.977). Ms Parkhill explains that she is working with Emily on tall kneeling, on trying to get her up to standing from tall kneeling using furniture, and on trying to get her gait pattern more independent. She states, "It would be nice to see her take, say, two or three steps without somebody holding the walker even" (p.979). Ms Parkhill sees qualitative changes in Emily's walking and sitting, and confidence in tall kneeling.

30 Emily has the strength to perform a pointing motion, but not to do a smooth motion up against the force of gravity, Ms Parkhill explains. She possibly would be able to target a large switch plate, Ms Parkhill points out, and she states,

"...there is ongoing improvement in the gross motor at a very slow pace" (p.991). Asked about the importance of motivation for Emily, Ms Parkhill states that Emily needs "...a lot of repetition...imagination and incentive" (p.993).

Fiona Robertson

10 Fiona Robertson is employed at Lansdowne Children's Centre as an occupational therapist specializing in pediatrics. She states that she assumed Emily on her case load in 1988 when Emily was about four years old.

Fiona Robertson describes Emily as "a child that has low postural tone, she doesn't have a lot of strength around her shoulder and, therefore, she has trouble high reaching and...targeting to an object: (Vol.5,p.802).

20 With regard to feeding, Ms Robertson observed Emily at Maple Avenue School and states, "at the time she was doing some spooning and she was finger feeding and she was drinking from a cup. She needed verbal prompts and sometimes a little bit of physical prompting for spooning. She was independent, at least physically, for a large portion of the meal: (p.807). In a report Ms Robertson noted gains in fine motor skills, shoulder control and reaching.

A report dated 13 January 1992 outlined areas that were addressed during a school visit as feeding, toileting, wheelchair and classroom seating. Ms Robertson states that, "It seemed that they [the school] were trying to work on...the fine motor skills and the strengthening goals and trying to do some of the ... recommendations...around toileting that we had provided" (p.818).

30 With regard to recognizing objects Ms Robertson feels that Emily recognized objects that she was familiar with like "...spoon and a bowl, a cup..." (p.821).

During cross examination, Ms Robertson was read a quote from the 1991-92 communication book (exhibit A39). The quote contained instructions from Mrs. Eaton to the school: "To

reiterate, as with phys. ed., we want Emily included in classroom activities - ALL activities - in an adapted manner. We do not want you doing an O.T. or physio or speech therapy program at school. Those should ONLY be used as a guide to "how to" make her integrated into the adapted age appropriate grade level goals of the regular academic classroom program. While Clayton feels that stacking rings, et cetera, are appropriate in a Grade 1 class, that is why we would like to see them there and not because they are to be used to carry out 'Emily's O.T. program.' Emily has a daily therapy program done at home to be more specific, while we feel strongly that at school the same goals should (and same methods where appropriate) be used only as a tool to aid Emily in being involved in the regular program" (pp.854&855). Ms Robertson was asked if she was aware that Mrs. Eaton was giving instruction like this to the educational assistant at school. She replies, "Not specifically" (p.856).

Mara Sapon-Shevin

Dr. Mara Sapon-Shevin is accepted as an expert witness in the area of education of children with exceptionalities in the inclusionary system in the United States.

Dr. Sapon-Shevin explains that an "inclusive school is one in which all children regardless of level of ability or disability are educated within a common setting within a regular classroom without segregation" (Vol.7, p.1233). Children are grouped according to their chronological age, and adequate support services are provided to ensure a productive and meaningful role within the regular classroom. She feels that special education is a service not a place.

Dr. Sapon-Shevin feels that when it is not clear how much a child is learning, one should always lean towards the side of rich stimulation in the education environment. She says this would only occur in a regular class with age appropriate peers. She feels placement in a neighbourhood school ensures that

special children share the same experiences as their siblings, and there is continuity when they go out into their neighbourhood after school hours.

Dr. Sapon-Shevin testifies that when children have a positive self-image and are confident about their acceptance within a community they will be more open to learning. She is of the opinion that this can only occur in a regular class setting. She feels that parents' wishes are very important and the Individual Program Plans should be established with their input and some negotiation.

Dr. Sapon-Shevin encourages the concept of using the "educational assistant as a second teacher, as someone who maybe works with a small group of children including, maybe, the child with the disability, but not just one-on-one because that, in many ways, kind of negates the whole point of having a child included" (p.1279). She says peers can become involved in an inclusive setting as "cross age tutors" (p.1270) where older children help the younger ones. When Dr. Sapon-Shevin was asked during cross if all children should be served in the neighbourhood school in a regular class with age appropriate peers and whether that placement would meet the needs of all exceptional youngsters, she replies, "The services that are provided and the structures that are provided could meet the needs... There has to be extensive curriculum modification and teacher preparation and support systems" (p.1318).

In cross examination when asked if there is research data that may show there is no benefit to integrated settings, or that may be inconclusive about benefits, she replies "I'm sure there is. There's much that's inconclusive in this field, that's why it's tricky" (p.1330). When asked if the research supporting integration includes children who can't be assessed for intellectual ability or social awareness he replies, "because they can't be assessed it's difficult to assess their progress in either setting. So, at that point one has to make decisions

based on - given that there is some hole in our information we have to think about the things that we can observe...." (pp.1333&1334).

Dr. Sapon-Shevin acknowledges that she has not seen Emily's placement.

Harry Silverman

Dr. Harry Silverman is an associate professor at the Ontario Institute for Studies in Education in the Instruction and Special Education Department. He is accepted as an expert witness.

Dr. Silverman states that "cognitive stimulation...should be an important component of any educational process...particularly ...for children with physical difficulties or who are nonverbal because their ability to explore their world and to understand their world has limitations imposed on it" (Vol.8,p.1385). He says, "There is no substitute for effective thinking and problem solving" (p.1385) and the "point of any cognitive education program...should be to develop a generalized ability...to apply those skills to situations other than just academic areas: (p.1387).

Dr. Silverman states, "I fully subscribe to the No Reject Concept" (p.1389) and in his opinion, a school board does not have the moral or legal right to exclude any child from education in a regular classroom.

He feels that a regular classroom would provide a stimulating environment and varied opinions with regard to problem solving and that this would be lost in a segregated setting. He also feels that social stimulation and appropriate models would be missing in a segregated class setting.

In terms of meeting the needs of a child with cerebral palsy, who is physically involved and nonverbal, Dr. Silverman feels that with appropriate sensitivity to the needs and learning level of the individual and adapting the curriculum in accordance with those needs, any classroom teacher would be capable of, and

should be expected to, provide for such a child.

When asked is the program within a placement rather than the placement itself what is looked at in order to determine whether a child's needs are being met, Dr. Silverman replies that the important things he looks for can be summed up under the heading, quality of instruction. This heading carries with it the social and the academic climate and he is not convinced that a quality education, given all of the characteristics that he thinks it needs to have, can be provided in a segregated setting.

10 Dr. Silverman suggest that the best way to set up an augmentative communication system would be to have the "individual needs assessed by people who are occupational therapists who can determine the positioning of the board relative to the individual in the wheelchair" (p.1413). He suggests that the Hugh McMillan Centre in Toronto would be able to provide an evaluation in order to set up a Blissymbolics system, and that training of teachers could occur there or staff from the centre could present a workshop within the school board itself.

20 Dr. Silverman discusses how the Wellington County Separate School Board, with which he had been associated on a consultative basis for several years, adopted an inclusive system of education and postulates that positive social interaction and general benefits accrued to all students and teachers involved. He also enunciates the benefits of inclusive education as opposed to segregated education.

30 After observing Emily for a full morning and viewing two video tapes, the ninth birthday party and general interaction with other family members, Dr. Silverman concluded that Emily could function effectively in a regular classroom with some adaptation to programming.

Dr. Sivlerman feels that the "type of social interaction presently occurring in the classroom could be characterized as benign neglect. There wasn't any antagonism on the parts of the

other children towards Emily, there wasn't any obvious rejection of her, but by the same token there wasn't any obvious acceptance of her or interaction directly with her. The children tended to be rather indifferent to her presence in the classroom" (p.1446). He further states, "the students have not developed the notion, I don't think, that Emily is an integral part of that classroom and, therefore, perhaps after initial stage of asking, 'What happened to Emily?' they would probably just go on with their typical reactions: (p.1465).

10 Dr. Silverman feels that the children's interaction with Emily was modeled after the teacher, and that the teacher did not capitalize on opportunities to interact with Emily. He feels that all modelling reflects to the teacher, and when a teacher has a receptive, accepting attitude, she encourages and demonstrates these qualities to the children in her class and they in turn will adopt them. This he feels is also the basis for peer modelling.

20 Dr. Silverman feels that there should be consistency in terms of stimulation and inclusiveness, between the family environment and other environments. This consistency will promote a positive self-image which contributes to the levels of interest and motivation when confronted with learning tasks.

Dr. Silverman was asked if he was aware that Emily's brothers did not attend the neighbourhood school. He states, "It's not whether you go to the neighbourhood school necessarily. It's whether or not you are seen as different such that you cannot attend a regular classroom in any neighbourhood school" (p.1529).

30 Kathy Vanderheyden

Ms Vanderheyden says that her daughter, Stephanie, was in kindergarten with Emily, and, according to Ms Vanderheyden, "She loved Emily" (Vol.8, p.1360). Ms Vanderheyden describes her children's acceptance of handicapped people, and she relates that

Stephanie cried when told by her mother that Emily might be moved to another school.

Sue Whittaker

Sue Whittaker is an educational assistant with the Brant County Board of Education. She states that she worked with Emily in April 1990 for approximately six weeks and then again from September until the following May at Maple Avenue School.

Ms Whittaker states that Emily was involve in all outings and participated in the various centres within the kindergarten room. She says she feels that Emily was integrated within the class.

Carolyn Jean Williams

Employed by the Lansdowne Centre as a special services at home worker, Ms Williams has worked with Emily Eaton two hours a day, five days a week, since September, 1991. The goals and activities are written by a physiotherapist, an occupational therapist, and a speech therapist. Ms Williams typically works with Emily on feeding skills, grasping skills, walking, standing, kneeling, crawling, sit-ups, balancing, visually attending, signing, turn-taking, and imitating sounds. Ms Williams feels that Emily knows and can distinguish among several colours, and that she has a sense of humour, manifested, for example, in a teasing kind of behaviour.

Bob Williams

Mr. Williams is a Policy Associate of the United Cerebral Policy Association, Government Activities Office, Washington. He recounts his experience of being in segregated self-contained classes during a period of about ten years before he entered mainstreamed classes in high school, adding, "Well, that was when [at age eight to ten years] it started to dawn on me that being different and having a disability somehow made others think less

of me" (Vol.14,p.546). He states, about being in the segregated class, "It ripped me apart and I think still does to this day" (p.547). He asserts, "...I think because of the lack of opportunity to get to know me, many kids used to call me retard and pelt me with stones" (p.549).

10 Mr. Williams says of observing children with disabilities in an inclusionary education setting, "What I have seen is kids like Emily with the same labels being befriended and surrounded by other kids. In these instances communication seems to become easy, free-flowing and natural..." (p.555). He explains that the segregated class placement affected his self-esteem: "...I think I can fairly say those early feelings of inadequacy and inferiority left scars" (p.556). He asserts, "Even as a child in the special class, I knew that my teachers and others held few expectations that I would do anything in life" (p.559).

20 Mr. Williams says he had met Emily for an hour or two the previous day. He says she was interested in what he had to say and in his manual communication board. He outlines his impression of Emily: "She seems like a little girl who is very aware of what is going on around her and seems to make a real physical effort to be social" (p.561). Mr. Williams says that Emily cried when he stated, "I do not think that anyone is nonverbal, because we all use language, and the term has really become a shorthand for saying that somebody has nothing to say" (pp.562&563). He says that Emily cried inconsolably when he suggested to her that her tears resulted from years of having people think she didn't have anything to say.

30 About transferring a child like Emily to a segregated class so that a communication system can be learned, Mr. Williams says that opportunities for communication became greater after he was mainstreamed. Missing for him in the segregated setting were the opportunities, in his words, "...to see communication as the most vital means of exerting choice and control in life" (p.572). He says that a segregated class does not afford opportunities for

greater friendship and peer interaction. He says, "It robs kids with and without disabilities of the opportunity and cause to look past obvious differences in all people and to look for similarities" (p.573). About vocalization he asserts, "...kids need to know not just when to speak, but when and where it is most effective to do so" (p.574). In Mr. Williams' view toileting is not justification for segregated placement, nor is expertise of personnel.

Mr. Williams says he had a typewriter at age six, and he typed a card for his mom when he was around eight.

Cathy Winter

Ms Winter says that her daughter, Sonia, has been in the same class as Emily for the past two to three years, and her three other children also are acquainted with Emily. She says that Sonia and her older sister, Monica, have enjoyed attending two of Emily's birthday parties.

Ms Winter feels positive about her children's exposure to Emily and about the latter's presence in the grade 2-3 class.

Donna Bell

Ms Bell was the educational assistant for Emily Eaton during the school year 1991-92 and for over a month during September and October, 1992. She describes her adaptation of various programs for Emily, and says she saw no indication that Emily knew or recognized numbers, letters, colours, or shapes. The other children in the class were very kind to Emily in Ms Bell's view, and they were encouraged to interact with Emily. Ms Bell says that she did not see any friendships develop with Emily.

Ms Bell recalls one occasion when Emily, as she was crying, made a sound which sounded to Ms Bell like "mama". She describes strategies used for involving Emily in classroom activities, and she affirms that Emily showed improvement in physical development throughout the year. Ms Bell, in describing Emily's role as chip monitor, asserts that she saw Emily make the "eat" sign three or four times, and the "you're welcome" sign once. In response to questions about a videotape of Emily's class (Exhibit R10), she explains that Emily was not placed in the centre of the group of students in order to avoid overstimulation, to promote physical ease of placement and access for toileting, and to allow her proximity to Ms Bell.

Emily's toileting regime prior to and following the parents' request for hourly toileting is outlined by Ms Bell. She describes an occasion in November of Grade 1 when she found it difficult to keep Emily awake or to awaken her after she had fallen asleep.

With reference to Emily's biting, Ms Bell states, "The original incidents of biting that we saw started back in October..." (Vol.11,p.157). "...just after it started...there were a few days where there were instances of biting and then after that they would be sporadic..." (p.158). She describes an incident in which Emily tried to put a brooch she was wearing into her mouth. Ms Bell says, "Some days were worse than others. Literally everything she picked up went into her mouth and other

days, the behaviour was less frequent" (p.159).

Ms Bell elucidates an incident in which Emily vocalized in conjunction with having independently placed her hand on Ms Bell's throat, where she presumably felt vibrations.

10 In September of Grade 2 Emily is described by Ms Bell as having started to make a new sound which was distracting to other students, "...a sound that was very prevalent and happening often..." (p.178). Ms Bell says she would remove Emily from the classroom when she persisted in making this sound, and would return her to the classroom when the vocalization ceased. Such removal might be necessary on a couple of consecutive days, she affirms, followed by a respite of a few days. The maximum period of each removal from the class is said to be five minutes.

Ms Bell says Emily enjoyed working with the joy stick during computer games.

20 During the period from September, 1991 to October, 1992 Ms Bell says, "I saw changes in the relationship of the peers with Emily but not Emily's relationship with them" (p.183). She indicates that a number of Grade 2 students did not wish to be wheel chair monitors, in contrast to the situation in Grade 1, and students were doing more individual work in Grade 2 than in Grade 1.

