



HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Grayson Kahn, as represented by his Litigation Guardian, Lisa Kahn

Applicant

-and-

Upper Grand District School Board

Respondent

-and-

Ontario Secondary School Teachers Federation

Intervenor

DECISION

Adjudicator: Brenda Bowlby

Date: August 8, 2019

File Number: 2018-35148-I

Citation: 2019 HRTO 1137

Indexed as: **Kahn v. Upper Grand District School Board**

APPEARANCES

Grayson Kahn, as represented by his Litigation Guardian Lisa Kahn, Applicant))))	David Baker and Laura Lepine, Counsel
Upper Grand District School Board, Respondent))))	Eric del Junco and Sarah Molyneaux, Counsel
Ontario Secondary School Teachers Federation, Intervenor))))	Joshua Phillips and Alex Stromdahl, Counsel

INTRODUCTION

[1] This Application was filed on December 11, 2018 under s. 34 of the *Human Rights Code*, RSO 1990, c. H.19, as amended (the “Code”), and was amended on June 6, 2019. The applicant, Grayson Kahn (“Grayson”), alleges that he was discriminated against in the delivery of education services because of disability.

[2] Specifically, the applicant asserts that he had been denied meaningful access to education because the respondent failed to properly accommodate his disabilities (Autism Spectrum Disorder (“ASD”) and a Learning Disability). The respondent says that it fulfilled its obligations to accommodate the applicant to the point of undue hardship and that its efforts to provide accommodation were unsuccessful because of the failure of the applicant’s mother, the litigation guardian, to cooperate.

[3] Grayson attended a French Immersion programme (French Immersion school) offered by the respondent. Starting around September 10 to October 22, 2018, in his Grade 2 year, Grayson experienced increasing incidents of dysregulation in which staff and students were hit, kicked and/or pushed. He last attended school on October 22, after seriously injuring his Educational Assistant (“EA”). Grayson ultimately was suspended retroactively to October 22 and then expelled from the French Immersion school on November 20, 2018, after agreement could not be reached with his parents on a plan to safely return him to that school. He was placed at his home school. He has not attended the home school.

[4] Grayson’s mother, Lisa Kahn (“Ms. Kahn”), appealed his expulsion to the Child and Family Services Review Board (“CFSRB”) at the same time as the Application was filed. The CFSRB upheld the expulsion in a decision dated February 4, 2019, *LK v. Upper Grand District Board*, 2019 CFSRB 2.

[5] On May 7, 2019, I issued Interim Decision 2019 HRTO 768 accepting the findings of the CFSRB with the exception of findings relating to the credibility of one of

the applicant's expert witnesses, Tracy Lindblad, and whether the respondent's "Loop of School" plan for returning Grayson to school included home instruction.

[6] The applicant also alleges that the respondent engaged in acts of reprisal involving the treatment of his sister, who also has ASD and was a student at the French Immersion school. Just prior to the hearing, the respondent made a request to bifurcate the hearing on the reprisal issue and on remedy. After hearing argument at the outset of the hearing, I ordered that the allegations relating to the allegation of reprisal be bifurcated, to be dealt with at a hearing in September.

[7] This case was tightly case managed in order to ensure that it could be completed and a decision issued prior to the start of the coming school year. The parties were required to file detailed affidavits/expert reports setting out the evidence of each witness prior to the start of the hearing in order to allow limited examinations at the hearing. The hearing took place over the course of nine days. Evidence was presented starting on June 27 and concluding on July 9, 2019. Final argument was presented on July 12, 2019.

[8] The applicant called the following witnesses: Ms. Kahn, Tracy Lindblad, Dr. Kerry Wells, Dr. Julie Koudys, Catherine White and Danielle D'Amato.

[9] The respondent called Leslie Newman, Chad Raey, Sarah Griffiths, Sarah Treadaway, Dr. Gareth Smith, Jocelyn Bowers, Suzanne Dougan, Cheryl Van Ooteghem Tracy Lindsay, Wendy Donaldson, Katherine Soule and Rebecca Kingshott.

RECUSAL REQUEST

[10] The applicant made an unparticularized request that I recuse myself two days before the hearing was to begin. I directed the applicant to provide particulars and a record and that the other parties provide any record they wished to rely on. After hearing the parties' submissions, the request was dismissed with reasons to follow in my final decision. These are my reasons.

Applicant's Submissions on Recusal Request

[11] The applicant argues that “ABA at Tier 3 is education”. The applicant says that I am predisposed to find that ABA (Applied Behaviour Analysis) at Tier 3 is not education because:

- During my legal career, a large part of my practice involved the provision of legal services to school boards in the areas of special education, employment and labour relations issues, human rights and litigation.
- In that capacity, the applicant alleges I “repeatedly appeared as counsel to school boards seeking to achieve a finding that ABA is incompatible with education of autistic children, that it is distinct and incapable of being an educational accommodation.” He relies on 3 Ontario Special Education Tribunal (“OSET”) decisions: *C. v. Simcoe District School Board*, 2003 ONSET 3; *M.W. and A.W. v. Simcoe County District School Board*, 2004 ONSET 3 and *B.T. and B.T. v. Simcoe County District School Board*, 2004 ONSET 4 (“the SCDSB cases”). I was counsel to the School Board in all three cases. The applicant alleges that because I argued on behalf of a school board that IBI (intensive behavioural intervention) therapy was not a special education program or service in 2003/4, a reasonable apprehension of bias arises that I am biased with respect to the issue today.
- Applicant’s counsel suggests that subsequent to these decisions, I advised my school board clients that ABA is incompatible with the education of autistic children.
- My name continues to appear on the website of my former law firm which, the applicant says, gives a “strong suggestion” that I retain a role in mentoring, advising or consulting in the firm’s business.
- In Interim Decision 2019 HRTO 979 I commented that a report prepared by one of the applicant’s expert witness had been posted on applicant counsel’s website for marketing purposes and that this diminished the appearance that this witness was independent from applicant’s counsel. The applicant argued a similar finding should be made as a result of my picture on my former firm’s webpage.

- The applicant also argues that in Interim Decision 2019 HRTO 979, I placed restrictions on this witness's evidence which preclude her from giving opinion evidence relating to whether "ABA at Tier 3 is education".
- Finally, the applicant submits that in another interim decision, my findings on his objections to evidence set out in the affidavits of the respondent's witnesses, including expert witnesses, contain errors and these errors point to bias on my part.
- Counsel says he was away on vacation when Interim Decision 2019 HRTO 979 was issued. Only when that Interim Decision came to his attention on June 25 did he conclude a reasonable apprehension of bias was present.

[12] The respondent and intervenor both provided records and made detailed submissions opposing the applicant's recusal request.

Law

[13] A party has an obligation to raise the issue of apprehension of bias at the first opportunity to do so, or it is taken to have waived its objection. A party will lose its right to request the recusal of an adjudicator if the grounds upon which the allegations of bias are made were known to the party before adjudication commenced and the party proceeded without objection: *Khakh v. Canada (Minister of Employment and Immigration) (T.D.)*, [1994] F.C. 548 at para 35.

[14] The legal principles to be applied, when considering whether a reasonable apprehension of bias exists, are set out in *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), at p. 394:

. . . the apprehension of bias must be a reasonable one, held by reasonable and rightminded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

[15] The Supreme Court of Canada defined bias in *Wewaykum Indian Band v. Canada*, 2003 SCC 45, at paragraphs 58 and 59, and further made the point that there is a presumption that the adjudicator is impartial which presumption the party alleging bias has the burden to disprove:

The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind. Conversely, bias or prejudice has been defined as

a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.

(*R. v. Bertram*, [1989] O.J. No. 2123 (QL) (H.C.), quoted by Cory J. in *R. v. S. (R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484, at para. 106.

Viewed in this light, “[i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary” (Canadian Judicial Council, *Ethical Principles for Judges* (1998), at p. 30). It is the key to our judicial process, and must be presumed. As was noted by L’Heureux-Dubé J. and McLachlin J. (as she then was) in *S. (R.D.)*, *supra*, at para. 32, the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. Thus, while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified.

[16] The Tribunal has recognized that the fact that an adjudicator advocated positions on behalf of clients prior to being appointed does not mean that they agree with those positions. In *Goodridge v. Toronto Police Services Board*, 2009 HRTO 94 (“*Goodridge*”) at paragraph 17, the Tribunal said:

Lawyers are ethically bound to make the best possible arguments on behalf of their clients, whether or not they reflect the lawyer’s personal views. Therefore, the fact that a person acting as a lawyer advocated a position does not mean that he or she agrees with it. Moreover, having existing, even publicly expressed personal views prior to appointment

does not generally lead to a reasonable apprehension of bias. Justice Cory of the Supreme Court of Canada put it this way in *R. v. S. (R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para. 119:

The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes. It has been observed that the duty to be impartial does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.

True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.

(Canadian Judicial Council, Commentaries on Judicial Conduct (1991), at p.12.)

[17] In *Ihasz v Ontario*, 2013 HRTO 333 (“*Ihasz*”) at paragraph 23, the Tribunal noted that a party’s dissatisfaction with an interim decision is not a basis for finding a reasonable apprehension of bias:

The applicant is dissatisfied with the Interim Decisions I issued in this matter, but that is not a basis for finding a reasonable apprehension of bias.

Analysis

The premise of the applicant’s recusal request

[18] As the intervenor notes, the lynchpin of the applicant’s submission is that I have a predisposition to deciding issues which the applicant wishes to raise in this case because I

(...) repeatedly appeared as counsel to school boards seeking to achieve a finding that ABA is incompatible with the education of autistic children – that it is distinct and incapable of being an educational accommodation.

[19] The applicant cites three OSET decisions from 2003-2004 in support of this proposition. All three involved the same school board, Simcoe County District School Board. He points to no other school boards and cites no other cases.

[20] First, as noted in *Goodridge*, the fact that a lawyer advocates a particular position in the course of representing a client in litigation is not a basis for a presumption that the lawyer is biased with respect to that issue. Therefore, it cannot be assumed that merely because I advocated for a client's position in a particular case that my personal views were the same as the client's. To find otherwise would preclude adjudicators from ever hearing cases in which an issue arises or might arise that also arose in a case in which they acted as counsel prior to being appointed.