Ms Bell describes strategies employed to encourage Emily to use more than one sense at a time. With reference to communication, physical needs, and toileting, Ms Bell says she does not feel good about Emily's present school placement, and about a special class placement she states, "I think it would provide a happy setting for Emily" (p.198).

30 Ms Bell agrees that Emily's episodes of crying decreased as the Grade 1 year progressed; likewise the frequency of startle responses. She also agrees that Emily teased her sometimes and that this was a form of communication. She acknowledges that Emily sometimes has a puzzled, questioning look on her face when she is faced by unfamiliar persons or situations.

Ms Bell thinks that Emily had a sense of achievement when she did well, e.g., when she performed well as chip monitor and needed only minimal reminders not to mouth the box. Ms Bell says she accepts that Emily may know her colours as indicated by her parents, but Emily hasn't communicated this to Ms Bell.

Brian Cronkwright

10 Mr. Cronkwright has been the principal of Maple Avenue Public School since September, 1990. He says that throughout that period he has visited Emily's class an average of three times per week.

He describes procedures implemented to ensure Emily was not left unattended when she arrived at school between 8:20 and 8:30 a.m. Mr. Cronkwright explains his consultation with Emily's parents relating to his concerns about Hepatitis B after Emily had bitten him, the teacher, the educational assistant, and another student, and relating to his suggestion that Emily wear slacks to obviate her tendency to mouth various parts of her dresses.

20 Regarding a February 4, 1992, conference report, Mr. Cronkwright denies any punitive intent and asserts he instructed the teacher and the educational assistant in the Grade 1 classroom to record their observations of Emily exactly. He describes a team effort by all the staff of Maple Avenue School to try to integrate Emily successfully. Although he recommended Emily's Grade 1 placement, he admits he had concerns about her fatigue in a full-time program and about her potential success with the gradually increasing independence required of students as they move beyond kindergarten. He explains that problems and activities become increasingly complex through grades 1 to 3.

30 Mr. Cronkwright observes that other students engage in decreasing interaction with Emily because they do not receive any response from her. He expresses concern about a reversal in her social growth under these conditions.

10 Mr. Cronkwright asserts that although he has not seen Emily signing, he sees her communicating through reaching gestures, smiling, and crying. He says he has not observed imitative behaviour by Emily, nor evidence that she is learning by modelling. He affirms that she has shown growth in gross/fine motor areas, but states that school personnel are unable to assess Emily academically. He expresses the opinion that a special class placement would best meet Emily's needs, which he specifies as gross/fine motor development and a communication system. Emily would be happier in a special class, Mr. Cronkwright feels. He expresses apprehension about her placement in a Grade 3 class because of her loud vocalizations, her crying, and her sleeping.

20 — Mr. Cronkwright says that he never taught for a school board which had an inclusive policy, but that he has taught exceptional pupils in regular classes. He describes his pattern of visiting classes, the team approach used by his staff, and the typical activity groups in the classrooms. He denies having been apprehensive about Emily's placement in the school when he became principal there, and he clarifies his view about the role of the parents, the role of personnel from the Lansdowne Centre, and the role of personnel from the Special Education Department, in the functioning of the team approach at Maple Avenue School. Mr. Cronkwright acknowledges that he did not consult with personnel of a school board having an inclusive education policy regarding Emily's I.P.P.

30 Regarding the role of the educational assistant, Mr. Cronkwright says she is not the person primarily responsible for Emily, but she is primarily responsible for interaction and communication links. He states that all of Emily's teachers have interacted with her.

With reference again to a conference report dated February 4, 1992, Mr. Cronkwright repeatedly points out the inability of school personnel to assess Emily's receptive

10 language, comprehension, academic development, and rationale for various behaviours; and he acknowledges the record of two occasions when Emily was observed in the school to be making a sign, one for "welcome" and one which was an approximation for "eat". He acknowledges a consensus among school staff that Emily's needs would be better met in a special education class. There, he states, "...they would be able to use the expertise, support and materials and equipment they have to make more progress on her needs hopefully" (Vol.9,p.1713). He feels that Emily would be happier in a special education class, asserting, "Our observations indicate to us that she is less happy this year than last year and less happy last year than she was the year before..." (p.1715).

Jackie Ireland

20 Ms Ireland is a Superintendent of Education for the Brant County Board of Education. She explains STEP, the congregation of special classes in designated schools instead of establishing special classes in neighbourhood schools: structure, time, encouragement and praise, and the opportunity for practice. The Board's philosophy regarding inclusion of exceptional students, Ms Ireland explains, is "...integration where possible. Hence, there is support, total support for a continuum of services" (Vol.13,p.356). If all the students from special education classes were integrated, Ms Ireland asserts, "The costs would escalate out of sight" (p.359).

30 Ms Ireland indicates she was present for all the IPRC meetings concerning Emily Eaton except the annual review in 1991. Regarding Emily's placement in kindergarten at Maple Avenue School she explains, "...I felt...Emily's...needs would best be met at Jane Laycock School. However, Mr. and Mrs. Eaton made an impassioned plea... So, we did go along with the parents' wishes, but it was not the IPRC's recommendation. It was an agreement" (p.363).

About the 1992 determination of the IPRC that Emily be placed in a special class, Ms Ireland says, "I felt that the priority was to develop a communication system" (p.371). She identifies Emily's other needs as physical and social. Ms Ireland says that she suggested in a September 3, 1992 letter to Mr. and Mrs. Eaton a modified school day, because, she asserts, "Emily's needs were not being met... She was losing a fair amount of time sleeping...perhaps she could rest the other half of the day...it would reduce the need for a full-time educational assistant..." (p.373).

Ms Ireland describes the renovated classes for multihandicapped students, where the teacher/pupil ratio is one/six. She states that the special class students are integrated with regular students through a buddy system and through inclusion in school activities and in regular classrooms. She explains that Emily's transportation to such a class in Prince Charles School would be direct and would take about twenty minutes.

Ms Ireland acknowledges that while exceptional students are not labelled as such, there are labels on the classes they attend, e.g., developmentally delayed, developmentally handicapped, developmentally challenged. She says she has met Emily Eaton only once. She asserts she was present for about a half hour while Donna Bell and Emily were watching a video.

Of several schools having special classes which Ms Ireland considers suitable for Emily, she says she prefers Prince Charles because staff there have had experience in some of the methods of communication advised through such centres as Hugh McMillan. She describes most of the students in the special classes at Prince Charles School as multihandicapped. Ms Ireland believes Emily to be developmentally delayed, but she acknowledges that she doesn't know for sure because Emily can't communicate. She expresses disagreement with expert witnesses who state the opinion that Emily's lack of a communication system

is not an impediment to her integration into a regular class. She indicates that the Board had never, before Emily, integrated into a regular classroom a student who was multihandicapped and non verbal, and that she does not know of anyone within the Board who has experience doing that.

Ms Ireland explains that she has responsibility for the Paris family of schools, not Burford; however, she has responsibility for Special Services and the IPRC process. Emily is in the Burford family of schools.

10 Ms Ireland does not agree that the Board never requested from the Eatons medical information about Emily. She asserts that Dr. Lock, Emily's family doctor, did not say anything as a witness that would assist with educational programming.

Ms Ireland agrees that by August, 1992 the options offered for Emily by the Board were Maple Avenue School half time or Prince Charles full time. She thinks there would be more opportunity for Emily to communicate and to socialize in the special class setting at Prince Charles School than in the regular classroom at Maple Avenue School. At Prince Charles, in 20 Ms Ireland's view, Emily's vocalizing would not disturb other students as in a regular class, and personnel could capitalize on the vocalization to get some two-way communication going. She states that no multihandicapped students from the special education class at Prince Charles School have moved into a regular placement.

Ms Ireland says that the Board never discussed with the Eatons the principle of maintaining a regular class enrolment for Emily with the possibility of extensive withdrawal for compelling reasons.

30 Audrey Lottridge

Ms Lottridge teaches the grade 2-3 class in which Emily is enrolled. She explains that she operates a design and technology program, which involves computers and manipulatives: saws, hand

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drills, screwdrivers, awls, woodworking tools. Ms Lottridge outlines the variety of grade/group instruction/activity in her classroom.

She explains that the principal advised her and the educational assistant to record positive things about Emily in the communication book, and to deal with negative issues through the principal. Such issues are recorded in an observation book.

Ms Lottridge describes the modification of the Grade 2 program for Emily, e.g., use of tactile material and provision of multisensory stimulation. She states that she rotates around the room to speak to individual children, including Emily, and she explains, "I don't sit down and specifically work with Emily without Diane [the educational assistant] being present" (Vol.14,p.598).

About Emily's vocalizations Ms Lottridge says they vary from low sounds which do not disturb the other children in their activities, to loud crying or distracting sounds which are disturbing. She observes that lately Emily tries to sleep first thing in the morning, is revived by a walk in the hall, and again tries to sleep as soon as she is back at her desk in the classroom. Emily consistently enjoys physical activities and music according to Ms Lottridge.

She says of the other students in the classroom, "They're very careful and considerate of Emily, but I don't find they interact with her as a peer" (p.605).

Emily is described as having made physical progress in the grade 2-3 classroom, but not academic or social progress. Ms Lottridge feels that the regular class placement does not meet Emily's needs. Ms Lottridge says the necessity of removing Emily from class because of her vocalizations, and Emily's tendency to sleep or try to sleep at her desk, are of concern to her. She feels that a special class placement would have a positive impact on Emily because of the smaller number of students, the opportunity for less restricted vocalization, and the access to

physical activities within the classroom.

In Ms Lottridge's class there are two other pupils besides Emily identified as exceptional. She explains how she attempts to modify the program for individual students, and she estimates her planning time to be 10 to 12 hours per week. Ms Lottridge and the educational assistant often consult on modifications for Emily during recesses or spontaneously as required. She indicates that she and the educational assistant have not tried changing roles, the teacher working one-on-one with Emily and the educational assistant working with the rest of the class.

Ms Lottridge says that Emily enjoys sitting in the big chair in the hall. She is more alert to taped stories heard through earphones than to stories read by Ms Lottridge. She observes, "Mrs. Williams [the educational assistant] is wonderful with Emily. She loves her dearly, and she treats her with that same feeling" (p.645). She says that she and the educational assistant made the decision about how to work with Emily, and while Ms Lottridge may have consulted with Mr. Boyd, the learning resource teacher, she did not consult a psychologist or other special education consultants, nor did she visit a school board having an inclusionary policy.

Ms Lottridge acknowledges her inability to assess Emily academically. She says she doesn't know whether Emily should be learning academic things, that she wants to sleep frequently and cries or vocalizes in the academic setting of the regular classroom. Ms Lottridge states that on the basis of her teaching experience she imagines a special class would be a better setting for Emily. She acknowledges that she has not taught a special class and has not observed a special class of physically challenged students.

In Ms Lottridge's opinion, Emily needs easy access to the opportunity for physical activity and she needs a setting where her vocalization can be encouraged. She says she reached independently the conclusion that Emily's needs would be better

met in a special class, but she discussed the decision with many people. She acknowledges having been aware before Emily's placement in her class that the School Board had made a decision to place Emily in a special class.

Ms Lottridge expresses the opinion that if Emily were left unattended she would probably fall asleep or mouth articles within her reach.

June Piggott

10 Mrs. Piggott has been a primary teacher for thirty-two years and was Emily's Grade 1 teacher. She states, "I team teach with another Grade 1 teacher. We plan activities together that involve cooperative learning and child-centred learning. We try to plan activities which will address different learning styles and also that will address the whole child... I've taught children with learning disabilities. I've taught children with physical disabilities. I had another child with cerebral palsy, a child with Down Syndrome. I've had hard of hearing children. I had a hydrocephalic [child] that had a shunt. I currently have
20 a child with cleft palate and a child who has alopecia (Vol.10, pp.1745&1746).

While discussing the other pupil with cerebral palsy she says, "I was able to assess the strengths and needs and plan a program and to administer the program and then I was able to assess the growth that had taken place" (p.1748).

30 Mrs. Piggott discusses the Individual Program Plan of December 1991 saying she had more input with it than the previous one. She states, "One of the difficulties was consistent involvement in a modified Grade 1 program. I found that in the modified program usually you're modifying your language and math to meet the child's, at the child's level. So, we worked with the parents at the December 6th meeting and came up with the word 'differentiated' and it allowed Emily to be doing a language activity that would meet her needs" (p.1752). During cross

examination Mrs. Piggott agrees that differentiated was meant to mean parallel program (Vol.11,p.39).

Mrs. Piggott states that throughout the year she utilized board resources like the "learning resource teacher, my vice-principal, the principal and special services" (Vol.10,p.1752). With regard to her understanding of what the parents wanted for Emily she testifies "...they wanted Emily integrated into the room and to be exposed to all the academic areas and that we would try to use her occupational goals as best we could" (p.1752).

Mrs. Piggott testifies that in her class the educational assistant "...was responsible for the physical needs of Emily. She prompted Emily. She intervened for Emily. She worked with me to adapt activities. She sometimes helped in the planning of activities" (p.1753).

Mrs. Piggott was asked about the amount of time she spent working on Emily's integration into the classroom, on Emily's program or issues surrounding Emily. She replies that compared with any other individual student, she spent a great deal more time.

She further testifies she spent no one-on-one time with Emily "because her academic needs were very different than the other children" (p.1757). The nature of her interactions with Emily included "...oral language input and more or less a social context...maybe an event...written in her communication book...something that was happening at the school" (pp.1757&1758). Mrs. Piggott states Emily was her responsibility and "We tried to include Emily in everything" (p.1760).

During examination in-chief Mrs. Piggott comments on an assessment for Emily for the IPRC. in the spring of 1992. When asked to comment on no accurate way to assessing her level of contentment and the difficulty in attaching a reason to observed behaviour, Mrs. Piggott testifies, "What I observed in the class was sometimes she would laugh and I could not find any

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reason why she would be laughing at that particular time or she would cry and I wouldn't know why she cried at that particular time and I could see no connection between the times that she did things" (pp.1761&1762).

Mrs. Piggott comments on Emily's signing saying, "You have to be very knowledgeable of Emily's approximations to signs in order to see her signs" (p.1765). She feels that given the size of her class she was not able to spend the amount of time with Emily necessary to gain that kind of knowledge.

10 When questioned about her concern that Emily might choke if she put some of the small supply materials from the classroom into her mouth Mrs. Piggott says the parents "didn't feel that was a problem...she only swallowed food" (p.1771). This did not allay her concerns because she felt she "...was ultimately responsible for Emily while she was in my class" (p.1771).

With regard to integration and interaction with peers Mrs. Piggott testifies "...[the children] would like to dress her up in the scarves and some clothing. Then they would treat her like a much younger child than they were" (p.1777). Mrs. Piggott further testifies "...[during] cooperative learning groups [when] it would come to Emily's turn they expected Mrs. Bell to respond... It seemed the ones that needed a little extra help knew that and they would go ask Emily to be their partner" (pp.1777&1779).

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30 When questioned about socialization, and if Emily seemed to have friends, Mrs. Piggott states, "She had children who treated her kindly and friendly" (p.1790). During cross, when asked if Emily paid more attention to the other children in the class by the end of the year Mrs. Piggott testifies, "I didn't find that she socialized more with the other children" (Vol.11,p.69). During Tribunal questioning when asked about the amount of time the other children in the class spent with Emily Mrs. Piggott says, "in September...they would spend more time with Emily. In the classroom, if...everybody had to have a partner, they would

choose Emily, but...she would be one of the last ones chosen:
(p.109).

When asked if she observed any academic progress, any indication that Emily was imitating or modelling the behaviours of her peers, any indication that Emily was benefitting from instruction in the regular class, Mrs. Piggott replies "no".

During cross examination when asked about the basic teaching method she uses, she states, "Any child should learn well, but it doesn't necessarily mean that the child will learn well" (Vol.10,p.1811). When questioned about making special provisions for Emily Mrs. Piggott testifies, "I would discuss with my team partner and we would prepare activities that we thought Emily would be able to participate most in...things that would be very, very difficult for her to do then we would adapt...the ones that she wasn't able to do...we would get alternatives for Emily to do right within the group with the children" (p.1814). Mrs. Piggott says planning was done before and after school and during recess.

John Shurvin

John Shurvin states that he has been with the Brant County Board of Education for eight years since September 1988. During this time he has taught in a special class setting at Prince Charles School.

Mr. Shurvin says the special classroom is a double room which currently houses twelve students whose age range is six to eighteen or nineteen years. Some of these students may be proceeding to a high school program. The nature of the disabilities in the classroom involves an intellectual and physical component, presently all students are nonambulatory and have very limited verbal skills.

He explains that the types of programs are multi-sensory, and focus on the child's skills and level of functioning. They include thematic units, self-help, feeding, communication encompassing cognitive development, community awareness and

choice making.

Mr. Shurvin says the special class is integrated with the regular classes through morning circle and a buddy system which may include hand-over-hand art activities, music, reading, outings such as walks and recess, special activities like assemblies, mini olympics, interactive games, including rolling balls and playing catch.

10 Mr. Shurvin says he viewed the video tapes of Emily (exhibits A1 & R10) and would not make an assumption of her cognitive potential but feels she would do well in his class and he would "look forward to having her in my class and working with her and finding out her potential and trying to realize it" (p.929).

20 Mr. Shurvin says each day basically runs from 9:00 a.m. to 3:00 p.m. beginning with a music circle for approximately half an hour. The children then work on their physio, occupational, gross motor and fine motor goals along with a rotation of computer, switch plate and/or tape recorder tasks. He says that work on thematic units occurs either in the morning or afternoon, depending on time allotment.

When asked during cross about Emily's intellectual abilities Mr. Shurvin states, "I would say that they're not being expressed in what I see, whether there's a potential there, I can't tell from what I've seen. The children in my class can have a potential much higher than what they express and that would be my comment that the children in my class may have a tremendous ability, a tremendous potential. It's that it's not being used and that's our focus, is to develop" (p.933).

30 Jeffers Toby

Dr. Toby testifies that he has been employed with the Brant County Board of Education since 1984. He visited the class to observe Emily eight times for a total of eight and a half hours. He visited twice when Emily was in Grade 1 for a total of two

hours and six times in Grade 2 for a total of six and a half hours.

Dr. Toby noticed that what appeared to be fatigue was exhibited by Emily in the morning as well as the afternoon. He says during one observation period distracting vocalizations decreased/stopped when Emily was removed from the class and increased in volume and pitch when she was returned. He states the class instruction at this time was interrupted and could not begin again until Emily was removed for the duration. He says the vocalizations sounded like there was some distress.

Dr. Toby noticed that during a lesson involving cooperative efforts between students in terms of goal completion the other children tended to interact with the educational assistant rather than go to Emily. He says during one observation session the educational assistant continuously stimulated Emily verbally and physically in an effort to get Emily to attend, which she did for only seconds to minutes. Emily was observed participating in a music period but this type of attending and participation was not noticed during sessions like reading, writing and environment studies.

Dr. Toby testifies that while observing Emily he saw no indication of imitative behaviours, modelling behaviours, general understanding of what was going on in the classroom on Emily's part. He feels that a person must understand the why of a behaviour before he will imitate it.

Dr. Toby feels that Emily would fall into the sensory motor stage of Piaget's theory of Development although, during cross, he agrees that this is difficult to determine because of the physical involvement and limited verbal skills that Emily possesses. He says this stage involves the individual identifying what kinds of motoric behaviours bring you pleasure and how your body works. He feels that a regular class placement does not reinforce these types of behaviours since certain behaviours must be stifled thus reducing the chance of imprinting

brought on by repetition of the behaviour. This repetition is often too distracting to the class to be allowed, therefore, the level of reinforcement necessary to shape a behaviour could not occur in a regular class. He also feels, the amount of stimulation in terms of pictures et cetera displayed in the classroom should be geared towards the individual. Dr. Toby feels too much can be as detrimental as too little.

10 Dr. Toby states that a major concern when dealing with children "...is academic or intellectual competence... In a regular class you appear to be competing with regular students in the stage where the individual cannot win...[whereas]...if you're competing on the stage where your program is so individualized, everything around you is geared towards you...the probability of achieving a higher level becomes easier and much quicker (Vol.13,p.530).

20 Dr. Toby feels that there could be integration to the class as well as from the class to other classes thus eliminating an either/or situation. He says by eliminating an either/or situation you create a continuum type situation where you can deal with the people who fall outside of the inclusionary concept of education.

Dr. Toby states that he hates to recommend a child for special classes but he looks at whether or not they will be lost in a regular class setting, does the special class have the materials, personnel, time and patience to deal with the particular child and, whether or not more damage will be done especially in the area of self-esteem should the child remain in a regular class.

30 During cross examination, when asked about Emily's level of integration Dr. Toby states, "I think the Grade 1 class is an extension of your kindergarten class and for the kids that are going into kindergarten, it's more a play atmosphere, blocks and colours and water and sand and all that kind of stuff. Most kids seem to do fairly well with that kind of material, hands on type

of...material assessment (p.809).

When he visited the class he was concerned about the physical problems with regard to space and wheelchair mobility, later the negative affects of over stimulation. During cross Dr. Toby states that there was no direct discussion between himself and Mr. and Mrs. Eaton regarding placement of Emily. During cross when asked whether or not he felt the teacher could at times spend one-on-one time with Emily while the educational assistant circulated within the room Dr. Toby says he has seen it work in other situations but that he had never seen it tried with Emily.

During cross Dr. Toby states that there was considerable patience and time given to Emily in the regular class, however the quality of time becomes a factor when it cannot be, due to the class structure, spent reinforcing individual goals. He feels that the necessary materials seemed to be available in the regular class.

Dr. Toby states that based on his many conversations with Mrs. Ireland, Mr. Cronkwright and the classroom teacher all possibilities had been expended and the regular class placement was not working.

Diane Williams

Diane Williams is employed as an educational assistant with the Brant County Board of Education. Her role is to, in her words, "Under the supervision of the principal and Mrs. Lottridge, I work exclusively with Emily one-on-one at all activities" (Vol.14,p.686).

Mrs. Williams kept a communication book in which she "would write back and forth to Mr. and Mrs. Eaton on a daily basis all the activities Emily and I did together in the classroom" (p.676). She also kept another book. When asked she states, "I was told only to report to the parents what went on in the classroom that day and that they were well aware that Emily did

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sleep and did excessive mouthing and vocalizing in the classroom and there was no need to report that and the only time I did report that, the sleeping or the excessive mouthing or the vocalization, is if we in the classroom, Mrs. Lottridge and I, felt that maybe Emily was ill" (p.685). During cross, Ms Williams, when asked if only negative went into the book, states, "I was to record the sleeping and crying and excessive mouthing, things that mom and dad were aware that Emily does and don't need to be repeated day after day after day after day" (p.714).

Ms Williams says that she worked with the classroom teacher to adapt the curriculum and together "...[we] decide...what materials we could use to best suit Emily, a lot of tactile materials" (p.688).

Diane Williams says that Emily's program included number recognition from one to five, shapes, and rote counting from one to five. She further states that she used "lots and lots of tactile materials" (p.689). When asked whether she felt Emily recognized any one of the numbers one through five, geometric shapes, and colours, Ms Williams replies "no".

Ms Williams states that during language arts she was working on letter recognition with Emily. "I was working on the letters of her name" (p.692). When asked if she had any sense that Emily is recognizing any letters, she replies "no".

With regard to socialization Ms Williams states, "[Mrs. Lottridge and I] make sure that Emily is put in a group. Basically making sure that she's in the group and that the children know that she is a part of their group... There's little interaction. They tend to ask me questions and not really interact with Emily in the group...[I say]...I'm not part of this group. I'm here for Emily. Emily is your group member" (p.693). During cross Ms Williams states "I wanted them to ask the questions to Emily, whatever questions that they had or, you know, I wanted them to interact with her" (Vol.15,p.761).

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Ms Williams says kindergarten children sometimes interact with Emily at recess but no one from her class on a regular basis. During cross when questioned about a get well card Ms Williams agrees that the children of the class had some understanding of Emily and what she enjoyed.

When asked if she observed any social development on Emily's part over the year or any indication that Emily is imitating or modelling the behaviour of her peers she replies "no".

10 In terms of Emily's sleeping, Ms Williams testifies, "We have found that she's sleeping more now than she did in the beginning. We find that she's - sometimes she comes and she's very, very tired and right after chip duty, if I put her at her desk, sometimes she starts to nod off right then. To the best of my ability in the afternoon she begins to get very tired again... Sometimes just by rubbing her cheek and saying 'Wake up. Em. Wake up Em.' she'll wake up for me. Sometimes I find if I loosen her top buckle or belt around her chest and just stir her a bit, that we wake her up. Sometimes I have to physically remove her and take her out and have a walk. That will do it. 20 Sometimes if we just change activities, she'll wake up... Sometimes I continue to work with her hand-over-hand when she is sleeping and sometimes if I feel she's extremely tired and needs the sleep, I'll let her sleep and I'll sit beside her" (Vol.14, pp.597&698).

When asked about types of vocalizations Ms Williams states, "Just a soft murmur, like a humming. Sometimes it's a little bit louder than a hum and sometimes it's a very loud noise... I take her out of the classroom when it's disrupting the other students... Sometimes it could be five minutes, sometimes it could be a little bit longer, ten, fifteen minutes...just before a b.m. she becomes very vocal" (pp.699&700).

30 Ms Williams says she has not seen Emily sign independently.

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Toileting takes approximately ten to fifteen minutes each
try and Emily is toileted hourly on the half hour. Ms Williams
feels there has been no progress in this area. She feels that
there has been improvement in Emily's physical development.
During cross, when questioned about other people seeing
Emily independently press a button on the computer, Ms Williams
agrees it would surprise her "Because I haven't seen it happen
and I'm with her every single day... I believe that if she could
do it, I would have seen it by now and if somebody else says they
have seen her do it, they have seen her do it. I only know what
I see" (Vol.15, p.721).

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During cross Ms Williams states, "I don't know if Emily was
enjoying what was being said or Emily was enjoying the sounds
that were going on in the tape, the airplane and all the other
noises that go on. I don't know if she was enjoying that, the
pitch of the voice of the man that was speaking. I don't know
which one she was enjoying" (p.723).
During cross, a skating party is discussed where Ms Williams
comments that Emily enjoyed watching the other children. She
says, "her eyes were going around watching...she's staying awake,
she's alert, she's happy" (pp.729-730).

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During cross, when questioned about providing the
opportunity for Emily to do things independently Ms Williams
testifies, "I will do it first and then do it hand-over-hand with
Emily and then ask Emily to do it for me... She'll go sometimes
for the object, not always. I always end up doing it
hand-over-hand with her... I don't know exactly how long I wait
for her to do it before I help" (p.744).

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During cross, when Ms Williams was presented various
instances of teasing behaviour on Emily's part, she testifies she
has never seen this type of behaviour displayed by Emily.
Ms Williams testifies she would do physical things as well as
verbal with Emily in an attempt to elicit a response. However,
she does agree that Emily responded only when the verbal cue was

presented with regard to going on a walk.

During cross, Ms Williams agrees that Emily enjoys "being outside...physical activity...music and tape(s) stories" (p.762). She says "I'd say that was what she liked to do at school" (p.762).

10 During cross, Ms Williams was asked about the purpose of doing hand-over-hand when Emily was asleep, and she replies, "Because sometimes she'll just nod off for a few minutes and start back and be back, you know, be conscious again, so that's why I sometimes keep doing it, in case she does wake up" (p.768).

During re-examination, Ms Williams was asked about a visit from the speech pathologist who testified earlier that Emily was able to name the parts of a doll, pick out colours and was successful with choice making, for example, a ball or a shoe. Ms Williams testifies that Emily was not able to indicate the body parts and was inconsistent with choice making (pp.778&779).

Decision

The Tribunal unanimously denies the request of the appellants and affirms the determination of the IPRC of 24 February 1992.

Basis For Decision

10 The principal issue in this decision is whether Emily Eaton's special needs can be met best in a regular class or in a special class. Bearing upon this principal issue are several immediately relevant, significant, and interdependent considerations: the wishes of Emily's parents; the empirical evidence available from Emily's three school years in a regular classroom setting; the evidence available from the literature on placement; the testimony of individuals presented as experts in the matter of classroom placement; the effect of the Ontario Ministry of Education and Training's proposed directions in regard to integration of exceptional pupils; and the impact of the Charter of Rights and Freedoms and the Ontario Human Rights Code and related case law. We address these matters separately below.

Emily Eaton's Needs

30 Like those of any other unique person, Emily's needs are specific, and like those of any other person, those needs arise out of her physical, intellectual, and emotional makeup. Because *Emily is clearly exceptional her needs are special, and in school, they can only be met in a manner that is qualitatively and quantitatively different from the way in which the needs of the vast majority of students are met. By itself, the fact that Emily has different needs does not, ipso facto, call for special class placement. What distinguishes her, and provokes consideration of special placement, is the nature and extent of her particular needs.

Intellectual and Academic Needs:

The Tribunal received no convincing evidence that Emily responds to the type of curriculum and instruction typical for children at her age level. On the contrary, the weight of evidence strongly suggests that Emily has not assimilated, throughout three years in regular classes, even a fraction of the learning which she is said to have mastered in the more intimate and less anonymous environment of her home and family. In fact we received considerable evidence that, viewed with objectivity, and notwithstanding her communication needs, suggests she has a profound learning deficit. Despite the contention of the appellants that Emily's intellectual ability is undetermined and unspecified, it is unrealistic in our opinion and, we believe, a disservice to Emily to discount the extensive empirical evidence that points to a profound intellectual handicap.

From evidence and testimony it is clear that what Emily may be learning in school, and what she may be expected to learn, is not remotely similar to that which is being learned by her age-level peers. There is a wide and significant intellectual and academic gap between her and her peers. This is readily apparent from evidence and testimony of the school personnel who have been responsible for Emily's education.

The testimony offered by witnesses presented as experts, is that Emily requires a "parallel curriculum" in the regular classroom setting, one adapted to her uniquely different needs. The Tribunal is familiar with the concept of "parallel curriculum" and has immediate, hands-on experience with its implementation. Experience demonstrates that in practice, "parallel curriculum" benefits the receiver when it is realistically parallel. But when a curriculum is so adapted and modified for an individual that the similarity the parallelism is objectively unidentifiable, the adaptation becomes mere artifice and serves only to isolate the student.

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In Emily's case, it is clear from evidence and testimony that a "parallel" learning program specifically designed to meet her intellectual needs, isolates her in a dis-serving and potentially insidious way.

It is the unanimous opinion of the Tribunal therefore, that Emily's intellectual and academic needs cannot be met best, if indeed they can be met at all, in a regular class.

Communication Needs:

10 It is clear from evidence and testimony that although Emily vocalizes, she does not appear to be developing the kinds of expressive skills that could be construed as a foundation for oral communication. Also, the evidence is very strong that Emily's comprehension of speech is extremely limited. It appears therefore, based on the evidence presently available, that Emily will not be able to use oral speech as a principal means of communication.