[21] Nor is it appropriate for a party to justify a challenge to an adjudicator's impartiality based on speculation by that party's counsel on what the adjudicator advised clients prior to the adjudicator's appointment. However, I can state categorically that it was not the practice of any of school board clients to consult me about the content of the placements, educational programming or educational services they provided to any of their students for the simple reason that I am a lawyer, not an educator or expert in ABA or IBI.

[22] As the respondent notes in its submission, the OSET is a different tribunal with a different mandate and the SCDSB cases were decided at a different time. Pursuant to s. 57 of the Education Act, RSO 1990, c. E.2, the OSET hears appeals from parents regarding identification and placement which the OSET has decided includes special education services and special education programs to be provided in the placement. It is also significant that these cases were decided in 2003/4, well before PPM 140 was issued by the Ministry of Education. In any event, the OSET did not deal with the issue of discrimination under the *Code*.

[23] Further, the applicant is simply wrong in his characterization of the SCDSB cases. The SCDSB did not argue that ABA is incompatible with the education of autistic children. The special education placement the SCDSB argued was most appropriate for the appellants' children was a special education class for children with autism that specifically incorporated ABA principles and methodology in the delivery of educational programming by staff who had received ABA training from the Geneva Centre. The SCDSB did take the position that there was a distinction between IBI therapy and ABA used in the delivery of education but so too did experts called by the appellants (parents). This is reflected in the OSET's decisions.

[24] Accordingly, the premise for the applicant's bias submission, that I "repeatedly appeared as counsel to school boards seeking to achieve a finding that ABA is incompatible with the education of autistic children – that it is distinct and incapable of being an educational accommodation" is wrong.

Other Factors

[25] I did represent school boards during the time I practiced law with my former law firm, and my practice included education law. However, as noted by the respondent and intervenor, I retired in March of 2015. I did continue to do work for my former firm for a couple of months following my retirement, but only to complete two hearings which I was mid-way through when I retired. I have not, as the applicant suggests, continued to work for my former law firm or to consult with it. As the respondent points out, my status with the Law Society is that I am not engaged in the practice of law but employed (by the government of Ontario in the capacity of a part-time member of the Tribunal).

[26] My former law firm's website confirms my retirement and gives information about the lawyers who assumed the education law parts of my practice. There is no indication on the website that I continue to be available to provide legal services and I am not. Although my old phone number and email address continue to be shown, anyone trying to contact me through either of these will find that both are inactive.

Further, as the intervenor notes, my former law firm does not represent any party in this case.

[27] In respect of a “cooling off” period, as the respondent points out, I was appointed as a member of the Tribunal in February 2018, almost three years after my retirement from the practice of education law. I have not represented a school board since concluding my last case in July of 2015. Even if the fact that I represented school boards during my practice was a factor on which an apprehension of bias might arise, I am satisfied a sufficient cooling off period has passed to remove any such apprehension.

[28] I also note that, as the intervenor submits, the applicant has been aware that I would be the decision maker in this matter since the Case Management Conference Call (“CMCC”) on March 18, 2019 but made no objection until two days before the hearing was to commence.

[29] Finally, turning to the applicant’s argument about my earlier Interim Decision, as noted in *Ihasz*, a party’s dissatisfaction with the result of an interim decision cannot be the basis for apprehension of bias.

[30] For these reasons, I dismissed the applicant’s request that I recuse myself.

OVERVIEW

[31] In order to understand the parties’ position, it is helpful to provide a brief summary of Grayson’s school history. Grayson attended the French Immersion school from Junior Kindergarten to October 22, 2018 of his Grade 2 year.

[32] The French Immersion school has approximately 620 students including more than 95 who are identified with special needs and approximately 40 who have formal diagnoses such as learning disability-communication, ASD, Attention Deficit Hyperactivity Disorder (“ADHD”), and Down Syndrome. In September of 2018, the

French Immersion school had approximately 50 staff, including a Special Education Resource Teacher (“SERT”), and 3.5 full-time EAs (to meet the needs of 12 students). The Principal works regularly with one of the three Board Certified Behaviour Analysts (“BCBAs”) employed as ABA facilitators by the school board.

[33] The CFSRB outlined the “general sequence of events” agreed to by the parties as follows:

[T]he Pupil’s IEP identifies his exceptionality as “Autism: Communication”.

JK/SK: There were concerns about the Pupil’s behaviour in JK/SK and the parents provided the school board with a Psychological Assessment dated August 2017. The Pupil was diagnosed with Autism Spectrum Disorder (“ASD”).

Grade 1: As described in the Principal’s Expulsion report, the Pupil displayed serious behavioural issues, but staff were able to manage the risk and keep the Pupil, other students and themselves safe with support.

Summer 2018: The appellant [the applicant’s mother and litigation guardian] observed more signs of aggression when the Pupil was frustrated including hitting, which she reported to the Principal in August.

Grade 2: The first week of school went well. Commencing the second week of school, the Pupil experienced increased dysregulation and behavioural issues which were ongoing and of increasing severity, until his suspension on October 22, 2018.

[34] The CFSRB found that Grayson successfully completed his Grade 1 year based on the agreement of the appellant and the respondent. The CFSRB found that the respondent was able to manage his behavioural issues in that year and that the accommodations implemented by the respondent in Grade 1 were “effective in supporting [Grayson] in Grade 1.”

[35] Although the respondent offered a number of times to meet with Ms. Kahn to discuss options for Grayson’s return to school after his expulsion, these offers were declined. The applicant took the position that the options offered did not provide the type of ABA he required to be successful in school. The applicant’s litigation guardian

argues the respondent failed to provide the academic program and supports Grayson needed and that this failure was the cause of his dysregulation.

[36] The respondent denies that it failed to provide appropriate academic programming and supports and takes the position that Grayson's dysregulation was caused by other factors including his language of instruction (French Immersion), his litigation guardian's behaviours and possibly a co-morbid disability, which has not been diagnosed. The respondent submits that it offered reasonable accommodations which the applicant declined.

BACKGROUND FACTS

Credibility and Reliability of Fact Witnesses

[37] There is no dispute between the parties that Grayson experienced dysregulation while attending the French Immersion school during his Grade 2 year. However, there are disputes regarding the causes of Grayson's dysregulation, the incidents of dysregulation – including whether the conduct of the litigation guardian was a factor in Grayson's dysregulation -- and about the educational program and supports provided by the respondent to Grayson. There were conflicts in the evidence of witnesses called by the parties in relation to these issues.

[38] Consequently, it is necessary to make determinations regarding the credibility and reliability of the evidence of Ms. Kahn and of the respondent's witnesses.

[39] In assessing the evidence of the litigation guardian and the respondent's staff respecting what happened at the French immersion school, I have considered the principles set out by the Tribunal in *Shwan v. Ontario Lottery and Gaming Corporation*, 2019 HRTO 653 at paragraphs 21 and 22:

In making this assessment, I have been guided by the well-established principles as set out in *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (BCCA), and particularly the following comments at pp. 356-357:

...Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility.

The credibility of interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions (...) Again, a witness may testify to what he sincerely believes to be true, but he may be quite honestly mistaken.

I also have been assisted by the observations on credibility assessment made in *R. v. Taylor*, 2010 ONCJ 396 , as follows at paras. 58 to 60:

“Credibility” is omnibus shorthand for a broad range of factors bearing on an assessment of the testimonial trustworthiness of witnesses. It has two generally distinct aspects or dimensions: honesty (sometimes, if confusingly, itself called “credibility”) and reliability. The first, honesty, speaks to a witness’ sincerity, candour and truthfulness in the witness box. The second, reliability, refers to a complex admixture of cognitive, psychological, developmental, cultural, temporal and environmental factors that impact on the accuracy of a witness’ perception, memory and, ultimately, testimonial recitation. The evidence of even an honest witness may still be of dubious reliability.

All of this has been said many times before, including by Doherty J.A. for the Court of Appeal in *R. v. Morrissey*, 1995 CanLII 3498 (ON CA), (1995), 97 C.C.C. (3d) 193, at 205:

Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves

considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is honest witness, may, however, still be unreliable.

Depending on the circumstances, some portions of a witness' testimony may be more credible or worthy of belief than other portions. Accordingly, I can, with good reason, accept all, some or none of any witness' evidence: see *R. v. R.E.M.*, 2008 SCC 51 (CanLII), [2008] 3 S.C.R. 3, at para. 65.

[40] The disputes between the parties emerged primarily through the evidence of Ms. Kahn. During her examination in chief, she accused the respondent's staff at the French Immersion school of "gaslighting" her and disputed the evidence of the respondent's witnesses regarding her behaviour which the respondent asserts was a factor in Grayson's dysregulation. For example, Ms. Kahn's evidence regarding an incident on September 25, 2018 involving a "heated conversation" between Ms. Kahn and Principal Lisa Newman (Ms. Newman), in front of Grayson, was as follows:

...it wasn't my finest moment in my life, but, at the same time, I think any parent of any child would have reacted the same way. The school was intentionally gas-lighting me and still does to this day, **but I have learned not to react to their gas-lighting techniques. But they have been intentionally gas-lighting me probably since Grayson has been in SK.** And I was at a point where his education was at risk. I was concerned that he was not going to come home alive at the end of the day because the school backs onto a river, and he was eloping from school constantly and running off into the forest. So I would say that my own mental health was probably through the roof. I was extremely stressed out because I was worried for his safety and the safety of others. [Emphasis added.]

[41] During cross-examination, Ms. Kahn confirmed that what she meant by "gaslighting" was that the school staff were "engaging in a form of psychological manipulation" by seeking "to sow seeds of doubt to ... a targeted individual to make

them question their own perception and sanity”. She stated, “I am telling you there is not one person in that school that... would not like to see me dismantled 100%”. She gave the following example of the “gaslighting” she says she subjected to,

the repeated lies of locking my child out of the classroom for hours on end, and excluding him from the rest of his classmates repeatedly over and over again, day in and day out, and lying about the academic supports that they were providing him, and any other supports related to his disability that they were supplying him.

[42] Ms. Kahn also challenged the veracity of the respondent’s witnesses. When asked whether she was suggesting that they had knowingly sworn false affidavits, she stated, “Absolutely. It wouldn’t be the first time and it won’t be the last time, I’m sure”.