20 Carol Eaton testifies that Emily uses and comprehends a small number of manual signs. She also testifies that Emily rarely repeats signs, and that she often presents them quickly and idiosyncratically. Carol Eaton and the educational assistants, Diane Williams and Donna Bell, testify that to learn sign, Emily needs repetitive, hand-over-hand instruction; they testify further that this practice has indeed been followed with Emily for several years. Nevertheless the testimony of the teachers and educational assistants is that they have very rarely, if ever, seen her use sign spontaneously, or at least in a manner that adults versed in sign can interpret. Based on this testimony, the Tribunal concludes there is reasonable doubt that Emily will be able to use sign meaningfully.

30 We also have testimony that Emily may one day communicate with assistive technology, e.g., an electronic, computerized device, custom-designed to the needs and abilities of an individual. Whether such a device is currently available to meet

Emily's unique needs, or whether one can be designed for her, or whether Emily will ever be able to use such a device, is unknown and unpredictable.

Appellant witness, Robert Williams, an adult male with cerebral palsy whose limbs are fully involved, and who is non-verbal, testifies (by means of assistive technology) that once he was able to communicate, he was also able to demonstrate his abilities, and people around him then modified their view of what he could accomplish. He also testifies that he was placed in a special setting for his elementary schooling and that what was "missing in the segregated setting for me and the others were the easy, natural opportunities, not just to communicate, but to see communication as the most vital means of exerting choice and control in life." (Vol.XIV,p.572)

While this witness's personal situation is a persuasive example of the potential benefits of assistive technology, and while we have his assessment of the benefits of integration, we have no evidence that simply because, like him, Emily has cerebral palsy and is non-verbal, she will have her communication needs met in the way that he did. From Robert Williams' evidence describing his childhood, the point at which comparison with Emily is most meaningful, it is clear that his strengths at that time were significantly different from hers.

Given the evidence we have and do not have it is the Tribunal's unanimous opinion that Emily's need to communicate is going to be met only with very individualized, highly specialized, extremely intense, one-on-one instruction. Because this need is of such over-riding importance for Emily, it makes sense to address it, at least initially, and until she demonstrates some minimal competence, in a setting where there will be maximum opportunity for such instruction.

Emotional and Social Needs:

In assessing the extent to which these very important human needs can be met for Emily in the regular classroom, the Tribunal pays particular heed to the testimony of the parents, and of the teachers and educational assistants.

10 The testimony of the parents is that Emily responds well to her peers and is happy among them. In Exhibit A-2, a videotape presentation of Emily's birthday party in February, 1993, the parents point to examples of her response and involvement when surrounded by age peers. Although parents are frequently very subjective in assessments of their own children, family intimacy may enable them to identify behaviours in their children that strangers may not see. Nevertheless, despite several viewings of the videotape by the Tribunal, and despite granting the parents full benefit of the doubt, we are unable, separately and in concert, to detect the nature and depth of response in Emily, that they describe. We believe that if the videotape is viewed and assessed with reasoned objectivity, the contents illustrate
20 Emily's spontaneous response to her father, but very minimal reactions to others, both peers and adults, and then only when prompted.

30 The testimony of Emily's teachers and educational assistants is that generally, her classmates tend not to involve themselves with her in class or at play. The contents of a videotape (Exhibit R-10) showing Emily's Grade 1 class in three different activities, illustrates that during these times there was very limited interaction between Emily and her classmates, especially compared to the interaction of the classmates among one another. The evidence of appellant witness, Harry Silverman, is that the children [in Emily's Grade 2 classroom] "have not developed the notion, ...that Emily is an integral part of the classroom." (Vol. VIII, p.1465) In further testimony, he offers the opinion that this indifference is possibly a consequence of the teacher's

not pro-actively involving Emily. However, this witness saw only one class for a period of about two and one-half hours, and in our opinion therefore, would not be competent to make such a judgement. Further, the Tribunal notes that Emily had been a classmate of many of that group of children for almost three years by that point, and if a pattern of natural interaction were going to develop, it is our view that it would have developed by this time, with or without the teacher's intervention.

10 The Tribunal notes that although the empirical evidence is that there is limited, if any, interaction between Emily and her classmates, it may be possible that some of her social and emotional needs are nevertheless being met. Because she does not communicate effectively, it is conceivable that she is enjoying the experience and cannot tell us. However, her classroom behaviours—the increasing incidents of crying, sleeping and vocalization—suggest that this is not the case. There appears to be little if any, social interaction between Emily and her peers in the regular class.

Physical and Personal Safety Needs:

20 There is extensive testimony from both appellant and respondent witnesses that while Emily's physical abilities when walking, sitting, standing, focusing, and using her hands in purposeful activity, have improved, these abilities are significantly less well-developed than the norm for her age. However, Emily's physical abilities by themselves ought not to be the deciding factor in evaluating whether her needs can be met best in a regular or special class. Although her need for a wheelchair, a walker, and a special desk, as well as physical assistance, together require much extra time and attention from the responsible adults in a classroom setting, 30 it is not unreasonable to expect this of them, even though a special classroom may be better designed and equipped to address special physical needs.

What is unreasonable, in our opinion, is to treat lightly, Emily's habit of mouthing objects. This habit is attested to by both appellant and respondent witnesses as consistent and well-established. The Tribunal notes that some of the objects mouthed may be relatively innocuous in small amounts (e.g., sand, paper) but we have evidence that Emily also mouths potentially harmful objects (e.g., pins).

10 The parents assert that they are not distressed by this habit in Emily, and that they are confident she will not swallow harmful objects. However, a home setting that is adjusted to a child with pervasive muscular dysfunction, and idiosyncratic communication abilities, and who regularly mouths objects, is significantly different from a regular classroom setting. It is unreasonable to expect Emily's age-peer classmates to manage their classroom materials with her mouthing habit in mind. It is also unreasonable to expect a school to treat Emily as though she will never swallow something potentially dangerous. Therefore the school has a choice of establishing a level of adult supervision of Emily that is more intense than mere watchfulness, or, of cleansing the classroom of mouthable materials. It is the Tribunal's unanimous opinion that for Emily's personal safety, one of these conditions must prevail, and neither condition can reasonably be realized in a normal, integrated, regular classroom.

Emily's Experience In The Regular Classroom Setting

30 The Tribunal regards as fundamental to its decision, the fact that Emily has spent more than three school years in a regular class, with many of the same classmates for that period of time. Our unanimous opinion is that the evidence and testimony indicate strongly, that this placement has not been successful for her.

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Emily's presence. Nevertheless, for integration of an exceptional child to be meaningful and fulfilling, the child must not be just physically placed in a regular classroom, but must be intellectually, socially, and emotionally involved. He or she must be accepted naturally as a regular member of the class despite a need for special support and consideration.

Integration can be given momentum by adult intervention, but at some point over a reasonable amount of time, it must of itself, grow past artifice and manipulation. There must be regular, natural, spontaneous interaction between the exceptional child and the class. We have no convincing, objective evidence or testimony that over three years, any of this has developed for either Emily or her classmates.

Thus, while the Tribunal agrees with appellants' counsel that there is "clear evidence of benefits from integration, the value of integration psychologically for children with disabilities..." (p.64) we do not agree that, from evidence and testimony, there is indication of benefits in Emily's case. In fact, the testimony describing Emily's three years in a regular classroom indicates that the nature and extent of immediate adult intervention and care essential to meet her profound intellectual, physical and emotional needs even minimally, has the counter-productive effect of isolating her, of segregating her in the theoretically integrated setting. In the opinion of the Tribunal this is a far more insidious outcome than would obtain in a special class.

The Wishes Of The Parents

The Tribunal notes the submission of appellants' counsel that the parents' "decisions in regard to Emily were carefully thought out and reasoned and based on an over-all philosophy." (29 July 1993, p.10) We note the contents of Exhibit A-6, a summary of the parents' reasoning and philosophy submitted to the IPRC of February 1992. As well, we note the testimony of both

parents, wherein they express their wishes regarding Emily's placement, particularly that they wish her to be placed in a regular class in the neighbourhood school because, in their opinion, it is here where their hopes for Emily will be fulfilled.

While we accept that the Eaton family has reflected on Emily's situation at great length, in considering the parents' wishes regarding her schooling and evaluating their testimony on the matter, we are struck by what appears to be an inordinate amount of inconsistency and contradiction.

10 For example, the parents state that they want Emily to attend Maple Avenue School because of the benefits that will accrue to her being in her neighbourhood. Yet Emily is not enrolled in any community activities in the neighbourhood (Burford) area. Her three brothers do not attend the neighbourhood school, and Emily herself was initially enrolled, at the parents' choice, in Dufferin School in Brantford. In Exhibit A-39 (Communication Book 3) the parents write that for Hallowe'en, the family "go(es) out trick or treating, usually in Cambridge where my parents live in a nice lengthy street as it's
20 no fun driving from place to place in the country__esp. when we know so few people out here."

Carol and Clayton Eaton say they want Emily to be in a regular class so that she can model her peers. Their testimony is that her regular class experience thus far, offers dramatic proof of such modelling. Carol Eaton says in Exhibit A-4 "We feel...that until she had contact [in the regular class] with other girls__who walked__Emily did not realize that GIRLS (sic) are able to walk...". However, Carol Eaton acknowledges in testimony that before Emily began attending school, she had seen
30 other girls her age in the community who could walk, and that she [Carol Eaton] "did not know" and "was supposing" (Vol.III,p.477) that it was the regular class experience which taught Emily that girls walk.

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The impact of the modelling to which the parents point does not appear to extend to Emily's attire, even though it is well-established in the child behaviour field that clothing styles are an especially powerful element in peer modelling. When the school suggested to the Eaton family that Emily be dressed in pants like the other girls in the class, the reply was "it is ALWAYS (sic) Emily's preference to wear a dress". (Exhibit A-5)

10 Further, although the parents testify that Emily learns from modelling, it is clear from their own evidence, and from the testimony of the school staff, and from the testimony of social services personnel that she learns best with repeated, one-on-one, hand-over-hand instruction.

20 The Tribunal is struck by the significant discrepancy between the parents' and the school personnel's assessment of Emily's abilities. Whereas the parents testify, for example, that Emily can identify a range of colours, and even distinguish shades within a colour, both the teachers and educational assistants testify that Emily's responses indicate she is not capable of such identifications and distinctions. There are also differences in the testimony of how far Emily can walk with her walker, and of how well, when, or even if, she uses sign.

30 While recognizing the parents' very strong insistence that Emily attend a regular class in the neighbourhood school, and given that parent volunteering and on-site participation is a long accepted and beneficial practice in elementary education, especially in cases of unique needs like Emily's, we are perplexed by what appears to be rather limited in-class, on-site involvement on their part. We have no evidence or testimony that either parent volunteered or participated on a regular basis in Emily's kindergarten, Grade 1 and Grade 2 classes, which were in a school that they report to be only five minutes away.

1 The Communication Books (Exhibit A-39) contain regular,
pointed, lengthy, and extremely specific directions to the school
in regard to what should or should not be done in Emily's
classroom experience (e.g., from Exhibit A-39, Communication
Book: "...we want Emily included in classroom activities__ALL
activities__in an adapted manner. We do not want you doing an
O.T. or physio or speech therapy program at school.") It is
apparent that the parents were intensely involved, but from a
distance, and it is apparent that imperatives and directions
10 outweighed participation. We believe that much of the difference
of opinion over Emily's needs and abilities, and quite possibly,
much of the disagreement and disputation in this case, has arisen
because the parents did not observe personally and at first hand,
on a regular, frequent basis, what was happening in Emily's
classroom. In our opinion, this lack of direct involvement
diminishes the appellant counsel's argument that the parents'
wishes and decisions are "carefully thought out and reasoned and
based on an overall philosophy". (29 July 1993, p.10)

Taking these discrepancies, contradictions and
20 inconsistencies into account, it is the Tribunal's view that the
parents' request that Emily be placed in a regular classroom,
full time, is not based on a reasoned, empathetic assessment of
what she needs and what she can do, outside her family home.

Ministry of Education And Training's Proposed Directions
Regarding Integration

Our decision in regard to Emily Eaton takes into account the
Minister's statement in the Ontario legislature on 28 May 1991,
during which she indicated her intent to initiate a policy for
30 the province wherein "the integration of exceptional pupils into
local community classrooms should be the norm in Ontario,
wherever possible, when such a placement meets the pupil's needs,
and where it is according to parental choice".

The Minister also stated in the same address that her Ministry recognizes that "an integrated setting will not be appropriate for every child".

Evidence Available From The Literature On Class Placement

In testimony from witnesses presented as expert, the Tribunal heard numerous references to the literature on placement as a part of special education practice. We are unable to conclude from this testimony that the literature clearly establishes any one setting as the best to meet the needs of exceptional children. (E.g., Mara Sapon-Shevin: "There is much that's inconclusive in this field; that's why it's tricky." Vol. VII, p.1330); Gary Bunch: "...we've come to an understanding of the literature that in some cases says, yes, there is a beneficial effect...and other literature says there is a neutral effect...and other that says that placement in regular classrooms has at least equal effect..." (Vol.VI, p.1044)

Accordingly, since the Tribunal itself has expertise in the literature on placement, and having regard to our discretionary powers under Section 16(b) of the Statutory Powers Procedure Act (R.S.). 1980, Chapter 484) we completed for ourselves, an extensive and intensive review of the placement literature and conclude that this body of literature, taken as a whole, is seriously flawed

1) by very poor research methods (e.g., lack of controls; cf. the study described by Gary Bunch, Vol. VI);

2) by the polemical stance taken by many of the researchers and writers (cf. Exhibits A-33, A-34, entered with the testimony of Mara Sapon-Shevin);

3) by the inherent difficulty in controlling variables while conducting research on human learning and behaviour (e.g., confounding place with what happens pedagogically and socially in the place);

4) by extrapolating conclusions that fit a hypothesis rather than the other way around (e.g., studies of social status and self-image among disabled children do not show that if they feel stigma and isolation, it is necessarily the result of being educated outside a regular classroom; yet the argument is regularly advanced by advocates of integration that this is indeed the case, and that a significant proportion of the literature verifies this contention);

10 5) by the regular use of non-cognate cases and situations to demonstrate outcomes for other cases (e.g., reference to the successful integration of, say, a child who is blind, to establish regular class placement as the best setting for a child who is deaf); and,

6) by the inexplicably wide acceptance__and citation in the same context as refereed journals__of what has come to be called "gee whiz" literature (e.g., descriptive, anecdotal, journalistic, and clearly unscientific reports on individual cases of exceptionality).

20 Most important, the references in the literature to situations that are even vaguely analogous to that of Emily Eaton are extremely limited.

The Tribunal therefore, in its own review of the literature, does not find support for placing Emily in a regular class.

Testimony Of Expert Witnesses

Three witnesses, Gary Bunch, Mara Sapon-Shevin, and Harry Silverman were presented to the Tribunal as experts by the appellants' counsel.

30 Harry Silverman observed in Emily's classroom for approximately two and one-half hours on the morning of 27 January 1993. Neither of the other two witnesses saw Emily in a school setting.

In our opinion, all three witnesses are committed to a philosophy of full inclusion (integration). Harry Silverman testifies "I fully subscribe to the 'no reject concept' which suggests that no school board has the right to exclude a child from education in a regular classroom...[and that a school board] does not have the moral or legal right to exclude any child". (Vol. VIII, p.1389)

10 Gary Bunch testifies that he is chair of the board for the 'Centre For Integrated Education' the purpose of which is to "advocate for, consult on, advise on inclusionary education". (Vol. VI, p.1112)

20 Mara Sapon-Shevin testifies that she is a member of 'Schools For Everyone', which is "a group devoted to promoting inclusion for children with disabilities in regular classrooms." (Vol. VII, p.1206) and of an organization called the 'Association For Persons With Severe Handicaps' and says "that my work with that organization has been primarily again, in the field of inclusion". (Ibid.) She also testifies that she has been involved in several other projects in the U.S.A. which have had inclusion of exceptional children in regular classrooms as a principal objective.

30 All three witness manifest an entirely subjective view of class placement, and in fact could not reasonably be expected to testify in any other way than strongly supportive of integration. Given the absence of clear research support and clear empirical support for the integration of exceptional children like Emily; viz., the uncertainty in the area for which they are presented as expert, and given that they did not, except for Harry Silverman, observe Emily in a school setting, we do not find their testimony significant in the specific matter of Emily's placement.

Obiter Dictum

The fact that the disagreement over Emily Eaton's class placement has been allowed to continue to the level of a Special Education Tribunal hearing is a grave disservice to this child. The Tribunal has no doubt that everyone involved with Emily has her present best interests and future well-being at heart. But we also feel that both are being put at risk by an unnecessarily rigorous adherence to principle and by the tyranny of moral certainty.

10 Having examined the historical development of this disagreement over Emily's placement, it is clear to us that Emily, the child, is now at risk of becoming Emily, the symbol. It is also clear to us that engaging legal counsel, turning to judicial and quasi-judicial avenues of redress, in short, taking an adversarial approach, has pushed this disagreement away from compromise and into competition, away from accommodation and into dispute. Emily's present and future well-being will not be served by going farther down this road.

20 We have evaluated her school situation in a manner we consider rational and dispassionate, and we are convinced by the evidence, and by common sense, that a regular class is not the best place for Emily. Nevertheless, our decision in favour of a special class placement does not relieve the school board and the parents of the obligation to collaborate creatively in a continuing effort to meet her present and future needs. Emily's is so unusual a case that unusual responses may well be necessary for her. Such achievements can only be realized through
28 cooperation, and most important, compromise.

The Charter Of Rights, And Human Rights Issues

We accept the argument of appellants' counsel that we are bound by The Charter and by the Ontario Human Rights Code (OHRC) in making our decision and that The Charter would take precedence over the Education Act if there is conflict between the two. We also accept that consideration of The Charter and the OHRC are within our mandate as a tribunal. Accordingly, we considered at great length the submissions of both counsel in regard to the impact of The Charter and the OHRC in Emily Eaton's case.

10 Although we find that the case law presented to us offers analogous principles, it does not have relevance in the matter of Emily Eaton's placement.

It is our opinion that where a school board recommends placement of a child with special needs in a special class, contrary to the wishes of the parents, and where the school board has already made extensive and significant effort to accommodate the parents' wishes by attempting to meet that child's needs in a regular class with appropriate modifications and supports, and where empirical, objective evidence demonstrates that the child's needs are not being met in the regular class, that school board is not in violation of The Charter or the OHRC.

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We find that in the case of Emily Eaton, the Brant County Board of Education, in placing her in a special class, is not acting in contravention of The Charter and is not violating her human rights.

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For the Tribunal

K. J. Weber
Professor Kenneth J. Weber, Chair

19 November 1993
Date

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Court File No. 42/94

ONTARIO COURT OF JUSTICE

(GENERAL DIVISION)

DIVISIONAL COURT

CARRUTHERS, DUNNET and ADAMS JJ.

B E T W E E N:

CAROL EATON AND CLAYTON EATON

Applicants

- and -

THE BRANT COUNTY BOARD OF
EDUCATION

Respondent

)
)
)
) Anne Molloy and Janet
) Budgell for the Applicants

)
)
) Christopher Riggs, Q.C. and
) Brenda Bowlby for the
) Respondent

)
) Dennis Brown Q.C. and
) John Zarundy for the
) Intervenor, the
) Attorney General for
) Ontario

)
) Heard: February 8, 1994

ADAMS J. (ORALLY)

This application seeks to quash the determination of the Ontario Special Education Tribunal that an educational placement of Emily Eaton in a special class best meets her special needs, while a continued placement in a regular class, not only does not do so, but is detrimental to her.

Emily Eaton is a nine-year old student enrolled in the Brant County Board of Education. Emily has cerebral palsy. She is unable to communicate orally and is unable to use sign language meaningfully. The Education Act, R.S.O. 1990, c.E.2. and its

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Regulations set out a comprehensive scheme for the identification of exceptional pupils and for the placement of those students into educational settings where the special educational programmes and services appropriate to meet their needs can best be delivered. This scheme also provides for a right of parents to appeal the identification and placement of their children by school boards.

10 Regulation 305, R.R.O. 1990, sets out the requirement that every board of education set up an Identification, Placement and Review Committee, hereinafter the IPRC, to deal with the identification and placement of exceptional pupils in the first instance. From the IPRC, there is an appeal to a special education appeal board and, from this appeal board, parents may apply for leave to appeal to the Special Education Tribunal.

20 In November 1989, the IPRC for the Brant County Board, identified Emily as exceptional and determined that she would be placed, on a trial basis, in a kindergarten in the parents' neighbourhood school, with an educational assistant. In June of 1990, the IPRC determined that Emily would continue in kindergarten for the 1990-91 school year. In May of 1991, it was determined that Emily would be placed in the regular grade 1 class. During Grade 1, a number of concerns arose concerning the appropriateness of her continued placement in a regular classroom.

30 There is no need to itemize all the concerns, save to say

that the teachers and educational assistants working with her came to the conclusion, based on this three-year experience, that the continued placement was not in Emily's best interests and, indeed, that its continuation might well harm her. These concerns were shared with the IPRC and Emily's parents. Thereafter, and by decision dated February 24, 1992, the IPRC confirmed Emily's identification as an exceptional pupil, but determined that she would be placed in a special education class. Emily's parents appealed this decision to a special education appeal board which unanimously confirmed the decision of the IPRC. The Eatons then appealed, a leave hearing being waived, to the Ontario Special Education Tribunal. This application is in respect to the resulting decision of that tribunal.

In the intervening year between the IPRC decision and the conclusion of the appeal hearing, Emily remained in a regular class placement in Grade 2, pursuant to the order of Borins J., dated September 11, 1992. Her teachers and educational assistants continued, however, to be concerned about Emily.

Before this court, it was argued that the Tribunal was not expert, as evidenced by the presence of only "a final and binding" style privative clause. The essential errors alleged to have been committed by the Tribunal were: (1) conducting its own literature search on the close of the hearing, without permitting comment by the applicants prior to the Tribunal rendering its

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10 decision; and (2) failing to place on the Board of Education a legal burden, said to arise under the Education Act by implication from the Charter of Rights and Freedoms and the Ontario Human Rights Code, to establish that the transfer of Emily out of the regular class to a special education class would be clearly better for her. With respect to this latter ground, it was also submitted that the Tribunal had no basis for rejecting the expert evidence adduced by the applicant that "an integrated approach" was almost always the preferred approach. It was further submitted that there was no evidence before the Tribunal affirmatively establishing that the special education class proposed would redress the concerns raised about Emily's education and would be clearly better for her. Finally, it was submitted the Tribunal failed to deal with evidence that a special education class would present its own negative problems for Emily.

20 We are all of the view that this specialized body dealt comprehensively and thoughtfully with all the issues raised before it and with the central focus being what was best for Emily in all of the circumstances. It had before it the evidence of three years of experience with Emily in a regular class environment; the evidence of Emily's parents, based on their experience with her and their understanding of her needs; and the evidence of various expert witnesses. The Tribunal accepted that a regular class was to be considered the preferred placement, as long as this was consistent with the best interests of a student in any particular

case. The Tribunal was also conscious of the Charter of Rights and Freedoms and the Ontario Human Rights Code.

Against this backdrop and after a 21-day hearing, the Tribunal unanimously denied the appeal and affirmed the determination of the IPRC of February 24, 1992.

While we find the Tribunal to be ~~worthy of~~ curial deference given the structure of the legislation, the subject matter, and the composition of the Tribunal, we can find no error of law on the record before us in any event. Onus did not play a role in the Tribunal's determination. It found there was ample evidence before it establishing that the recommended placement was in Emily's best interest. This was a factual determination it was entitled to make on the evidence placed before it. There was also no legal error in giving the weight it did to the testimony of the three experts called by the applicants, having regard to the evidence they gave and the admissions they made.

Furthermore, we are not satisfied, in these particular circumstances, that the Tribunal's post-hearing review of "the literature" to which the experts generally referred did anything more than confirm its independent assessment of the evidence before it and the various admissions of the applicants' experts with regard to that research. Indeed, we note that counsel for the applicants, in an argument directed at seeking to place before the

Tribunal certain articles in the literature, stated that the Tribunal was:

... an expert Tribunal and what I am doing is putting forward articles which you've already read, at least know about, and I am pointing to the ones in which I would place emphasis. There's nothing to stop you from reading these articles in any event. I would expect that you probably would do that.

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Accordingly, there was no denial of natural justice in the circumstances.

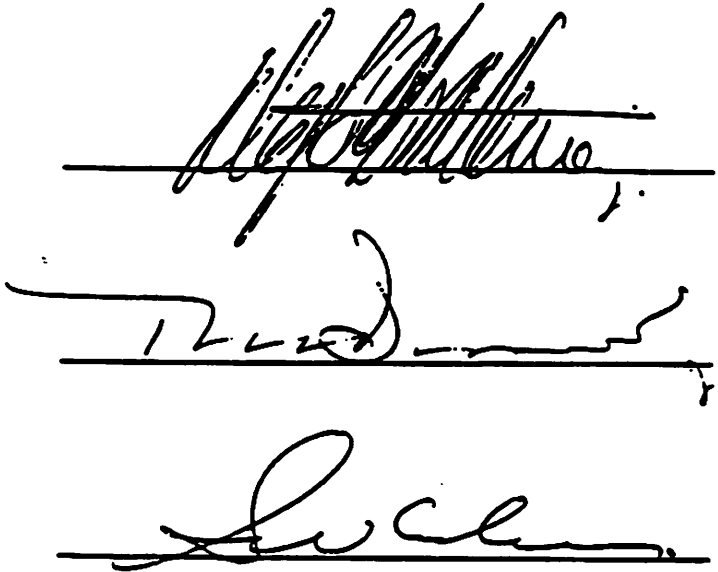
Finally, we have great difficulty in appreciating how the Charter of Rights and Freedoms and the Ontario Human Rights Code create a presumption in favour of one pedagogical theory over another, particularly when the implementation of either theory needs the protection of the saving provisions found in s.15 of the Charter and s.14 of the Code. But in this case, that issue is entirely academic because the Tribunal found the evidence clearly established that Emily's best interests will be better served with the recommended placement.

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In dismissing this application, however, we echo the Tribunal's reminder that our decision does not relieve the School Board and the parents of the obligation to collaborate creatively in a continuing effort to meet Emily's present and future needs.

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There is no order as to costs

Three handwritten signatures are present, each written over a horizontal line. The top signature is highly stylized and appears to be 'H. J. M. L. S.'. The middle signature is more fluid and appears to be 'J. L. S.'. The bottom signature is also fluid and appears to be 'J. L. S.'.

RELEASED: FEB 11 1994

Reasons for Judgment of the Court of
Appeal for Ontario dated July 13, 1994,
granting leave to appeal and allowing
motions to intervene by the Ontario
Association for Community Living and the
Canadian Disability Rights Council

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File Nos. M12992
M13821
M13836

COURT OF APPEAL FOR ONTARIO

RE: CAROL EATON AND CLAYTON EATON (Applicants
(Appellants)) and THE BRANT COUNTY BOARD OF
EDUCATION (Respondent (Respondent in Appeal))

BEFORE: MORDEN A.C.J.O., AUSTIN AND LASKIN J.J.A.

COUNSEL: ANNE M. MOLLOY
FOR THE APPLICANTS (EATON)

CHRISTOPHER G. RIGGS, Q.C. AND
BRENDA J. BOWLBY
FOR THE RESPONDENT

DAVID W. KENT AND MELANIE A. YACH
FOR CANADIAN DISABILITY RIGHTS COUNCIL
(Application for Intervention)

H. B. RADOMSKI
FOR ONTARIO ASSOCIATION OF COMMUNITY LIVING
(Application for Intervention)

DENNIS W. BROWN, Q.C.
INTERVENER - ATTORNEY GENERAL FOR ONTARIO

HEARD: JULY 11, 1994

ENDORSEMENT

1. The Leave Motion

Leave to appeal is granted. The costs of the leave motion are reserved
to the panel hearing the appeal.

2. The Intervention Motions

Ontario Association of Community Living ("OACL") and the Canadian Disability Rights Council ("CDRC") each seek to intervene on this appeal as a friend of the court pursuant to rules 13.02 and 13.03. OACL proposes to confine its intervention to issues relating to s.15 of the *Charter*; the CDRC to issues relating to s.15 of the *Charter* and to the *Ontario Human Rights Code*. Both motions are supported by the appellants and opposed by the respondent Board.

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The proposed interveners are well recognized public-interest organizations with expertise in disability issues. Their factums suggest that each organization may have a different perspective from that of the applicants on the constitutional and human rights issues raised on this appeal. The expertise and perspective that OACL and CDRC bring to the public law issues on this appeal may be of assistance to the court. Thus, we think it is desirable to grant both motions to intervene, but on terms. The terms are as follows:

- (i) each intervener shall take the record as it is and shall not be permitted to adduce further evidence;
- (ii)(a) OACL's intervention shall be limited to issues on the appeal relating to s.15 of the *Charter*;

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- (b) CDRC's intervention shall be limited to issues on the appeal relating to
s.15 of the *Charter* and the *Ontario Human Rights Code*;
- (iii) each intervener shall deliver its factum no later than 14 days after being
served with the appellants' factum;
- (iv) the interveners shall not seek costs of the appeal but they may be
subject to an award of costs against them.

The costs of the motions to intervene are reserved to the panel hearing
the appeal.

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JUL 13 1994

F. H. W. L. O. R. A. E.
R. E. S. T. E. R. J. A.
J. L. A. S. L. J. A.

/emr

COURT OF APPEAL FOR ONTARIO

CARTHY, ARBOUR and LABROSSE J.J.A.

B E T W E E N :

**CAROL EATON AND CLAYTON
EATON**

Appellants

- and -

**THE BRANT COUNTY BOARD
OF EDUCATION**

Respondent

- and -

**CANADIAN DISABILITY RIGHTS
COUNCIL, ONTARIO
ASSOCIATION OF COMMUNITY
LIVING and ATTORNEY
GENERAL OF ONTARIO**

Intervenors

**Anne M. Molloy and
Janet Budgell for the appellants**

**Christopher Riggs and Brenda
Bowlby for the respondent**

**David Kent, Melanie Yach and
Geri Sanson for the intervenor
Canadian Disability Rights Council**

**Harry Radomski and Jacqueline
Dais-Visca for the intervenor
Ontario Association for Community
Living**

**Dennis W. Brown, Q.C. and
John Zarudny for the intervenor
Attorney General of Ontario**

Heard: December 19-21, 1994

ARBOUR J.A.:

Introduction

The appellants are the parents of Emily Eaton, a 10 year old girl with cerebral palsy. The Eatons assert, on behalf of Emily, an entitlement to being educated

in a regular classroom, in a regular public school. The nature and extent of Emily's disabilities are not directly in issue in this appeal, which is only concerned with legal issues, particularly issues related to equality rights. It is therefore only necessary to refer briefly to the nature of Emily's special educational needs. Emily does not speak, and she has no established alternative communication system. She has some visual impairment. Although she can bear her own weight and can walk a short distance with the aid of a walker, she is mostly in a wheelchair. Emily is presently in a grade 4 class in an integrated classroom in the separate school system.