[43] Applying the principles above to Ms. Kahn’s evidence, I have concluded that many portions of Ms. Kahn’s evidence lacked credibility and reliability. The reasons for this conclusion are as follows:

- Ms. Kahn’s allegations regarding “gaslighting” and dishonesty on the part of the respondent’s witnesses came out only at the hearing. Ms. Kahn’s affidavit, filed at the hearing, was not sworn until April 15, 2019 and it contained no rebuttal or contradiction of the evidence set out in the respondent’s affidavits about her behaviours despite the fact that, for the most part, these affidavits were filed with the Tribunal in January together with the response.
- There were inconsistencies and even conflicts in Ms. Kahn’s evidence on significant points. For example:
 - Ms. Kahn testified at the hearing that the first time she swore at the school was on September 21, and she underlined this by saying “100 percent”. However, attached to her affidavit are minutes of a meeting which took place on September 19, 2018 (though the minutes show a date of September 18). Contrary to her assertion that she did not swear at school prior to September 21, the minutes record that Ms. Kahn at one point said that “she did not give a s*** about any other kid in the building but her own”. The minutes go on to say as follows:

Chad and Leslie discussed how the EA on Monday morning felt bombarded with questions and [Ms. Kahn's] intimidating tone of voice. [Ms Kahn] responded by saying that she wasn't intimidating but that it was good that the EA felt that way because she should know everything about her son. She followed this by saying that, "If that f...ing EA ever sets foot around her son again that she would call the CAS in a blink.

- Ms. Khan testified that she refused the plan proposed by the respondent to return Grayson to school through a "Loop of School" plan because the plan did not include academics. Ms. Kahn continued to maintain this position until, in cross-examination, she was directed to her own email which refers to the fact that the plan included 5 hours of Home Instruction.
- Further, Ms. Khan asserted that she "didn't see any sort of plans for supports to support his language or any academics whatsoever". However, attached to Ms. Kahn's affidavit is a copy of Grayson's Individual Education Plan (IEP) summarizing Grayson's educational program, including Language, and outlined strategies (including supports) that would be used. Emails exchanges between Ms. Kahn and Sarah Griffiths (Ms. Griffiths), the school's special education resource teacher, make clear that at least a month before the revised IEP was issued, Ms. Kahn had been asked to provide her input for revisions to the IEP. Moreover, attached to Ms. Kahn's affidavit are minutes of two meetings (June 19, 2018 and September 18, 2018) between Ms. Kahn and school staff in which the academic program being provided to Grayson was discussed with Ms. Kahn.
- Ms. Kahn's assertion that she was being "gaslighted" by the respondent's employees and that all of them were dishonest is, quite simply, incredible and lacks any rational basis. It is quite clear that Ms. Kahn's view of the events which have occurred since the second week of Grayson's Grade 2 year, when his dysregulation increased significantly, is clouded by strong emotions. I note in this regard that Ms. Kahn questioned the extent of Ms. Bowers' injuries resulting from Grayson's behaviour. The seriousness of these injuries is amply documented and outlined further below.

[44] In respect of the respondent's witnesses, I have found these witnesses to be credible and reliable in their evidence, for the following reasons:

- There were some minor inconsistencies regarding details of incidents – for example the precise words spoken in interchanges and the timing of some events differed between some witnesses speaking about the same events. However, there was substantial accord in the descriptions provided by these witnesses about events including the nature and tone of conversations, and what was said, including the profanity used by both Ms. Kahn and Grayson. The minor inconsistencies on inconsequential details do not suggest that the evidence of the respondent's witnesses is either false or unreliable because of the substantial accord on the critical elements of the events which are the focus of the evidence. I also take into account that because these witnesses often found themselves in very stressful situations in which their focus was on keeping Grayson, other students and themselves safe from injury, it is not surprising that there would be minor inconsistencies in their recollections and recitations of how or when the incident unfolded. It would be more concerning if the recall of witnesses was identical down to the minutest detail since this would suggest collaboration between the witnesses.
- There are written records of a number of incidents of Grayson's dysregulation in the form of Violent Incident Reports ("VIRs"), which must be filled out by schools whenever a violent incident occurs. These contemporaneously created VIRs, were appended as exhibits to the affidavits of the respondent's witnesses and provide brief summaries that support the respondent witnesses' evidence regarding incidents of Grayson's dysregulation.
- With respect to the educational programming and academic supports provided to Grayson at the French Immersion school, I find the evidence of the school staff, including Ms. Griffiths, Ms. Newman and one of the respondent's BCBA's, Sarah Treadaway (Ms. Treadaway), to be reliable and credible. Their evidence is supported by documentary evidence including Behaviour and Safety Plans, and Grayson's IEP, staff meeting notes, notes of meetings and email exchanges with Ms. Kahn, and other documentary evidence appended to their affidavits. It is also supported by the minutes of parent/school meetings of June 19, 2018 and September 18, 2018, attached to Ms. Kahn's affidavit.

[45] As a result of these findings, where there is any conflict in the evidence between Ms. Kahn's evidence and the evidence of respondent's witnesses, I accept the evidence of the respondent's witnesses over Ms. Kahn's.

JK, SK and Grade One

[46] Grayson was enrolled in Junior Kindergarten ("JK") at the French Immersion school in September of 2015. His older sister was already a student there.

[47] In 2016, while enrolled in Senior Kindergarten ("SK"), Grayson began to have some difficulties in class, including difficulty with fine motor skills, maintaining attention, and knowing where his body was in space. Ms. Kahn asked Ms. Newman if the respondent would do an assessment of Grayson and was told that none would be done at that time. Grayson's parents then arranged for a private assessment by an Occupational Therapist ("OT") in November 2016. The OT made recommendations for school and home to improve Grayson's fine motor skills and to address Grayson's sensory needs. Ms. Kahn provided the OT's report to the school.

[48] Although Ms. Kahn took the position that the school did not implement the recommendations in the OT's report, Ms. Newman says that the school followed through on every recommendation in the report. In addition, OT services from Waterloo Wellington Community Care Access Centre were provided to Grayson at school through the year.

[49] Grayson was given his first IEP in December 2016.

[50] Ms. Kahn wrote to Ms. Newman in March 2017 requesting assessments for Grayson in light of his increasing behaviour problems including elopement from school and "melt downs". Ms. Kahn expressed her concern that possible issues with Grayson's learning had not been addressed, especially when Grayson progressed from play-based learning in SK to the different learning he would have in Grade 1. In response, Ms. Newman told Ms. Kahn that school staff knew Grayson's triggers and had put

things in place to try and eliminate unwanted behaviours as much as possible, including a behaviour plan and safety plan.

[51] Ms. Newman testified that typically assessments are not done for students in Kindergarten because they are not usually accurate. She said that in Grade 3, a cognitive abilities test is done. She said that no assessment was considered for Grayson in Grade 1 because his parents had a psycho-educational assessment done for him in the summer between SK and Grade One.

[52] In March 2017, Grayson began participating in the Literacy Based Language Intervention program developed by the respondent's Speech Pathologist, who had seen Grayson with Ms. Kahn's consent.

[53] In April, a representative of the Canadian Mental Health Association observed Grayson at the French Immersion school at his parents' request. He offered some suggestions to the school, but these things were already in place.

[54] Grayson was promoted to Grade 1 at the end of SK.

[55] During the summer of 2017, Grayson was assessed by psychologists Laura Genik and Dr. Newby-Clark, who produced a psycho-educational assessment report (the "Newby-Clark report"). This report included a diagnosis of Autism Spectrum Disorder and noted that Grayson demonstrated sensory-seeking and repetitive behaviour occurring most often when he became emotionally dysregulated. It further identified Grayson's tendency to respond with verbal and physical aggression when he became upset. The Newby-Clark report included a number of recommendations including recommendations for learning, and for behavioral and social-emotional functioning. Among the recommendations for behavioural and social-emotional functioning, the report suggested that the creation of a motivation system used consistently across settings "might be helpful."

[56] The Newby-Clark report did not recommend ABA/IBI therapy for Grayson, but rather “encouraged” Grayson’s parents “to investigate programs within their community and to participate in those their community that they might find useful for themselves or for Grayson (e.g. ABA/IBI, social skills programing, parent support groups).” There was no suggestion in the report that ABA/IBI be provided as part of Grayson’s education program or that he required ABA/IBI to access his education program.

[57] The recommendations set out in the Newby-Clark report, directed to the school and Grayson’s teachers, did not make any specific mention of ABA; nor did the report specifically direct that ABA be used to deliver Grayson’s education. The report did, however, mention the use of techniques and methods that are recognized as involving ABA principles, including the motivation system mentioned above.

[58] Ms. Newman stated that the school provided the ABA services that were recommended by the psycho-ed report, “Absolutely”.

[59] An addendum to the Newby-Clark report addressed the question of technology. The addendum did not specifically indicate that Grayson required technology but noted the benefits that technology might provide to Grayson while also noting that using tablets for reading or language may be a trigger for Grayson. Ms. Kahn complained that the respondent did not purchase an iPad for Grayson.

[60] Ms. Newman interpreted the addendum as suggesting the possibility of technology and that they would need to continue to explore it and weigh whether or not it would be a support for Grayson or a possible trigger. Ms. Newman said that the question of purchasing technology for Grayson was subject to ongoing monitoring, which is referred to in Grayson’s IEP. In the meantime, a computer and iPad were available in the classroom for Grayson’s use. The school purchased an MP3 player for Grayson.

[61] On September 8, 2017 (at the outset of Grayson’s Grade 1 year), a meeting was held with Grayson’s parents, the authors of the Newby-Clark report, school staff

including Ms. Newman and Ms. Griffiths, and the school's special education resource teacher. The findings of the psycho-educational assessment and the recommendations were discussed at this meeting, together with the IEP, including modifications for reading and writing and fine motor. The minutes of the meeting, attached to Ms. Griffith's affidavit, disclose that the only technology discussed at the meeting was the purchase of the MP3 player and that the only mention of ABA was that tokens used for the motivation system should "match what is happening in ABA". This appears to be a reference to the ABA therapy that Grayson was receiving at that time from Toby Stahlschmidt-Kah (Ms. Stahlschmidt-Kah), a private BCBA employed by Grayson's parents. The minutes disclose no discussion about the use of ABA in the delivery of Grayson's education.

[62] In October 2017, the respondent sent Ms. Treadaway to the French Immersion school to develop a plan for Grayson regarding his behaviour and social-emotional needs. ABA strategies were put into place as part of this plan.