History of the proceedings

When she began kindergarten, Emily attended Maple Avenue School, which is her local public school. The Identification, Placement, and Review Committee ("IPRC") of the Brant County Board of Education ("The school board") identified Emily as an exceptional pupil and, at the request of her parents, determined that she should be placed, on a trial basis, in her neighbourhood school. A full time educational assistant, whose principal function was to attend to Emily's special needs, was assigned to her classroom. This arrangement was continued into Grade 1, although toward the end of that year, at the IPRC meeting, the school board requested that Emily be placed in a special class for disabled students. Over the parents' objection, the IPRC granted the board's request. That decision was upheld by the Special Education Appeal Board and,

subsequently, by the Ontario Special Education (English) Tribunal ("The Tribunal"). The appellants' Application for Judicial Review was dismissed by the Divisional Court. Leave to appeal to this Court was granted earlier this year.

Meanwhile, we were advised at the outset of the hearing that an injunction had been granted to allow Emily to remain in a regular classroom pending the decision of the Tribunal. Once that decision was rendered, the appellants provided education for their daughter at home for one term, rather than have her attend the special class for disabled students. Mr. Eaton is a special education teacher who works in segregated classes for disabled children. Mrs. Eaton is trained as a social worker. They have other children who were then enrolled in schools with the respondent school board. At the end of the school year, the appellants enrolled Emily in a school within the separate system, where she receives instruction in a regular classroom.

Special Education in Ontario

The Education Act, R.S.O. 1990, c. E. 2, as amended, and the *Regulations* thereunder set out a comprehensive scheme for the identification of "exceptional pupils" and for the placement of these pupils in appropriate educational programs. "Exceptional pupil" is defined in the *Education Act* as follows:

s. 1(1) "exceptional pupil" means a pupil whose behavioral, communicational, intellectual, physical or multiple exceptionalities are such that he is considered to need placement in a special education program by a committee, established under paragraph iii of paragraph 5 of subsection 11(1), of the board,...

Section 8(3) of the *Education Act* sets out the Minister of Education's responsibility with respect to the provision of special education in Ontario:

s. 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, and for these purposes the Minister shall,

(a) require school boards to implement procedures for early and ongoing identification of the learning abilities and needs of pupils, and shall prescribe standards in accordance with which such procedures be implemented; and

(b) in respect of special education programs and services, define exceptionalities of pupils, and prescribe classes, groups or categories of exceptional pupils, and require boards to employ such definitions or use such prescriptions as established under this clause.

Regulation 305, enacted under the *Act*, requires that every board of education set up a Special Education Identification, Placement and Review Committee

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("IPRC") to deal with the identification and placement of exceptional students. The regulation also sets up the process by which the parents may appeal the IPRC's decision.

Under that scheme, pupils who are identified as exceptional, either because they have disabilities or because they have talents that bring their educational needs outside the range of what is being offered in a regular age-appropriate program, are provided with either remedial or enriched instructions responsive to their individual needs. These programs are offered either within the child's regular classroom, or through periodic withdrawal from the regular classroom, or in special classrooms where pupils with similar needs are instructed as a group as well as individually. It is apparent that most identifications and placements are determined on a consensual basis since we were advised at the hearing of the appeal that the Tribunal whose decision is being reviewed in this case sits quite infrequently and has not sat more than a dozen times in the last decade. We were told that there are presently approximately 170,000 pupils enrolled in special education programs in various school boards throughout Ontario.

The Decision of the Tribunal

The Tribunal delivered extensive reasons for its decision to uphold the IPRC and Special Education Appeal Board placement decision for Emily Eaton. The hearing before the Tribunal was effectively the first hearing in the matter. The IPRC and

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the Appeal Board do not hear evidence. They merely consider the representations made to them by school officials and parents. The hearing in this case took 21 days. Considerable expert evidence was called, all of which is summarized in the Tribunal's decision. The expert evidence dealt mostly with what the respondents refer to as the pedagogical controversy in education over the issue of placement, particularly whether full inclusion of exceptional students is preferable to education models that espouse segregation. The expression "segregation" is not one that the respondent favours. There is no doubt that, particularly when associated with education, the expression "segregation" evokes memories of racial segregation policies which were repudiated in the United States in the 1950's with the famous case of *Brown v. Board of Education of Topeka* (1954), 347 U.S. 483.

Despite that pejorative connotation, I think that the expression is accurate to describe the issue in the present case. To segregate is to separate (a person, a body or class of persons) from the general body, or from some particular class; to set apart, isolate, seclude (The Compact Edition of the Oxford English Dictionary, 1971). The placement that has been adjudged appropriate for Emily Eaton is a segregated placement. She is to be educated in a regular public school, albeit not the neighbourhood school that her brothers are free to attend, but in a special classroom of that school which will be attended only by other disabled pupils. Although the respondent emphasises that under

that placement model there would still be periods of integration for Emily, such as general school assemblies, recesses etc., it is unquestionable that the placement that has been recommended for her is one in which she is to be isolated from the mainstream and educated primarily in the sole company of children with similar educational needs.

10 It is apparent from the Tribunal's detailed and careful reasons that the choice of that segregated educational model for Emily Eaton was made in what it perceived to be in her best interest, and not without reasons. The Tribunal examined Emily's intellectual and academic needs, her communication needs, her emotional and social needs and her physical and safety needs. In each case, on the basis of evidence that was open to it to accept, the Tribunal concluded that Emily's needs were not being met in the integrated setting of the regular classroom in which she had been placed.

The Issues

20 The appellants raise several issues, which I find useful to regroup in the following manner. First and foremost, the appellants raise a constitutional issue. They contend that the Divisional Court erred in its interpretation of the application of the *Canadian Charter of Rights and Freedoms* to the process of placing disabled students in an appropriate educational setting. Second, the appellants raise a number of legal errors

which they submit were committed by the Tribunal and should have been reviewed by the Divisional Court.

The Scope of Judicial Review

Section 37(5) of the *Education Act*, R.S.O. 1990, c. E.2, as amended, provides that:

The decision of a Special Education Tribunal or of a regional tribunal under this section is final and binding upon the parties to any such decision.

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Guided by the principles of judicial review recently restated by the Supreme Court of Canada in *Pezim v. British Columbia (Superintendent of Brokers)* (1994), 114 D.L.R. (4th) 385 at pp. 404-405, I agree with the Divisional Court that the Tribunal is worthy of curial deference. In addition to the privative clause, the subject matter of the legislation and the actual composition of the Tribunal point to a standard of reasonableness, rather than to one of correctness, as the applicable standard under which alleged errors of law must be reviewed. However, Mr. Riggs, for the respondent, concedes that with respect to constitutional issues, the standard of review is one of correctness and that to the extent that the Tribunal purported to apply a constitutional

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principle, it is not entitled to any deference as to the correctness of that principle or its application (*Cuddy Chick v. Ont.*, [1991] 2 S.C.R. 5).

10 I find it convenient to deal with the alleged errors of law first. Having held that the Tribunal was worthy of curial deference, the Divisional Court held that, in any event, they could find no error of law on the record. The only alleged error that, in my opinion, needs to be addressed is the independent literature review undertaken by the Tribunal. At the hearing before the Tribunal, Ms. Molloy, counsel for the appellants, sought to put various articles and studies to the experts who testified, in order to elicit their comments. The school board objected and the Tribunal reserved its decision. Ms. Molloy then asked for permission to simply file with the Tribunal the literature that she wished them to review. In the course of her submissions to the Tribunal on that issue, Ms. Molloy invited the members of the Tribunal to rely on their expertise to review that literature. The Tribunal delivered a written ruling in which it held that counsel for the appellants could not put these materials to the experts for comments, nor could she file them with the Tribunal. As I understand the ruling, both procedures were said to be offensive to the hearsay rule, since the authors were not called as witnesses themselves.

20 However, having so ruled, the Tribunal proceeded to conduct its own review of the literature on placement of exceptional students, purportedly under the

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authority of s. 16 (b) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22. The reasons state that the Tribunal, relying on its own expertise with that literature, completed "an extensive and intensive review of the placement literature and conclude[d] that this body of literature, taken as a whole, is seriously flawed". The Tribunal pointed out that the literature contained very few references to situations even vaguely analogous to that of Emily Eaton, and concluded that the literature did not support placing Emily in a regular class.

10 The procedure followed by the Tribunal was wrong. It should have permitted counsel for the appellants to put the relevant literature to the experts for their comments. This would have allowed the respondent to conduct its own examination of the experts. Both parties would then have been in a position to make submissions to the Tribunal with reference to the experts's assessment of the literature upon which the appellants wished to rely. However, this error of law does not come within the ambit of reviewable error within the standard set out above since the analysis conducted by the Tribunal does little more than confirm that there is an ongoing pedagogical debate about the various models for the placement of disabled students, and that, solely from the pedagogical point of view, integration has not yet been proven superior. In any event,

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considering the total analytical framework followed by the Tribunal, I do not think that the literature review had an important impact on its decision. Even if the error was reviewable, it could therefore not serve to invalidate the decision.

The Charter Issues

10 The appellants submit that the Tribunal and the Divisional Court erred in applying a legal test for determining the appropriate placement for Emily that is discriminatory, and not justifiably so under s. 1 of the Charter. They contend, essentially, that s. 15 of the *Charter* and s. 1 of the *Ontario Human Rights Code* both require that a different legal test be applied. They propose, as an acceptable test, one which would create a presumption in favour of including disabled students into regular classrooms, while imposing a burden on those who propose a segregated classroom, in this case the Board, to establish why the student's exceptional needs can be better met in that setting. I will return to the test proposed by the appellants later in these reasons. Suffice it to say that this was clearly not the approach that was taken by the Tribunal. After reviewing the evidence, the Tribunal stated that the principal issue was "whether Emily Eaton's special needs can be met best in a regular class or in a special class". When considering the application of the Charter and the Code, the Tribunal held :

The Charter of Rights. And Human Rights Issues

We accept the argument of appellants' counsel that we are bound by *The Charter* and by the *Ontario Human Rights Code* (OHRC) in making our decision and that *The Charter* would take precedence over the *Education Act* if there is conflict between the two. We also accept that consideration of *The Charter* and the OHRC are within our mandate as a tribunal. Accordingly, we considered at great length the submissions of both counsel in regard to the impact of *The Charter* and the OHRC in Emily Eaton's case.

It is our opinion that where a school board recommends placement of a child with special needs in a special class, contrary to the wishes of the parents, and where the school board has already made extensive and significant effort to accommodate the parents' wishes by attempting to meet that child's needs in a regular class with appropriate modifications and supports, and where empirical, objective evidence demonstrates that the child's needs are not being met in the regular class, that school board is not in violation of *The Charter* or the OHRC.

It is clear from the above that the Tribunal rejected any notion of a presumption in favour of inclusion, or of imposing upon the school board a requirement of demonstrating the superiority of a segregated placement for Emily Eaton, over the educational experience that she was obtaining in an integrated classroom. The decision, when viewed as a whole, concludes that the integrated classroom has not been successful in providing an education for Emily. The Tribunal never answered the question as it

framed it, that is, whether Emily's special needs can be best met in a regular class or in a special class. Having found that the integrated placement had not met Emily's needs, the Tribunal did not state how the segregated class would likely be more successful. It is apparent that the Tribunal rejected the test that the appellants contend is mandated by the Charter and the Human Rights Code.

Adams J., speaking for the Divisional Court, found no error of law in the decision of the Tribunal. He addressed the Charter issue as follows:

10 Finally, we have great difficulty in appreciating how the *Charter of Rights and Freedoms* and the *Ontario Human Rights Code* create a presumption in favour of one pedagogical theory over another, particularly when the implementation of either theory needs the protection of the saving provisions found in s. 15 of the *Charter* and s. 14 of the *Code*. But in this case, that issue is entirely academic because the Tribunal found the evidence clearly established that Emily's best interests will be better served with the recommended placement.

20 The Legal Framework of Analysis

With the greatest respect for the Divisional Court, in my view, it mischaracterized the issue. The question is not one of choosing between competing

pedagogical theories, but one of determining the appropriate legal framework within which that choice will be made.

Essentially, the appellants contend that in determining what is an appropriate placement for a disabled child, school officials cannot simply apply a test of "best interest of the child". Such a test could prove insensitive to the equality rights of the child, which, when asserted, may trump what would otherwise appear to others to be in the child's best interest.

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In my respectful view, the Divisional Court erred in two respects: first, in finding that the Charter and the OHRC did not apply since the tribunal here was merely asked to choose between two competing education theories; and second, in finding that the choice of program was not subject to a Charter challenge in any event since the special education programs depend on s. 15(2) for their existence, assuming that this is in fact what was intended by the reference to the protection of s. 15 of the *Charter* and of s. 14 of the *Code*.

The applicability of s. 15(2) of the *Charter*

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This point can be conveniently addressed at the outset. As I understand it, Adams J. suggested that the implementation of the special education programs required

the protection of the "saving provision" of s. 15(2) of the *Charter* and of s. 14(1) of the *Human Rights Code*, and , as such, were exempted from *Charter* compliance. This argument was advanced by the respondent in the appeal.

It is unnecessary to determine whether the special education programs offered pursuant to the provisions of the *Education Act* and Regulations would need the protection of s. 15(2) of the *Charter* in the event of an allegation that they discriminate against mainstream students. Even though these programs were enacted in part to ameliorate the condition of disabled students, they arguably do nothing more than to provide these students with the real equality that they are entitled to under s. 15(1). In such a case, they may not be viewed as "affirmative action" programs as understood under s. 15(2). Be that as it may, even if the special education programs could only have been implemented pursuant to s. 15(2) of the *Charter*, it does not follow that these programs would be immune from constitutional attack by the proposed recipients of the intended benefit. The decision of the Divisional Court was rendered prior to the judgment of this court in *Ontario Human Rights Commission v. Ontario* (1994), 19 O.R. (3rd) 387 which dealt with age as a basis for exclusion from an affirmative action program. Although that case was decided on the basis of s. 14(1) of the *Human Rights Code*, the result is the same under s. 15(2) of the *Charter*. The enactment of an

affirmative action program does not exempt the state from *Charter* compliance within the program.

The application of s. 15(1) of the Charter

Before embarking on the analysis of the Charter issues, two preliminary matters must be addressed. The first is the interaction between the Charter and the Ontario Human Rights Code. Section 15 of the Charter states as follows:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 1 of the Ontario Human Rights Code reads as follows:

1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap.

Although there is considerable overlap between s. 15 of the Charter and s. 1 of the Ontario Human Rights Code, I find it difficult to conduct a simultaneous parallel analysis of all issues under both the Charter and the Code. The Charter is the superior document and will prevail in case of conflict with the Code. The attack is on the decision of a Tribunal upholding the position taken by a school board, under the authority of the *Education Act*. Since the Charter applies to the *Education Act*, I find it unnecessary to pursue the equality analysis under the Ontario Human Rights Code.

10 Secondly, although the appellants in this case are the parents of Emily Eaton, the interest that they advance is her interest, not their own. Their views as parents are important in the special education scheme set out above. As parents, they are entitled to attend the IPRC meetings, and to appeal an identification or placement decision with which they disagree. But when it comes to asserting their daughter's constitutional right to equality, as provided by s. 15 of the Charter, they represent her, and their submissions to the courts are made for her and on her own behalf. They are entitled to do so and their position on the Charter issue must not be confused with their position as parents in opposing the school board on what is best for their daughter's education.