[63] In both Grade 1 and Grade 2, Ms. Griffiths modified the curriculum to individualize it for Grayson to ensure he was working at things at his level.

[64] Grayson successfully completed Grade 1 and was promoted to Grade 2.

Grade 2 – September 3, 2018 to October 22, 2018

[65] During the summer prior to Grade 2, Ms. Kahn noticed Grayson showing an increase in aggressive behaviour. He was hitting people when he was frustrated; this included hitting Ms. Kahn which he had not previously done. Ms. Kahn wrote to Ms. Newman to advise her about this. Ms. Kahn also posted on Facebook that Grayson had also started "randomly" hitting kids.

[66] During the first week of school in September, things went well. At this point, Grayson's teacher was using a motivation/incentive system called the "token system"

that had been implemented by Ms. Treadway in the prior school year. This system had worked well.

[67] Ms. Newman assigned two Primary EAs to work with Grayson, one in the morning and one in the afternoon. Both were assigned to his class to work with other children when not working with Grayson. Jocelyn Bowers (Ms. Bowers), the EA who had worked with Grayson in Grade 1, was assigned to work with Grayson in the afternoons in Grade 2. Another EA was assigned to work with Grayson in the mornings.

[68] Ms. Newman's decision to assign two EAs in this way was, in part, because in the past Grayson either would become possessive of the EA assigned to assist him or would become frustrated by constant contact with just one EA. In addition, Ms. Newman was concerned that because of Grayson's significant behavioural challenges, it would be difficult for one EA to work effectively with Grayson for the entire day.

[69] The initial EA assigned to work with Grayson in the mornings was injured on September 3. On September 17, Santana Nickerson was assigned to replace the initial EA and she remained for the balance of Grayson's time at the French immersion school. During the interim period, 6 other EAs worked with Grayson, none remaining for any length of time due either to illnesses, injuries and a work refusal.

[70] Ms. Griffiths testified that the IEP from Grayson's Grade 1 year carried over into the Grade 2 year, and that modifications were made and curriculum was individualized for Grayson to address his learning needs prior to the completion of the revisions of the October 15, 2018 IEP document. Ms. Duguay, Grayson's classroom teacher, would check in almost daily with Ms Griffiths, looking for suggestions and guidance, and they would spend hours after school working on ways to support Grayson. Ms. Griffiths stated that she believed that an appropriate level of instruction was being provided to Grayson.

[71] The IEP identifies the assessments used in creating the IEP, sets out the student's strengths and needs, interests, health support services, accommodations,

human resources involved with the student (both teaching and non-teaching), and individualized equipment. The IEP also sets out an overview of the student's special education program. In Grayson's October 2018 IEP, this included annual program goals, learning expectations for language (including reading and writing), physical, self-regulation and transition plans. A log of parent consultation is also set out in the IEP.

[72] The Newby-Clark report set out "Recommendations for Learning" distinct from the "Recommendations for Behavioral and Emotional Functioning", also set out in the report. A comparison of the IEP with the Newby-Clark report shows that the Recommendations for Learning appear to have been addressed in the IEP. Moreover, teaching strategies outlined in the IEP included ABA strategies, including use of positive praise and encouragement and a reinforcement system.

[73] Ms. Griffiths confirmed that the behaviour plan created by Ms. Treadaway complied with the ABA requirements of the Newby-Clark report.

[74] On September 10, 2018, a meeting was held at the school, attended by Ms. Kahn, Ms. Stahschmidt-Kah, Ms. Newman, Ms. Griffiths and Ms. Duguay to review Grayson's accommodations. Ms. Kahn and Ms. Stahschmidt-Kah suggested that the school try the "self and match" incentive system, being used during Grayson's sessions with Ms. Stahschmidt-Kah and at home, in place of the token system Ms. Treadaway had put in place during the prior school year. The school agreed and Ms. Stahschmidt-Kah gave directions to staff about the system.

[75] The new incentive system did not work for Grayson. Both Ms. Treadaway and Ms Lindblad (the applicant's expert witness) agreed that the change in the incentive system to "self and match" was a mistake because of its complexity, the fact that it used a delayed gratification approach and poor training provided to the EAs who were to implement the "self and match" program.

[76] During the second week of school, Grayson's behaviours escalated. Ms. Griffiths became increasingly concerned that French was a burden for Grayson which

was aggravating his dysregulation. She was concerned that Grayson did not understand Ms Duguay, who is Francophone, whereas his Grade 1 teacher was an Anglophone who spoke French as a second language. Both Ms. Newman and Ms. Treadaway observed that the demands of a French Immersion program were a significant aggravating factor in Grayson's dysregulation. Ms. Treadaway believed that the increasing complexity of the French language used was difficult for Grayson. Grayson reported to a number of staff that he hated French.

[77] Ms. Bowers observed that around the middle of September, Grayson started to escalate very quickly, became very aggressive and that they were not able to de-escalate him using the techniques that had worked in Grade 1.

[78] On September 19, 2018, a meeting was held to discuss Grayson, attended by Ms. Kahn, her sister-in-law, Ms. Newman, Ms. Griffiths and Vice Principal Chad Raey (Mr. Raey). Ms. Kahn raised a number of concerns about what was and was not happening. Ms. Newman spoke to these concerns and an action plan was agreed to.

[79] On September 21, Ms. Treadaway returned to the school to provide assistance. She spent 5 hours at the school observing and assessing Grayson. She recommended that the school discontinue the new "save and match" incentive system and return to the token system. She contacted Ms. Stahlschmidt-Kah to review her observations and recommendations with Ms. Stahlschmidt-Kah and they agreed that they were both "on the same page" respecting the strategies, recommendations and next steps that would benefit Grayson. Ms. Treadaway spoke briefly with Ms. Kahn at the end of the day on September 21 and then again on September 25 to advise Ms. Kahn of her thoughts and to inform her that she would be creating an ABA Facilitator Support Plan ("AFSP").

[80] On about September 24, as Grayson's behaviours escalated, additional EA support was brought in. Ms. Bowers was reassigned to work full days at the French Immersion school (she had been working at another school in the mornings), and essentially full time with Grayson. Often, she would double up with Ms. Nickerson in the

morning and Ms. Nickerson would double up with Ms. Bowers in the afternoons so that Grayson had 2 EAs working with him at the same time.

[81] Ms. Treadaway developed an AFSP to manage Grayson's needs. She worked with Grayson and classroom staff to model the ABA techniques and provide training to the classroom staff on September 27, 2018. During this time, Grayson was relatively calm and eloped from the classroom only once.

[82] The implementation of the AFSP was disrupted when Grayson's family removed him from school for a vacation from September 28 to October 9.

[83] On October 1, Ms. Treadaway met with school staff to revise and finalize the AFSP and on October 2, emailed the final draft to Ms. Kahn with the changes proposed by school staff. Ms. Kahn acknowledged receipt of the AFSP but did not propose any changes to the final draft.

[84] Ms. Treadaway returned to the school on October 9 for Grayson's return from vacation to observe, assess and gather data regarding his progress. Grayson was highly escalated that day and engaged in very intense, challenging behaviours. Ms. Treadaway emailed Ms. Kahn that evening to request her consent to observe Grayson during a session with his private ABA provider, Ms. Stahlschmidt-Kah.

[85] Ms. Treadaway returned to the school on the afternoon of October 12 and observed Grayson during that period. She spoke to Ms. Kahn and told her things were relatively calm up until 2:30 when Grayson refused to take a break and then shouted profanities and tried to kick and hit Ms. Treadaway when she spoke to him. She told Ms. Kahn that all the recommended ABA supports were in place and being used at the time of the incidents, including his visual schedule, checklists to break down task demands, token system and break system. She also advised Ms. Kahn that task demands had been reduced and that even when Grayson was allowed to just sit at his desk in the absence of any demands, his behaviour escalated.

[86] On October 15, Ms. Treadaway returned to observe Grayson from 12:30 p.m. to 3:30 p.m. During her observation, Grayson became agitated, made verbal threats of aggression, hit his EA, attempted to hit other students, stood on a table and threw markers at the EA and Ms. Treadaway. Later in the day, Grayson was offered the opportunity to present his artwork (a picture) to his class and did so, imitating the French words his teacher modeled for him. The class clapped and Grayson smiled.

[87] That evening Ms. Treadaway attended a session at Ms. Stahlschmidt-Kah's residence. Initially, Grayson was quite agitated when Ms. Treadaway arrived. After about half an hour he calmed down and completed task requests made of him. Ms. Treadaway determined that no changes to the AFSP were required, based on what she had observed, since the ABA methods being used by Ms. Stahlschmidt-Kah were the same as used at school. However, she noted that Ms. Stahlschmidt-Kay relied on full physical prompts and restraint to support Grayson when he engaged in challenging behaviour during his session, which could not be done at school.

[88] Both Ms. Newman and Ms. Treadaway explained that there is a policy in place that staff must not have any contact with a student and cannot physically prompt or restrain a child unless there is imminent risk to the student or another person. Staff receive Behaviour Management Systems ("BMS") training in connection with this policy. As a consequence, when Grayson experienced dysregulation that resulted in him eloping from his classroom, staff would follow him around the school to keep him (and others) safe while trying to de-escalate him verbally. Ms. Kahn did not consent to use of physical prompts or restraints with Grayson at school, although she apparently did give such consent both to Ms. Stahlschmidt-Kah and to Monarch House.

[89] Ms. Treadaway returned to the school to observe Grayson on October 18 and 19. On both days, Grayson became highly dysregulated.

[90] Ms. Treadaway was asked why she did not conduct a full Functional abilities Behaviour Analysis ("FBA"). She said that she had done parts of an FBA but, because of Grayson's high level of dysfunction, which was putting others and Grayson at risk,

she was only able to do the functional assessment part of the FBA. She was unable to stand back and collect data for ethical reasons because of the safety issues which Grayson's dysregulation posed.

[91] Ms. Bowers stated that despite the best efforts of those working with Grayson, things continued to get worse. He began to hit staff and students on a frequent basis and also began to leave the classroom (a portable) and run to different areas of the school. He began to engage in extreme verbal abuse of staff. Ms. Bowers estimates that over a period of 3-4 weeks leading up to October 22, she was verbally and physically assaulted by Grayson with varying degrees of seriousness many dozens of times. She said, "I was screamed at, sworn at and called a "f**g b**ch many times every day. He threatened to kill me and to get me fired many times every day." During the incident on October 22, described in more detail below, Grayson hit Ms. Bowers causing a concussion, diagnosed in the hospital, and subsequently developed PTSD.

[92] Following October 22, Grayson did not return to French Immersion school.

Incidents of Dysregulation

[93] The evidence regarding Grayson's dysregulation is extensive. The most significant events were cited in the evidence of Ms. Newman, Mr. Raey, Ms. Griffiths, Ms. Treadaway and Ms. Bowers. These incidents included the following:

- September 13: Grayson ran from his classroom and tried to enter his sister's classroom. Ms. Griffiths, who was acting principal that day, went to support Grayson and keep him safe. Grayson hit and kicked Ms. Griffiths and an EA several times. Ultimately, he went to the music room and started banging on the drums. After around an hour he calmed down and they were able to direct him back to his class.
- September 17: Grayson brought the class attendance sheet to the office and then refused to return to class. He became highly dysregulated and disruptive for several hours in and around the school office, at times running in and out of the Vice Principal's office and slamming doors. At one point he said to Mr. Raey "I thought they fired you, you stupid idiot."

Later, when Mr. Raey tried to redirect and calm him, Grayson responded, "If you don't get out of my way, I'm going to hit you." He also said that if he went back to his class, he would kill the students in his class. This incident continued until the recess bell at 10:15 at which point Grayson ran outside to play. After recess, Grayson returned to Mr. Raey's office and began going in and out of the office, locking himself in the office – which Mr. Raey was able to unlock with his key. Grayson stayed in the office until lunch break and then, again, went outside to play. After lunch, Grayson returned to Mr. Raey's office and continued to refuse to go to his class for the remainder of the day. He continued cycling up and down, running in and out Mr. Raey's office, sometimes running out of the office into the hallway and sometimes hiding under Mr. Raey's desk.

- September 18: Mr. Raey was called to Grayson's classroom in a portable because Ms. Kahn was speaking loudly to an EA. After a discussion (outlined in greater detail below) between Ms. Kahn and Mr. Raey, outside the portable and in front of Grayson, in which Ms. Kahn was visibly upset, raised her voice and used profanity, Grayson ran to the office. Mr. Raey and Ms. Kahn followed. After further brief discussion with Mr. Raey, Ms. Kahn left. Grayson remained in Mr. Raey's office, highly escalated. Shortly afterwards, he ran out of the office and into a wooded area adjacent to the school. Mr. Raey followed him. Later, Grayson ran to his portable, yelling, "I am going to kill everyone in this class, one by one. I will kill Ms. Newman and Mr. Raey." At about 9:50 a.m., Grayson hit Mr. Raey in the stomach with a stick, then soaked him with his water bottle at around 10 am. He climbed to the top of the climber and threatened to jump off. He swore profusely at a staff member who tried to calm his, saying things like, "I f***g hate you all, I will fire you all, you f**kers." Later that morning, Grayson was filling up his water bottle, became upset and threw the lid at Ms. Bowers, ran out of the office and out the front doors, threw a grapefruit sized rock at Ms. Bowers and continued to run into the kindergarten area where he picked up a large stick and threw it at Ms. Bowers, shouting "I f***g hate you f***g bitch" and "I want to kill you idiots". Grayson's extreme dysregulation continued throughout the day.

- September 20: When Grayson escalated around 9 am, Mr. Raey was called to the portable to support him. From 9–10:15 am, Mr. Raey accompanied Grayson after he left the classroom to keep him and others safe. During this period Grayson dumped water from his water bottle on the stairs; ran outside and yelled "I hate you. I want to kill you"; threw his metal water bottle at Mr. Raey; motioned as if to throw the water bottle at

another student and soaked Mr. Raey with water when Mr. Raey stepped in the way to protect the other student.

- September 24: Grayson threw the lid of his water bottle, a large stick and a large rock at Ms. Bowers, punched her in the groin and punched a student. Grayson also threw sticks at and punched another EA (Ms. Dougan) in the arm, hit her leg with a large stick, saying to her “you’re a f**g b**ch”, “I hate you”, “I’m going to kill you all” and telling her to stop talking as she blocked him from throwing sticks at passing students.

- September 25: Over the course of the day: Grayson ran out of his class; blocked the portable classroom door so no one could leave; blocked the door so that no one could enter; pushed and kicked Ms. Nickerson and a student when they tried to enter; repeatedly pushed and hit Ms. Nickerson through the first period; threw sticks at Ms. Nickerson, Ms. Griffiths and Mr. Raey, hitting Ms. Nickerson in the face; ran at School Office Coordinator Kathy Lambkin from behind, hitting her in the back with closed fists; hit a student in the face twice; hit Ms. Newman in the neck with a closed fist leaving a red mark; stated repeatedly that he wanted to kill everyone in his class; and flipped over chairs and desks in his class. At one point his class was evacuated for safety reasons and other classrooms to be locked down to prevent him from entering them. Subsequently, Grayson sought out his classmates who had been evacuated to the library saying “The library door isn’t closed, I can still kill people” and stated that he would find his class and give them “a big kill” and that “I’ve always wanted to kill my class”. He attempted to force his way into other classes, ripped up student work, attempted to push another student and EA down the stairs and shouted numerous threats and profanities.

- October 9: Grayson ran out of his class to the office. While he was in the office, one of his classmates was paged to the office to meet her father. Grayson said in the hearing of the father, “good, now I can kill [student’s name]”. Grayson remained out of his class throughout the morning, screaming and yelling threats such as, “I’m going back to kill my class” and “I’m going to destroy my class, bye”. Later, Grayson hit and scratched an EA, hit Ms. Treadaway and continuously hit, pushed and punched others, slammed doors, and made inappropriate comments (for example, calling Ms. Treadaway “an idiot”).

- October 12: Grayson threw a chair at another student, injuring the student. He also threw his bag at Ms. Bowers and kicked Ms. Bowers.
- October 18: During the morning, Mr. Raey was called to Grayson's classroom when Grayson became escalated to the point of being out of control. The class had been evacuated. Remaining in the class with one of his EAs and Mr. Raey, Grayson ripped student work off the walls, tipped over desks and chairs, cut the head off the class mascot (a stuffed lamb) and said, "I am going to kill this thing, just like I am going to kill everyone else". Grayson calmed down after 20-25 minutes and returned to the office with Mr. Raey where he did some colouring in the conference room. Subsequently Mr. Raey visited the class and found students to be visibly distraught that their mascot had been destroyed.
- October 19: Grayson began to show aggressive behaviour immediately following first bell, punching a classmate's backpack, threatening to kill his classmates, telling his teacher to "shut up" and trying to hit Ms. Nickerson with a pencil. Grayson left the portable, followed by Ms. Nickerson and his teacher, then began to hit Ms. Nickerson and his teacher to prevent his teacher from locking the classroom door. Grayson then threw a stick at Ms. Nickerson, lunged at her knees and hit her legs and stabbed her with a stick. When other adults intervened (including Ms. Treadaway and Ms. Bowers), Grayson attacked them, hitting Ms. Treadaway, throwing a rock at Ms. Bower's head and injuring her hand when she blocked the rock with her hand. Grayson repeatedly hit Ms. Bowers and Ms. Nickerson. Grayson's class was evacuated to the library, and on their return to class, as the school librarian stood between Grayson and his classmates so that they could safely enter their class, Grayson screamed and pushed and kicked her.
- October 22: Grayson became very dysregulated immediately upon entering the class, stabbing and hitting Ms. Nickerson with a stick repeatedly and yelling that he would kill his class. Grayson also stabbed 5-6 classmates with a stick – Ms. Bowers found these children crying quietly and they told her that they were afraid that if they cried loudly, this might provoke Grayson to attack them again. When Ms. Newman arrived, Grayson hit her hard in the chin, knocking off her glasses and leaving a red mark. Grayson smashed a mug in the classroom. After Grayson's class was evacuated; Ms. Newman calmed Grayson down and eventually took him to the office. Grayson became quite agitated again and kept asking when his parents were coming as he was aware that they would be

attending school for a meeting later that day. After recess, during which Grayson went outside to play, he returned to the office and jumped up on the desks of the administrative assistants and began pacing back and forth on their desks, talking about destroying their computers. After his parents arrived and the meeting began, Grayson repeatedly banged on the door and/or walked in, yelling, "Why is my mom meeting with those f**g b**ches? And "I'm going to f**g kill Mr. Raey". Mr. Raey left the meeting several times to support Grayson and at one point, Grayson grabbed a stick of connect blocks, gestured with it like a gun and then hit Mr. Raey across the chest with it, leaving marks on his skin. Grayson then ran outside, yelling and swearing loudly, trying to enter portables. At about 2:15, Ms. Bowers and Mr. Raey were between 2 portables with Grayson when he picked up a large stick and cocked it behind his head as if to hit Mr. Raey with the stick. Ms. Bowers was behind Grayson and wrested the stick from his hands. Grayson turned around and hit her hard repeatedly around the head, neck and shoulders with a closed fist, shouting at full volume, "I'm going to kill you, you f**g b**ch, I will f**g kill you, you b**ch, you deserve to die". When Mr. Raey tried to stop Grayson, he turned around and hit Mr. Raey repeatedly on the arm, upper body, stomach and hip with closed fists, saying "I f**g hate you all, I'm going to kill everyone, you will pay for this" and "you're gonna get it too, you f**ker". At least one child, a girl in Grade 3 who had been heading towards her portable, was standing a few feet away and witnessed the entire episode. Mr. Raey had moved between Grayson and the girl to protect her. Grayson ran back into the school and ran down the hall, grabbing a knapsack off a hook and throwing it at Ms. Bowers. Once back in the school, Grayson continued to interrupt the meeting his parents were having with staff until his father left the meeting to take him out for a walk.

Interactions between the School and the Litigation Guardian

[94] There were a number of interactions between school staff and Ms. Kahn in which Ms. Kahn displayed what can only be described as inappropriate behaviour, including raising her voice and using profanities towards staff. On several occasions, this occurred in front of Grayson.