20 I now wish to return to the characterization of the issue by the Divisional Court as being merely one of choosing between two pedagogical theories. It is true that

the decision of the tribunal espouses a philosophy of education for disabled children that does not reflect a preference for integration in a regular classroom over segregation in a special class with other disabled children. But there is more to the decision than a choice between the two pedagogical theories, one which favours integration and the other which looks to meeting the special needs of the child in any setting, whether integrated or not. In legal terms, the two pedagogical theories are not on the same footing if one produces discrimination and the other does not.

10 This raises the question of whether the placement of Emily in a special classroom for disabled children, in an integrated school but not the neighbourhood school that she would otherwise attend, amounts to discrimination within the meaning of s. 15 of the Charter such as to require justification under s. 1. In *Andrews v. Law Society of B.C.*, [1989] 1 S.C.R. 143, an infringement of s. 15(1) was said to occur when a distinction was made by a state actor, based on a prohibited ground, that deprived a person of a benefit or imposed a burden or disadvantage on him or her. Emily Eaton is prevented from attending a regular class, in her neighbourhood school, because of her disability. I have no difficulty in concluding that a classification has been made on a prohibited ground. The decision has been made by a school board, under the authority of the *Education Act*, thereby involving state action. Does this decision create a burden or disadvantage, or deprive Emily of a benefit? The respondents submit that it does not,

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since, in the special segregated classroom, Emily will be receiving the same kind of education as her peers.

The appellants, on the other hand, contend that although other forms of special programs are not a burden or disadvantage for Emily, segregation is. The appellants concede that to simply place Emily in a regular classroom in her neighbourhood, without more, would not meet her equality entitlements. This would be the equal treatment of unequals which does not yield true equality. The appellants concede, therefore, that some distinctions must be made, on the basis of her disability, to ensure her equal treatment. It would not be enough to say that she can go to her neighbourhood school. She may need assistance in transportation for getting there, and would also need considerable assistance in the classroom so that her educational experience can be as close as possible to that of her peers. Even though she would be treated differently, none of these measures, in the appellants' submissions, would amount to the deprivation of a benefit; none would be a burden or a disadvantage. Therefore, none of these would be discriminatory.

Removing Emily from the classroom altogether would, in the appellants' submission, be a burden or a disadvantage and would deprive her of a benefit. It is therefore essential to determine whether segregation of a disabled student, against the

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student's wishes, is discriminatory. If the measure is not a disadvantage, or the deprivation of a benefit, it is not discriminatory, even if it is based on a prohibited ground, and there is no infringement of the person's equality rights. If the measure is discriminatory, then it will be permissible only if justified under s. 1. The appellants do not consider segregation a benefit, but rather a detriment to Emily's education. Although one should not ignore the intended recipient's perception of whether the measure designed to enhance her equality is in fact a burden rather than a benefit, that subjective perception is not in itself determinative of the issue.

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Is placement in a segregated classroom discriminatory?

In *R. v. Turpin*, [1989] 1 S.C.R. 1296, Wilson J., at p. 1332, indicated that the indicia of discrimination must be found in the social, historical and political context surrounding the measure which is alleged to be discriminatory. This cannot be ascertained solely within the confines of the applicable legislation. Nor can it be determined by the intent with which the measure is offered.

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The history of discrimination against disabled persons, which the Charter sought to redress and prevent, is a history of exclusion. Some of the Ontario landmarks in that history have been canvassed by Weiler J.A. in her dissenting opinion in *Adler v. Ontario* (1994), 19 O.R. (3rd) 1 at p. 48. She referred to the 1971 Williston report which

endorsed the ongoing movement for deinstitutionalization of the mentally disabled (Walter A. Williston, *Present Arrangements for the Care and Supervision of Mentally Retarded Persons in Ontario*, 1971, prepared for the Ministry of Health), and to the subsequent report by Robert Welch entitled *Community Living for the Mentally Retarded People in Ontario*, (1973). These led to the transfer of jurisdiction over persons with disabilities from the Ministry of Health to the Ministry of Community and Social Services (MCSS), with a view to facilitating the integration of mentally disabled people into the broader community.

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Deinstitutionalization was the first step towards full community integration, which has been the primary objective of the disability movement. When she examined education and training as part of her Report on Equality in Employment, Judge Rosalie Abella, then acting as Commissioner, singled out the disabled and native people as groups who faced serious problems of equitable access to education ("Equality in Employment: A Royal Commission Report", October 1984, pp.134-136). She recognized the lack of consensus on whether segregated or integrated facilities best served the educational needs of the disabled and proposed an individualized approach. She then added, at p. 135-136:

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10 Wherever possible, the disabled child should learn alongside children who are not disabled. This should be the rebuttable presumption. It may involve extra tutoring, the use of an attendant, or specially designed programs to supplement the classroom instruction. It will most certainly involve provincial ministries of education in putting more resources into facilities, aids, and teachers for disabled children. It may be unfair to place a disabled child in a regular class in the public school system without appropriate supports, since integration may come at the cost of learning. As the child falls further and further behind, confidence and motivation may ebb accordingly. Yet in many parts of Canada no special educational facilities exist for children with special needs, and to get a basic education they have to be separated from their major support centres - their families. Where integration is not feasible, instruction should be available close to home with as early an entry into the regular school stream as possible.

20 From the earliest age, disabled children should see themselves as part of the mainstream of society, and children who are not disabled should see them the same way. These enabling perceptions, carried into adulthood, have the power to affect, on both sides, expectations about the extent to which the community is and should be accessible and about standards of behaviour in the workplace, both for employers and employees.

30 This represents more than the endorsement of a pedagogical theory. It puts the educational choice in the broader context of equality rights, freedom of choice, and the community benefit which is derived from the early interaction of all members of society.

In all areas of communal life, the goal pursued by and on behalf of disabled persons in the last few decades has been integration and inclusion. In the social context, inclusion is so obviously an important factor in the acquisition of skills necessary for each of us to operate effectively as members of the group that we treat it as a given. Isolation by choice is not necessarily a disadvantage. People often choose to live on the margin of the group, for their better personal fulfilment. But forced exclusion is hardly ever considered an advantage. Indeed, as a society, we use it as a form of punishment. Exile and banishment, even without more, would be viewed by most as an extremely severe form of punishment. Imprisonment, quite apart from its component of deprivation of liberty, is a form of punishment by exclusion, by segregation from the mainstream. Within the prison setting, further segregation and isolation are used as disciplinary methods. Even when prisoners are segregated from the main prison population for their own safety, the fact that they will have to serve their sentences apart from the main prison population is considered an additional hardship.

When segregated education for the disabled is understood in a broader context, it is easier to understand why the appellants draw the distinction between the necessity for the school board to provide extra assistance to Emily, in the form of a full-time educational assistant in her regular classroom, amongst other things, and the boards' decision to educate her in a segregated facilities for pupils with similar disabilities. It

has been argued that the distinction is merely one of geography, as a student can be effectively isolated in a regular classroom if he or she is unable to participate in a meaningful way in the life of the group. This form of isolation must also be combated, but it remains that the opportunities for interaction with mainstream students are simply not available when the disabled child is segregated in the plain geographical sense of the word.

Inclusion into the main school population is a benefit to Emily because without it, she would have fewer opportunities to learn how other children work and how they live. And they will not learn that she can live with them, and they with her.

Thus, it seems to me that when analyzed in its social, historical and political context, the decision to educate Emily Eaton in a special classroom for disabled students is a burden or disadvantage for her and therefore discriminatory within the meaning of s. 15 of the *Charter*. When a measure is offered to a disabled person, allegedly in order to provide that person with her true equality entitlement, and that measure is one of exclusion, segregation, and isolation from the mainstream, that measure, in its broad social and historical context, is properly labelled a burden or a disadvantage. The loss of the benefit of inclusion is no less the loss of a benefit simply because everyone else takes inclusion for granted.

Segregation of a child with disabilities in a special class for disabled children, against the child's wishes as expressed by the child's legal representatives, is therefore discriminatory within the meaning of s. 15(1) of the Charter. Under the *Education Act*, children are permitted to attend a school in their neighbourhood in which they will associate freely with their age-appropriate peers. The school board has denied Emily this opportunity on the basis of her disability. This is not a mere innocuous classification. It deprives the child of a benefit or imposes on her a disadvantage or a burden within the meaning of *Andrews, supra*.

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If there was any doubt about whether the segregation of disabled students is discriminatory, it would be useful, in my opinion, to reflect on whether a similar kind of segregation could be effected on any of the other grounds enumerated in s. 15, without an infringement of that section. Could public school officials determine, on the basis of a pedagogical theory, that, at a certain age, girls would learn better in an all girl environment, and exclude them on that basis from the neighbourhood school that they wished to attend? Could they determine that native children should be educated "in their own schools" against their wishes? Or that black children should attend identical but separate school facilities? The respondent argues that there is no analogy between race and disability when it comes to classifying access to educational facilities. The respondent contends that, except in the context of affirmative action, race would always

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be an impermissible criterion upon which to determine access to an education program. However, that aside, the respondent says that education is unique in its attention to individual characteristics. Therefore, it is argued, the equality right that is involved here is the right to equality in education, which translates into providing an equal educational opportunity. That, in turns, requires an educational experience which is individualized to take into account each child's needs. In other words, as I understand the argument, the respondent contends that to the extent that education is to be both meaningful and equal, it must treat each student according to his or her needs and abilities.

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It is on that basis that disability is said to be unanalogous to race. With respect, I believe that the argument is flawed. It may appear to find support in *Andrews*, *supra*, where Mr. Justice McIntyre, at p. 174, concludes his remarks on what constitutes discrimination:

Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

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I do not read this passage to suggest that distinctions based on physical or mental disability, a prohibited ground in s. 15, will be less discriminatory than

distinctions based on race or sex. The merits and capacities which may properly found the basis for different treatment cease to do so when they become personal characteristics, such as sex, ethnic origin or disability, which have in common a history of stereotyping. Although it may be easier to justify differences in access to educational facilities on the basis of disability than it would be if the differences were based on race, that analysis belongs to s. 1. For s. 15 purposes there is no hierarchy of prohibitions elevating some grounds of discrimination to a more suspect category and requiring a higher degree of scrutiny. If anything, one should be wary of accepting as inevitable and innocuous a classification on the basis of physical or mental disability, without the rigorous analysis required by s. 15. The present case is a good example. The combination of the obvious difference in ability between Emily Eaton and the other children of her age, and the obvious good intentions of all those concerned with her best interest, make it difficult to conclude that she has been the object of a discriminatory practice. In legal terms, I believe that she has been.

Whether the placement that is offered to Emily is of equal or even superior value is not relevant to a finding of discrimination. It is only relevant to the s.1 analysis which needs to be embarked upon if the discriminatory treatment is to be justified. Under s. 15(1) it is sufficient to find a classification, on a prohibited ground, which deprives the person of a benefit or imposes a burden or disadvantage.

Moreover, it cannot be said that her placement in a special class is a form of accommodation necessary to grant her a true equality of access to education. That reasoning would offer a justification to any "separate but equal" treatment under s. 15(1) without the need to examine the separate treatment under s. 1 of the Charter. The proper analysis, in equality adjudication, must respect the separate functions of s. 15 and s.1. The constitutional right that is at issue in these proceedings is not the right to education but the right to equality. Access to public education cannot be governed by classifications based on prohibited grounds such as race, sex, religion (except where otherwise provided for in the Constitution) or physical or mental disability, if the classification creates a burden or denies a benefit. When that is the case, as it is here, the unequal treatment must find its justification in s. 1. The importance of respecting the analytical boundaries between s. 15 and s. 1 was recognized in *Andrews*. McIntyre J. said, at p. 178:

The distinguishing feature of the *Charter*, unlike the other enactments, is that consideration of such limiting factors is made under s. 1. This Court has described the analytical approach to the *Charter* in *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, and other cases, the essential feature of which is that the right guaranteeing sections be kept analytically separate from s. 1. In other words, when confronted with a problem under the *Charter*, the first question which must be answered will be whether or not an infringement of a guaranteed right has occurred. Any justification of an infringement which is

found to have occurred must be made, if at all, under the broad provisions of s. 1. It must be admitted at once that the relationship between these two sections may well be difficult to determine on a wholly satisfactory basis. It is, however, important to keep them analytically distinct if for no other reason than the different attribution of the burden of proof. It is for the citizen to establish that his or her *Charter* right has been infringed and for the state to justify the infringement.

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What is the source of the discrimination?

Although I stated earlier that the *Charter* was engaged here because state action was involved in the school board acting under the authority of the *Education Act*, the actual source of the discrimination must be scrutinized further in order to understand whether it can be justified under s. 1, and, if not, what remedies would be appropriate to redress the *Charter* violation.

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The appellants have developed an argument with which I have considerable difficulty. They say, essentially, that they are not attacking the *Education Act*. They also concede that the order of the tribunal is not in itself unconstitutional, in the sense that, in an appropriate case, using an appropriate test, a Tribunal could order that a child like Emily be put in a special segregated class. What they say they are attacking is the reasoning of the tribunal, or the test that it used in exercising its discretion. That test, or reasoning, they submit, violates the *Charter* and the Human Rights Code. As I understand

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the appellants' position, it seems to amount to little more than asking the courts to require that the adjudication by the tribunal be made in accordance with Charter and Human Rights values and principles.

In *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038, the Supreme Court accepted that the order of an adjudicator could be attacked as "state action" under the Charter, without an attack on the empowering legislation. However here, the attack is not on the order. Nor is it, apparently, on the legislation. If the appellants are correct that the Charter mandates a preference for non-exclusionary education programs for disabled students, then the deficiency must, in my view, be in the failure of the *Education Act* to so provide. Section 8 of the *Education Act* imposes a duty on the Minister of Education to make appropriate special education programs available to all exceptional children in Ontario. Section 6 of Regulation 305, which deals with special education identification and placement, provides that placements are to be effected with the consent of the parents of the exceptional child, failing which the placement may be effected by direction of the board, subject to the parents' rights of appeal. That legislative scheme provides no impediment to the method and reasoning employed by the IPRC, Appeal Board and Tribunal in the present case and, as such, it is constitutionally inadequate, unless it can be justified under s. 1 of the *Charter*.

As I see it, the *Education Act* confers a discretion upon school boards to provide exceptional students, including disabled students, with an educational program that best meets their special needs. In the absence of other language in the *Act* or in the *Regulations*, the statute therefore authorizes the placement that the school board selected for Emily Eaton. That placement is discriminatory. The discrimination must thus be attributed to the legislation, and not, as the appellants contend, to the reasoning of the school board or the Tribunal. The issue therefore become whether the *Education Act*, and the regulations thereunder, constitute a reasonable limit, within the meaning of s. 1 of the *Charter*, on Emily Eaton's equality rights as provided for in s. 15 of the *Charter*.

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Is exclusion justified under s.1 of the Charter?

Section 1 of the *Charter* provides that:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

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The appellants do not contend that segregation of disabled students for educational purposes could never be permissible, nor do they contend that Emily Eaton has an absolute right to be educated in a regular classroom, with the requisite support.