[95] At the end of the day, on September 17, Ms. Kahn attended the school to pick up Grayson up. She went Ms. Newman's office. Grayson had spent much of the

afternoon in Mr. Raey's office and Mr. Raey took him to his mother. Ms. Kahn was speaking loudly to Ms. Newman. Ms. Kahn told Grayson to get his stuff because they were going home. In Grayson's presence, she yelled at Ms. Newman, "This school is useless." and "You continue to fail my student." Ms. Kahn's voice was loud, she was red in the face, she had clenched fists, and her eyes were very wide open. She appeared to be distraught, angry, and was visibly upset. Grayson seemed concerned and looked back and forth between Mr. Raey and Ms. Kahn as if seeking guidance and direction.

[96] On September 18, prior to the start of the school day, Mr. Raey was called out to the portable where Grayson's class was located. On his arrival, he found Ms. Kahn loudly questioning a substitute EA (who was replacing the EA who had been assigned to work with Grayson in the mornings but was off injured). Ms. Kahn was demanding to know why Mr. Raey had shouted at Grayson on September 17 and locked Grayson in his office. (Mr. Raey later explained to Ms. Kahn that he did not raise his voice to Grayson the day before, or lock Grayson in his office. Further, he showed Ms. Kahn that it is not possible to lock anyone into that office because it can be opened from the inside.) Ms. Kahn then went into the classroom, and while standing at the back of the classroom, spoke to someone on her phone and said in a very loud voice, that everyone in the class including Grayson could hear, "Yesterday was a complete f***g shit show." Students turned their heads to look back at Ms. Khan. Grayson appeared to be unsure, like he did not know how to respond.

[97] Mr. Raey suggested to Ms. Kahn that they discuss the matter in private where the children could not hear. Grayson then left the classroom and sat down on the ground behind the portable. Mr. Raey and Ms. Kahn followed. Once outside, in front of Grayson, Ms. Kahn said:

- He needs to hear this because this is our complete s**t show that is happening at school.
- I will contact the Board, media, the [HRTO] and the police.
- I hope you don't sleep one f***g blink at night worrying about me and my kid and worrying about the legal actions I will take.

- I show up early to watch you all f***g epically fail.
- The only time this f***g school does anything is when I decide to bark up the tree loud enough that it forces your hand.
- I don't give a f***g s**t about any other child in the f***g school.

[98] Ms. Kahn's voice, when making these comments was very loud. Her face was red, her fists were clenched. Meanwhile, Grayson sat on the ground quietly, looking at Mr. Raey and then at his mother. Ms. Kahn did not speak to her son. Mr. Raey tried to redirect Ms. Kahn during this interaction because he was concerned about how the tone and content of her statements might affect Grayson, but she would not listen. Grayson eventually got up and ran to the office; Mr. Raey and Ms. Kahn followed. As outlined above, Grayson was dysregulated for most of the rest of the day.

[99] Ms. Kahn denies that these events happened. For the reasons set out above with respect to the credibility and reliability of witnesses, I have accepted the respondent's witnesses' evidence over the evidence over Ms. Kahn's.

[100] On September 25, Grayson became extremely dysregulated, as described in more detail above. Ms. Newman asked Mr. Raey to call Ms. Kahn and ask her to pick Grayson up. Ms. Kahn refused unless he was suspended. Ms. Newman felt that Grayson was in crisis, needed to be picked up and so decided to suspend Grayson. The reason for the suspension was that Grayson attempted to push a student down the steps. The suspension was for the balance of the day.

[101] Ms. Kahn explained that she did not want to pick Grayson up because she was concerned that Grayson wanted to go home and that if she picked him up, this would reward him for his behaviour and reinforce it.

[102] When Ms. Kahn arrived at the school to pick Grayson up, she met with Ms. Newman and Mr. Raey at the office. When Ms. Newman told Ms. Kahn that Grayson had attempted to push another student down the stairs, Ms. Kahn said in a loud voice, "I don't f***g care." And "get my f***g kid." While Mr. Raey went to get Grayson, Ms.

Newman and Ms. Kahn went to the front of the school where Ms. Kahn began to talk with another parent. Mr. Raey brought Grayson to the front of the school. In front of Grayson and the other parent, Ms. Kahn began to yell at Mr. Raey and Ms. Newman. While the precise words recollected by Ms. Newman and Mr. Raey are not identical, they are similar in content and tone: Ms. Kahn told Mr. Raey and Ms. Newman that the school was “f***g” useless, had “f***g” failed Grayson and did not deserve to be in the city of Guelph in words that also included the “f” word. Mr. Raey and Ms. Newman agree that Ms. Kahn was asked not to speak like that in front of Grayson, to which she responded, “I know he can hear this and I don’t f***g care.”

[103] Mr. Raey described the loudness of Ms. Kahn’s voice as 10 out of 10. Ms. Kahn stomped her feet, was visibly red in the face, and clenched her fists. Grayson stood off to the side taking steps towards his mother and then backing off, as if unsure if he should approach her. He seemed to be in a distressed state.

[104] Ms. Kahn denies that she was verbally abusive towards Ms. Newman when she arrived or that she made the comments which Ms. Newman and Mr. Raey say she made, set out above. For the reasons set out above regarding credibility and reliability of witnesses, I accepted Ms. Newman’s evidence over Ms. Kahn’s.

Impact of Grayson’s Dysregulation on the School

[105] In their evidence, school staff noted the impact of Grayson’s dysregulation on the school. It can only be concluded from this evidence that the cumulative effect of the incidents of dysregulation, including the need for school lockdowns, was becoming increasingly stressful for both staff and students. Some of the specific impacts on staff and students were:

- Ms. Bowers was diagnosed with a concussion as a result of being repeatedly hit in the head on October 22. She was also diagnosed with PTSD causing her to be off work for a further extended period.

- Ms. Duguay experienced extreme emotional stress, went off work on November 19 and remains off work.
- An Administrative Assistant went off work as a result of stress and has moved to a different school.
- Ms. Nickerson was off on sick leave for a week and sought medical attention for an injury.
- Ms. Griffiths, despite her training and years of experience working with high needs children, was extremely distressed by what she experienced and used many sick days because of this stress and experienced significant sleep loss.
- Ms. Newman received multiple complaints from parents who were concerned about their children being exposed to violence and inappropriate language, as well as the safety of their children.
- Several students received minor injuries such as bruising.
- Students have run from their portables in fear when they saw Grayson outside during class time.
- Students have been observed “flinching” when Grayson walked past them in the halls or appearing to be frightened when Grayson was being verbally and physically aggressive.
- Mr. Raey reports that students have asked him if they were safe to go into the class.
- Students were anxious and unsettled by being evacuated from their class on a regular basis and displaced in the library.

[106] School staff expressed concern for Grayson and the impact which his dysregulation was having on him. Ms. Treadaway stated that she saw children being less willing to interact with Grayson, to react fearfully when he yelled at them, threatened or hit them. She believes that this was negative and harmful for Grayson.

October 22, 2018 – November 20, 2018

[107] The meeting which took place on the afternoon of October 22 was convened by Ms. Newman. In attendance, in addition to both Ms. Kahn and Mr. Kahn, were Cheryl Van Ooteghem (Ms. Van Ooteghem), the Superintendent of Education responsible for the French Immersion school; Wendy Donaldson (Ms. Donaldson) Assistant Superintendent with responsibility for Special Education; Tracy Lindsay (Ms. Lindsay), Superintendent of Program, and Ms. Griffiths. At this meeting, Ms. Van Ooteghem, with whom Ms. Kahn had been in contact on several occasions leading up to the meeting, outlined the respondent's concerns about Grayson. This included concerns regarding Grayson's threats to kill everyone, and his high level of dysfunction. Ms. Van Ooteghem advised the Kahns that the respondent would be prepared to pay the cost of their private ABA provider's participation in ongoing discussions about how to address Grayson's needs and behaviours at school.

[108] During the meeting, Ms. Donaldson expressed her concerns that the behaviour the school was seeing had spiked so quickly and asked about whether this behaviour was happening at home and elsewhere in the community. Ms. Donaldson explained that it was very rare that school would be the only place where the behaviour was happening when it was as challenging as it was. Ms. Donaldson explained to Ms. Kahn that it was necessary to get this information in order to have a community-based approach to most effectively address this behaviour. Ms. Kahn responded that school was the only place where this behaviour was happening and that it was the respondent's problem to fix. Ms. Donaldson asked for permission to involve the Kahns' private ABA provider and their contact at Kerry's Place autism services to collaborate in working to support Grayson. The Kahns agreed.

[109] At the end of the meeting, it was agreed that the Kahns would keep Grayson home until an appropriate plan could be put in place for his full participation in school in a manner that would keep everyone safe. The planning for this would begin the next day.

[110] Subsequent to the meeting, Ms. Newman was advised by the OSSTF Bargaining Unit President of a potential refusal of unsafe work as a result of an assault involving multiple hits to the face and head. Ms. Newman's evidence was that this posed unique challenges for the school since, at stage 2 of a work refusal under the *Occupational Health and Safety Act*, no one could be permitted to perform the refused work pending an investigation by the Ministry of Labour. Ms. Newman learned later that evening that Ms. Bowers had been taken to hospital for treatment of her injuries and diagnosed with a concussion.

[111] On October 23, Ms. Donaldson spoke with the Kahns' private ABA provider to discuss working collaboratively to support Grayson. Ms. Stahlschmidt-Kah advised Ms. Donaldson that it was not common for her to see behaviour seen at school when Grayson worked with her in one to one sessions, although they were evident when Ms. Treadaway attended to do an observation. However, Ms. Stahlschmidt-Kah said that this behaviour was happening in the community, that she had been asked to consult and support Grayson's parents to take Grayson to the YMCA recently. Ms. Donaldson noted that she had not been given this information by Ms. Kahn.

[112] Later that morning, a meeting was attended by school staff and Board staff, including Ms. Newman, Ms. Donaldson, Ms. Treadaway, Mr. Raey, Ms. Griffiths and other Board staff, including a second BCBA. Over almost six hours this group developed a Student Centred Intervention Plan (the "Loop of School plan"). The key elements of the plan, which would start on October 29, were:

- To work with Grayson 1 on 1 outside the classroom in a quiet space to minimize distractions and triggers as he seemed completely unable to regulate himself in the classroom; and
- To support him in short loops of school to allow him to build on success and avoid failure with a view to returning to his class as soon as possible.

[113] Mid-afternoon, Ms. Donaldson and various school and Board staff met with Ms. Kahn to share and discuss the plan. Following this meeting, the original group from the morning meeting reconvened to finalize the Loop of School plan.

[114] On October 24, a meeting was held with school and board staff, Ms. Kahn, the Kahns' private ABA provider and Mandi McCreary (Ms. McCreary) from Kerry's Place, who Ms. Kahn had consulted respecting autism services. The Loop of School plan was shared with the group. Ms. McCreary and Ms. Stahlschmidt-Kah expressed agreement with the plan and made the following suggestions: that the plan be tried with Grayson at a new school to give him a fresh start and that Grayson be taught in English in order to remove French as a trigger. Ms. Kahn responded that Grayson was not going to be removed from French Immersion, nor was he going to another school.

[115] Ms. Kahn had to leave the meeting early but told the group to continue. After she left, Ms. Stahlschmidt-Kah suggested that a gradual entry to the plan would help to isolate where the specific challenges were in the plan. Ms. McCreary agreed and this was adopted, meaning that Grayson would initially attend school for short periods, and this would be increased as he was successful.

[116] School and Board staff continued to work on the Loop of School plan on October 25. Later in the afternoon, Ms. Newman and Mr. Raey called Ms. Kahn to discuss the plan and Grayson's gradual return to school full time. Mr. Raey explained that the plan would start with Grayson attending school for a very short period – for example 15 minutes to start. Grayson would transition to the conference room, which would be set up to support him to successfully engage in a preferred task, and then he would leave the school with positive reinforcement. On 3 successful sessions, the time would be increased. The initial period of 15 minutes was "negotiable". As part of the plan, Grayson would be provided with 5 hours a week of home instruction.

[117] Ms. Kahn disagreed with the Loop of School plan, threatened to sue and said that she was not willing to attempt the plan unless the respondent provided care for Grayson and paid her childcare bills when he was not at school. At a meeting the next

day, October 26, Ms. Kahn was told that Ms. Stahlschmidt-Kah agreed with the plan, but this did not alter her position. Nor did she change her view when told by Ms. Donaldson that the respondent had had success with gradual return to school with other students. Later that morning, Ms. Kahn requested a letter explaining the exclusion of “her student” and stating that if he was not allowed back at school, then he would have to be suspended.

[118] On October 31, Ms. Kahn again requested that she be given either a written exclusion or a notice of suspension.

[119] Meanwhile, Ms. Donaldson emailed Ms. McCreary, Ms. Stahlschmidt-Kay and Brett Freisen of the Canadian Mental Health Association (“CMHA”), together with Mr. and Ms. Kahn to schedule a case conference to discuss Grayson. Ms. Kahn was asked to invite anyone else who she wished to attend the meeting.

[120] On November 1, 2018, a notice of suspension under s. 310 of the *Education Act*, RSO 1990, c. E-5 was sent to the Kahns by the respondent’s lawyer on behalf of Ms. Newman. The suspension was retroactive to October 23 and was for the purpose of investigating the assault on Ms. Bowers on October 22. In this correspondence, the respondent offered three program options for Grayson. Two of these had therapeutic components and were located outside Guelph – transportation was included. The third was at Grayson’s home school and was called “Program Services Intervention Program”. This staffing for this program included staff with specialized skills in the area of autism and behaviour. The description of this program was as follows:

This is a program designed to provide academic and non-academic support to students who are dysregulated and are presenting with behaviours that are posing a safety risk to themselves or others. Students will work with dedicated staff to learn appropriate skills to reduce behaviour concerns such as self-regulation skills and frustration management. The goal is to reintegrate students into the regular classroom and/or home school when appropriate.

[121] As an alternative to these programs, the respondent offered to provide Home instruction to Grayson. The respondent also suggested that a “full assessment of Grayson’s issues by a psychologist qualified to diagnose and treat such issues” be obtained.

[122] The Kahns made no inquiry about the program at the home school until after the expulsion appeal was heard by the CFSRB on January 8 and 9, 2019. However, they did agree to the offer of Home Instruction for Grayson.

[123] After the notice of suspension was sent on November 1, 2018, Ms. Newman proceeded with her investigation.

[124] Home Instruction commenced on November 5, 2018.

[125] Ms. Kahn withdrew the applicant’s sister from the French immersion school on November 15, 2018 following circumstances that are central to the reprisal allegation which has been bifurcated. Subsequently, the respondent’s communications, outlined below, regarding the return of Grayson to the French Immersion school also included returning his sister to the school.

[126] On November 15, and through several follow up emails, the Kahns were invited to a Collaborative Case Conference (“CCC”) planned for November 23 to bring together community partners, including Kerry’s Place, the Kahns’ private ABA provider and other community supports as well as the respondent’s staff who had become involved in trying to support Grayson. The purpose of the meeting was to consider possible supports for both Grayson and his sister. However, the CCC was cancelled on November 22 when Ms. Donaldson was advised that the Kahns declined to attend.

[127] On November 19, 2018, respondent’s counsel sent a letter to applicant’s counsel. The letter included a request that the Kahns share any medical information regarding any underlying issues giving rise to Grayson’s extreme dysregulation to assist the respondent in planning appropriate accommodations for Grayson. Respondent’s

counsel also advised that the respondent was prepared to discuss “an appropriate medical or other psychological assessment” for Grayson to get a better understanding of the behaviours and better accommodating his needs. Respondent’s counsel also expressed concern about the request of applicant’s counsel that all future communications proceed through him and pointed out that if the parties were unable to communicate directly, this would encumber and delay the accommodation process.

[128] On completion of Ms. Newman’s investigation, she recommended that Grayson be expelled from the French Immersion school. The Kahns declined to attend the hearing of the Board’s Student Discipline Committee. On November 20, 2018, the Student Discipline Committee upheld the recommendation to expel from the French Immersion school only, and placed Grayson at his home school.

Home Instruction

[129] Although medical documentation to support a student’s inability to attend school is normally required by the respondent before providing Home Instruction, the respondent offered to provide Home Instruction for Grayson by way of a teacher attending at the Kahn home. The Kahns accepted this offer. Beginning November 5, 2018, the respondent provided Home Instruction for Grayson for 10 hours a week up until December 10. It was reduced at that point to the Ministry standard of 5 hours a week for a student unable to attend school for medical reasons.

[130] Home instruction was provided by Kathryn Soule (Ms. Soule). Ms. Soule is an experienced teacher who retired from employment with the respondent, as a Vice Principal, in 2018. She has Special Education qualifications and has taken courses relating to ASD over the years, including a 1-week intensive program at the Geneva Centre. She met with French Immersion school staff in advance of beginning to teach Grayson and was provided with very detailed information about Grayson’s needs and the levels he was at and she reviewed materials including his IEP. She also met with Ms. Kahn who advised that reading was a trigger for Grayson but provided no information or guidance about calming strategies that worked for Grayson.

[131] Ms. Soule describes the first day as “a pretty rough start” with Grayson screaming and kicking the dog. She told him on that day that she would be teaching him in English; Grayson appeared to be pleased about this and said he does not like French and that he told his mom that he wanted to go into English. During the time Ms. Soule taught Grayson, he hit her only once, when he slapped her on the hand.

[132] Ms. Soule’s approach to teaching Grayson included the following ABA techniques: a visual schedule, setting up a predictable schedule, use of reinforcers, identifying a body break room, setting small goals for him, doing three things each day, some reading, some word work and some math – first two tasks and then the desired task because Grayson likes math. In between each of these tasks, Grayson would have a body break based on a timer. The educational program which Ms. Soule provided to Grayson was individualized to meet his needs.

[133] By the end of Ms. Soule’s time with Grayson, he was starting to make progress: he was developing sight words – around 25-30 words - which was one of the goals. He also made progress in math and in his social skills.

[134] On January 5, 2019, respondent’s counsel advised applicant’s counsel that Ms. Soule would not be continuing in the Home Instruction assignment and asked whether the family wished to continue with Home Instruction with a different teacher. The Kahns advised on January 10, 2019 that they wished to continue with Home Instruction for Grayson.

[135] From January 23 to January 31, 2019, Home Instruction was provided by a retired principal. Ms. Kahn declined to continue Home Instruction with this individual because she had concerns about experience and consistency. However, she advised that she would accept a qualified person who can meet at the same time daily in a community setting.

[136] The respondent offered the services of Rebecca Kingshott, a retired special education teacher with experience working with children with autism who could meet at

the public library, Monday through Friday at the same time every day, at a time that worked for the Kahn family. Ms. Kahn accepted this offer.

[137] Ms. Kingshott was hired to provide Home Instruction of 5 hours a week. Her start date was February 4 and she followed the same process Ms. Soule had followed to prepare for teaching Grayson. The home instruction was scheduled to take place at the library at a time set by Ms. Kahn. However, between February 4 and April 1 (Ms. Kingshott's last scheduled day before Ms. Kahn terminated the Home Instruction), Grayson only attended 9 sessions with Ms. Kingshott. Ms. Kahn cancelled 11 dates for various reasons.

[138] At the first session, Ms. Kingshott had to walk around the library until she saw someone who she thought might be Ms. Kahn. When Ms. Kingshott asked if she was Ms. Kahn, Ms. Kahn responded "yes" and said nothing further the entire session. She did not introduce Ms. Kingshott to Grayson.

[139] Ms. Kahn was very uncommunicative with Ms. Kingshott throughout the sessions which Grayson did attend. Unless Ms. Kingshott asked Ms. Kahn a direct question, Ms. Kahn would not speak to her. Ms. Kahn did little to help regulate Grayson.

[140] Further, Ms. Kahn appeared to make an effort to be on the other side of the library or to avoid Ms. Kingshott. Ms. Kingshott perceived this as hostility which she felt was concerning based on the hostility that Grayson was communicating towards Ms. Kingshott and the respondent. Ms. Kingshott queried at one point whether Ms. Kahn was attempting to sabotage the Home Instruction.

[141] Ms. Kahn says that she "restricted communication" with Ms. Kingshott as a result of the fact that Ms. Soule testified in support of the expulsion at the appeal hearing. Ms. Kahn says that she only responded to Ms. Kingshott's questions about Grayson and did not engage in small talk with Ms. Kingshott.

[142] During the sessions, Grayson kicked Ms. Kingshott once and tried to kick her a couple of times. He repeatedly said he hated it there and was very verbally aggressive towards Ms. Kingshott. At their last session on March 5, Grayson yelled “I hate the f***g Board” twice.