They merely contend that there should be "a presumption" in favour of inclusion, and that the burden should be on those who advocate otherwise to show that it is the preferable course of action. They submit that unguided discretion conferred upon IPCRs, Appeal Boards and Tribunals to order a placement which may be discriminatory does not comply with s. 1 of the *Charter*, as interpreted in *R. v. Oakes*, [1986] 1 S.C.R. 103. The test articulated in *Oakes* requires that the impugned legislative measure be enacted in pursuit of a valid government objective of sufficient importance to override the constitutionally protected rights; that the legislative measure be rationally connected to the objectives; that it infringe the rights as little as possible; and that the effects of the measure be proportional to the objectives that it pursues.

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Very little time has been spent in this case addressing the s. 1 issue. In my view, it is unnecessary to embark upon every analytical step of the *Oakes* test. It is sufficient to recognize that the *Education Act* does not infringe the equality rights of disabled students as little as possible. It puts the selection of a segregated placement on the same footing as an integrated one. In the words of the Divisional Court, the *Education Act* permits the school board to reach its placement decision on the basis of its preference for one pedagogical theory over another, without having to weight the discriminatory impact of the selected theory. The *Act* authorizes the school board to require a disabled student to be educated in a segregated classroom, over the parents'

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objection, without having to show why less exclusionary forms of placement could not reasonably be expected to meet the child's special educational needs. Although the *Education Act* does not mandate a *Charter* infringement, it grants a discretion which may be used, and was used in this case, in a way that infringes s. 15. (See: Carol Rogerson, "The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness" in Sharpe, ed., *Charter Litigation* (1987), at p. 291). Since it permits a *Charter* infringement, without further guidance, I cannot say that the *Act* infringes the equality rights of disabled students as little as possible.

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The Remedy

Having identified a discriminatory provision in the *Education Act* that is not justified under s. 1 of the *Charter*, I think that the situation can be easily remedied without jeopardizing the entire structure of special education in Ontario, most of which, as indicated earlier, operates on a consensual basis, to the advantage of thousands of exceptional students whose learning needs might otherwise not be met. The present legislative and regulatory structure under which exceptional students are identified and placed into appropriate programs should therefore be left largely undisturbed. This can be achieved by curtailing the discretion conferred upon school boards by the *Education Act*. Section 8 of the *Act* should be read to include a direction that, unless the parents of a child who has been identified as exceptional by reason of a physical or mental disability

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consent to the placement of that child in a segregated environment, the school board must provide a placement that is the least exclusionary from the mainstream and still reasonably capable of meeting the child's special needs.

In *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 705, the court makes it clear that "striking down, severing or reading in may be appropriate in cases where the second and /or third elements of the proportionality test are not met." At p. 695, Lamer C.J. discussed reading in as a remedial option under Section 52:

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A court has the flexibility in determining what course of action to take following a violation of the *Charter* which does not survive s. 1 scrutiny. Section 52 of the *Constitutional Act, 1982* mandates the striking down of any law that is inconsistent with the provisions of the Constitution, but only "to the extent of the inconsistency". Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in. In addition, s. 24 of the *Charter* extends to any court of competent jurisdiction the power to grant an "appropriate and just" remedy to "[a]nyone whose [*Charter*] rights and freedoms...have been infringed or denied". In choosing how to apply s. 52 or s. 24 a court will determine its course of action with reference to the nature of the violation and the context of the specific legislation under consideration.

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In the present circumstances, curtailing the discretion conferred upon school boards by the *Education Act* achieves *Charter* compliance while minimizing interference with the legitimate legislative objectives of the *Act*.

When parents agree, on behalf of their child, that he or she should be educated in a special class for disabled students, there is no constitutional impediment to the school board proceeding accordingly. However, when this is not the case, the school board must select a segregated class as a last resort, having made all reasonable efforts to integrate the disabled child. Reasonable efforts are analogous to reasonable accommodation under *Human Rights* legislation. It is unnecessary here to speculate as to what reasonable inclusionary measures would be. Such measures could obviously include partial or occasional withdrawal from the regular class. The measures would only have to meet a reasonableness standard, which incorporates concerns for the needs of the other pupils in the classroom. In short, the *Charter* requires that, regardless of its perceived pedagogical merit, a non-consensual exclusionary placement be recognized as discriminatory and not be resorted to unless alternatives are proven inadequate.

Should the decision of the Tribunal be upheld despite the constitutional error?

It remains to determine whether the Tribunal would have inevitably arrived at the same conclusion had it appreciated that the *Charter* required that segregated

placement be used only as a last resort to meet Emily Eaton's educational needs. As indicated earlier, the Tribunal proceeded on a methodical and detailed review of the evidence and articulated its conclusions in a forthright manner on every contentious point. It is therefore easier to appreciate the impact of the approach that it took in arriving at the ultimate choice of placement. The tribunal concluded that none of Emily's needs were being met in the integrated classroom in which she had been placed. It did not specifically examine whether the evidence revealed that these needs would be better met, if at all, in a segregated environment. Indeed, in the case of her intellectual and academic needs, the Tribunal concluded that these "cannot be met best, if they can be met at all, in a regular class". As for her emotional and social needs, the Tribunal recognized the difficulty in determining the level of her enjoyment of the educational experience that she had received so far, since she does not communicate effectively. Relying on the increasing incidents of crying, sleeping and vocalizing, and the almost total absence of interaction between Emily and her classmates, the Tribunal concluded that those needs were also not being met in the current integrated setting. No finding was made that these needs would likely be better met in a special classroom, or that she would likely interact better with other disabled students. More to the point, in proceeding as it did, the Tribunal saw no need to examine the desirability of providing Emily with a modified integrated setting, such as assigning her to a regular class but with a different teacher, more experienced in integrating disabled students, or withdrawing her periodically from

the classroom for individual instruction. I do not wish to suggest that any of these measures would have been perceived by the Tribunal as likely to succeed where the integration in place, in its opinion, was failing. I simply remark that the Tribunal did not consider measures short of segregation, nor did it consider directly whether and how segregation offered better promise than the integrated model in place.

The point that has caused me the greatest difficulty is the Tribunal's conclusion that Emily's physical and personal safety needs could not be met in a regular classroom. The Tribunal examined that issue as follows:

Physical and Person Safety Needs:

There is extensive testimony from both appellant and respondent witnesses that while Emily's physical abilities when walking, sitting, standing, focusing, and using her hands in purposeful activity, have improved, these abilities are significantly less well-developed than the norm for her age. However, Emily's physical abilities by themselves ought not to be the deciding factor in evaluating whether her needs can be met best in a regular or special class. Although her need for a wheelchair, a walker, and a special desk, as well as physical assistance, together require much extra time and attention from the responsible adults in a classroom setting, it is not unreasonable to expect this of them, even though a special classroom may be better designed and equipped to address special physical needs.

What is unreasonable, in our opinion, is to treat lightly, Emily's habit of mouthing objects. This habit is attested to

by both appellant and respondent witnesses as consistent and well-established. The Tribunal notes that some of the objects mouthed may be relatively innocuous in small amounts (e.g., sand, paper) but we have evidence that Emily also mouths potentially harmful objects (e.g., pins).

10 The parents assert that they are not distressed by this habit in Emily, and that they are confident she will not swallow harmful objects. However, a home setting that is adjusted to a child with pervasive muscular dysfunction, and idiosyncratic communication abilities, and who regularly mouths objects, is significantly different from a regular classroom setting. It is unreasonable to expect Emily's age-peer classmates to manage their classroom materials with her mouthing habit in mind. It is also unreasonable to expect a school to treat Emily as though she will never swallow something potentially dangerous. Therefore the school has a choice of establishing a level of adult supervision of Emily that is more intense than mere watchfulness, or, of cleansing the classroom of mouthable materials. It is the Tribunal's unanimous opinion that for Emily's personal safety, one of these conditions must prevail, and neither condition can reasonably be realized in a normal, integrated, regular classroom.

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30 Even on that issue, which could by itself justify a segregated placement, I am not persuaded that the Tribunal would have necessarily concluded as it did, had it appreciated the legal impediments to the selection of a segregated setting. Emily is, for the most part, confined to a wheelchair in the classroom. If the Tribunal had appreciated the constitutional framework within which it is required to operate, I believe that it might have been less ready to dismiss increased adult supervision, or the removal of mouthable dangerous materials from Emily's vicinity, as unreasonable options.

For these reasons, I have come to the conclusion that the appeal should be allowed, the decision of the Tribunal should be set aside and the matter should be remitted to a differently constituted Tribunal for re-hearing in accordance with the constitutional principles set out in these reasons.

The "*obiter dictum*" in the tribunal's decision

The Tribunal concluded its reasons under a heading entitled "*Obiter Dictum*" in which it stated the following:

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Obiter Dictum

The fact that the disagreement over Emily Eaton's class placement has been allowed to continue to the level of a Special Education Tribunal hearing is a grave disservice to this child. The Tribunal has no doubt that everyone involved with Emily has her present best interests and future well-being at heart. But we also feel that both are being put at risk by an unnecessarily rigorous adherence to principle and by the tyranny of moral certainty.

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Having examined the historical development of this disagreement over Emily's placement, it is clear to us that Emily, the child, is now at risk of becoming Emily, the symbol. It is also clear to us that engaging legal counsel, turning to judicial and quasi-judicial avenues of redress, in short, taking an adversarial approach, has pushed this disagreement away from compromise and into competition, away from accommodation and into dispute. Emily's present and future well-being will not be served by going farther down this road.

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We have evaluated her school situation in a manner we consider rational and dispassionate, and we are convinced by the evidence, and by common sense, that a regular class is not the best place for Emily. Nevertheless, our decision in favour of a special class placement does not relieve the school board and the parents of the obligation to collaborate creatively in a continuing effort to meet her present and future needs. Emily's is so unusual a case that unusual responses may well be necessary for her. Such achievements can only be realized through cooperation, and most important, compromise.

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The Divisional Court reiterated the need for creative collaboration between Emily's parents and the school board in a continuing effort to meet Emily's present and future needs.

I agree that cooperation is a desirable course of action in such matters. However, I do not agree with the Tribunal's suggestion that the pursuit of Emily's legal rights to equality, by her parents who are her legal representatives, was ill-conceived and detrimental to the child. It could just as easily be suggested that it was ill-conceived and detrimental to the child for the school board not to simply yield to her parents' wishes and leave her in an integrated setting. The fact that the process for determining the validity of their respective positions was protracted and became adversarial cannot be visited on the parents. They did not design the statutory framework which sets up the IPCR process, the Appeal Board and the hearing before the Tribunal.

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They availed themselves of the only procedures made available to them by the legislation. Meanwhile, the child has remained in an integrated setting, which may not be the program that the tribunal felt was the most appropriate for her. It is, however, a non-discriminatory program, and the one that the parents, on behalf of their daughter, prefer.

In legal terms, the choice of a discriminatory alternative, even if it were justified under s. 1 of the Charter, is not one that a disabled child should be made to accept without the legal scrutiny to which she is entitled. There may be an ongoing pedagogical debate as to what is best for Emily's education. There can be no doubt, however, that as a person with disabilities, it is not against her best interest to assert her equality rights.

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I agree J.H.

I agree J. G. G. G. G.

I agree J. Mahoney J.A.

COURT OF APPEAL FOR ONTARIO

CARTHY, ARBOUR and LABROSSE J.J.A.

BETWEEN:

CAROL EATON AND CLAYTON EATON

Appellants

- and -

**THE BRANT COUNTY BOARD
OF EDUCATION**

Respondent

- and -

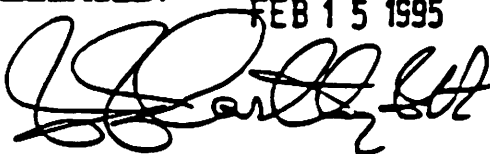
**CANADIAN DISABILITY RIGHTS
COUNCIL, ONTARIO ASSOCIATION
OF COMMUNITY LIVING and
ATTORNEY GENERAL OF ONTARIO**

Intervenors

J U D G M E N T

RELEASED:

FEB 15 1995



Supreme Court of Canada



Cour suprême du Canada

October 26, 1995

le 26 octobre 1995

JUDGMENT

JUGEMENT

MOTION

REQUÊTE

THE BRANT COUNTY BOARD OF EDUCATION -v.- CAROL EATON
and Clayton Eaton and Ontario Association for Community Living, Canadian
Disability Rights Council, and Attorney General for Ontario (Ont.) (24668)

CORAM: L'Heureux-Dubé, Sopinka and McLachlin JJ.

The application for leave to appeal is granted.

La demande d'autorisation d'appel est accordée.

J.S.C.C.
J.C.S.C.

Agreement of the Parties as to
Contents of Case on Appeal

Court File No.: 24668

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL
FOR THE PROVINCE OF ONTARIO)**

BETWEEN:

THE BRANT COUNTY BOARD OF EDUCATION

**Applicant
(Respondent)**

- and -


CAROL EATON and CLAYTON EATON

**Respondents
(Applicants)**


**AGREEMENT AS TO
CONTENTS OF CASE ON APPEAL**

In accordance with Rule 33(3) of the *Rules of the Supreme Court of Canada*, the parties agree as to the contents of the case on appeal to which this agreement is appended.

DATED: February 19, 1998


Janet L. Budgett
Counsel for the Respondents,
Carol Eaton and Clayton Eaton

DATED: February 19, 1998


Bronda J. Bowby
Counsel for the Applicant,
The Brant County Board of
Education

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Form D

Court File No.: C19214

COURT OF APPEAL FOR ONTARIO

BETWEEN:

CAROL EATON and CLAYTON EATON

Applicants

- and -

THE BRANT COUNTY BOARD OF EDUCATION

Respondent

ASSISTANT

I, the undersigned, Registrar of the Court of Appeal for Ontario, **DO HEREBY CERTIFY** that the foregoing case in *four* volumes, being pages numbered one to *735*, is the case as agreed upon by the parties to the appeal, by their Agreement as to Contents of Case on Appeal dated *FEBRUARY 19TH*, 1996.

AND I DO FURTHER CERTIFY that all judgments and orders appearing therein have been settled and signed in the form in which they appear and where required entered, and that there are no recorded reason for judgments other than those appearing in the said case. The hearing of the case required *10* hours and *41* minutes of the sitting time of this Court.

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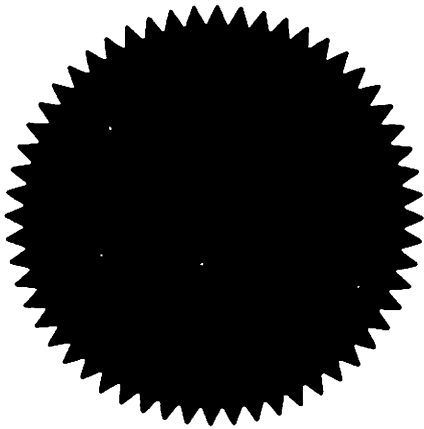
Form D

IN TESTIMONY WHEREOF I have hereunto subscribed my hand
and affixed the seal of the Court of Appeal for Ontario, this 22nd day
of *February*, A.D. 1996.

ASSISTANT

REGISTRAR

W. Brent Gault



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Form E

Court File No.: 24668

COURT OF APPEAL FOR ONTARIO

BETWEEN:

CAROL EATON and CLAYTON EATON

Applicants

- and -

THE BRANT COUNTY BOARD OF EDUCATION

Respondent

CERTIFICATE OF COUNSEL ON CASE

WE, CHRISTOPHER G. RIGGS AND BRENDA J. BOWLBY,
HEREBY CERTIFY that we have closely examined the annexed print of the case
in appeal to the Supreme Court of Canada and verily believe that the same is a
true and correct reproduction of the originals of which they purport to be copies
and that all reasonable methods have been taken to attain that end and that the
same has been proofread.



Christopher G. Riggs, Q.C.



Brenda J. Bowlby