[143] Ms. Kingshott observed that Ms. Kahn would talk on the phone within Grayson’s hearing about issues concerning this case. Ms. Kingshott was concerned that this was causing Grayson to have a negative view of the respondent, given the very negative views he expressed towards Ms. Kingshott. She felt that this, together with Grayson’s refusal to work, his yelling, swearing and elopement, impeded her ability to instruct Grayson. With this and the inconsistency in Grayson’s attendance, it appears that little academic progress was made during the period of Home Instruction provided by Ms. Kingshott.

November 20, 2018 Onwards

[144] On November 21, 2018, a letter was sent by the respondent to the applicant, through counsel, to invite Ms. Kahn to meet with the respondent’s staff to discuss therapeutic placement options for Grayson or to develop a plan for Grayson’s attendance at his home school effective November 30, 2019. When there was no response from Ms. Kahn, the respondent offered on November 22 to continue Home Instruction, and Home Instruction continued as outlined above.

[145] On November 29, the respondent wrote again, through counsel, inviting Ms. Kahn to resume talking about accommodations for Grayson.

[146] Applicant’s counsel, in letter dated November 30, 2018, followed up on an offer in an earlier letter from respondent’s counsel to discuss an “appropriate” medical and/or psychological assessment for both children at the respondent’s expense with a view to understanding their “extreme behaviours at school” and how to better accommodate their needs. Applicant’s counsel advised that the Kahns were willing to discuss retaining a “qualified, independent assessor with expertise in autism, ABA, co-

morbid mental health issues and SLP” to assess Grayson at the respondent’s expense. The applicant proposed Tracy Lindblad, Director of Monarch House.

[147] The response from respondent’s counsel, by letter dated December 4, 2018, noted the following:

- The respondent’s request for further medical information about Grayson had not been responded to.
- The opinion of the respondent’s Chief Psychologist was that Grayson would benefit from a full psychiatric assessment at the earliest opportunity and that this would assist the Board in better accommodating his needs. The respondent further noted that Ms. Lindblad was not qualified to perform a medical or psychological assessment or to diagnose medical issues.
- The respondent wished to discuss doing a further psycho-educational assessment of Grayson in the near future to update the Newby-Clark assessment.

[148] On December 6, 2018, applicant’s counsel sent an email to respondent’s counsel in which he advised that the applicant was in the process of retaining Ms. Lindblad as the applicant’s expert.

[149] In a December 8, 2018 email, respondent’s counsel reiterated the invitation “to resume the accommodation dialogue on the record” and noted that this “can and should commence with a Collaborative Case Conference with a view to developing a plan to return” Grayson to school at the earliest opportunity,

[150] On December 9, 2018, respondent’s counsel sent an email to applicant’s counsel noting that the applicant still had not responded to the respondent’s request for further medical information, further assessments or the issue of Grayson’s return to school. The email also indicated that while Grayson had a current school placement, the respondent was willing to discuss the possibility of alternative placements either in a therapeutic program or different schools. Applicant’s counsel was also asked to respond

immediately to the respondent's proposal for a CCC so that this could be arranged without delay.

[151] On December 10, 2018, applicant's counsel advised that the Kahns had no medical information that explained the severe dysregulation. Further, applicant's counsel again proposed that Ms. Lindblad be retained to do an assessment of Grayson, at the Board's expense and stated that when that assessment was available, Ms. Kahn would agree to participate in a CCC for the purpose of returning Grayson to an English-language school placement. Further, the Kahns would agree to have Grayson undergo psychiatric assessment and/or psycho-educational assessment conducted by an individual with expertise in autism at the Board's expense and then would be prepared to re-open the issue of accommodations, addressing any modifications needed.

[152] On December 12, 2019, respondent's counsel wrote applicant's counsel rejecting Ms. Lindblad as the assessor because of her lack of qualifications to do a medical assessment and continued to express the view that a complete psychiatric assessment or, as a second alternative, an assessment by a clinical psychologist, was required. Respecting Grayson's return to school, respondent's counsel expressed the respondent's belief that a CCC need not await a further assessment of Grayson and proposed that a CCC be organized immediately with the family and community partners in attendance, adding that further assessments could be discussed at the CCC. The respondent also clarified that it was prepared to pay for an appropriate psychiatric assessment provided that the cost was reasonable and provided that the assessment could not be arranged through a referral from a family doctor or other treating doctor, that would be covered by OHIP.

[153] By email dated December 14, applicant's counsel advised that Ms. Lindblad would be proceeding to do an assessment and requesting that she be permitted to speak with school staff. In addition, 3 psychiatrists were suggested to perform a psychiatric assessment. On December 18, applicant's counsel rejected any meeting with the Board on the basis that further information was needed before such a discussion "will be productive."

[154] Respondent's counsel, by letter dated December 19, 2018, advised that the Board was not prepared, "in all of the circumstances" to retain Ms. Lindblad on a joint basis or to cover her costs of assessment. The respondent declined to facilitate Ms. Lindblad's meeting with respondent's staff prior to the end of term break but expressed a willingness to respond to requests for documents or answers to questions Ms. Lindblad might have. The respondent again raised the possibility of a psychiatric assessment, for which the respondent would cover the costs beyond what OHIP would cover, subject to the respondent being provided with the following: i) provision of Grayson's medical history; ii) the information to be provided to the assessor and iii) the issues to be addressed by the assessor. Finally, the respondent again asserted its belief that a CCC with appropriate experts invited to participate by both the family and the respondent would provide the most expeditious path to getting Grayson back to school with appropriate accommodations.

[155] By letter dated January 23, 2019, applicant's counsel requested details about a regular class placement for Grayson including programs and services to accommodate his educational needs. Applicant's counsel also asked whether the Board would be assigning "the BCBA, whether she would be developing an ABA program commensurate with his needs and whether she will be overseeing the program's implementation and training of school personal, particularly the EAs so they can safely and effectively collect data and prompt data as set out in Ms. Lindblad's report." In addition, a request was made for details of the "different placement" the respondent was proposing at the home school.

[156] Respondent's counsel responded by letter dated January 25, 2019 describing the regular class placement and a possible alternate placement, which it called a transitional placement. Regarding this transitional placement, respondent's counsel said, "As previously discussed, given Grayson's behavioural issues in the weeks prior to his departure from [the French Immersion school] on October 22, the Board believes Grayson's needs would be better met on a transitional basis, through a temporary

placement outside a regular classroom.” The two placements were described as follows:

Home School placement:

- Grayson would receive support from an EA for the full day and this support would be as consistent as possible. However, this would not necessarily mean the same EA for the entire day.
- Focus of instruction would be on Grayson’s educational needs in English, incorporating methods of ABA.
- Direct training will be provided to the classroom teacher and EAs from a Board ABA Facilitator (“ABAF”) on how to utilize student specific ABA methods to support student learning expectations (e.g. data collection, use of reinforcement system, transfer of skills).
- The ABAF will develop an AFSP in consultation with school staff and will support school staff in implementing the AFSP.
- The goal will be for the student to remain at school for the full day.
- However, should safety concerns arise, the safety plan (that would include the student being picked up early due to an increase in dysregulated and unsafe behaviour) would be followed.
- Board staff would use BMS to support student, as well as all members of the school community.
- Safety plan from previous school would be reviewed and implemented at [Grayson’s Home School] and followed by school staff.

Possible Alternate Placement:

- Program designed to provide academic and non-academic support to students who are dysregulated and are presenting with behaviours that are posing a safety risk to themselves or others.
- Students will work with dedicated staff to learn appropriate skills to reduce behaviour concerns such as self-regulation skills and frustration management skills. The goal is to reintegrate students into the regular classroom and/or home school when appropriate.

- Temporary, alternative setting in the school.
- Program will be run by a teacher and Program Services Transitional Educational Assistant, supported by a special education consultant, ABAF and other staff if necessary.
- Focus of instruction will be on Grayson’s educational needs, in English, incorporating methods of ABA.
- Board ABAF will support school staff to successfully transition Grayson back into regular classroom.
- The goal will be for the student to remain at school for a full day. However, should safety concerns arise, the safety plan (that would include the student being picked up early due to an increase in dysregulated and unsafe behaviour) would be followed.
- Direct training would be provided to the classroom teacher and EA from a Board ABAF on how to utilize student specific ABA methods to support student learning expectations (e.g. data collection, use of reinforcements system, transfer of skills)
- When appropriate, skills and strategies will be generalized to school-based staff (Grade 2 classroom teacher, EA and special education resource teacher)
- Student will be integrated into a regular classroom program gradually and over time with the goal of a full transition to a regular grade 2 program.
- Board staff would use BMS to support student, as well as all members of the school community.
- Safety plan from previous school would be reviewed and implemented at [Grayson’s home school] and followed by school staff.

[157] By letter dated February 8, 2019, applicant’s counsel responded with a number of questions. Among these questions was the following question: “Does “methods of ABA” mean that scientific ABA will be implemented, in accordance with BCBA professional and ethical standards of delivery, as appropriate for the learning

environment? Will direct measurement be incorporated? Will modifications be made as data is collected to ensure Grayson's success? What tier of ABA will be implemented?"

[158] The respondent's response to these questions, forwarded in a letter dated February 13, 2019, was detailed in a document titled "Steps to Grayson's Return to School." This document outlined who would attend and what would occur at a CCC which would include the family's community supports. In response to the applicant's question about ABA, the response was as follows:

- a. Individualized, evidence-based ABA methods (specific to the student's needs) will be used in the classroom;
- b. Data collection will be used to support program implementation and modification;
- c. School board educational staff will be implementing the plan with the student;
- d. Comprehensive ABA therapy will not be provided.

[159] In a letter dated March 4, 2019, respondent's counsel clarified that while the respondent would be

(...) happy to receive relevant information and to work co-operatively with the Kahns (including their private ABA provider and any community organizations or health care providers whose input may be of assistance) in making plans for Grayson's accommodation at school, it could not agree that Monarch House would lead in the development of plans for Grayson's return to school or the implementation of "Tier 3 ABA" by Monarch House at [Grayson's home school]. In the UGDSB's view, it is not legally permitted to delegate the duties of its staff and school administration to private external organizations or individuals and it would not be appropriate for it to do so. For the same reasons it cannot permit Monarch House to attend at school for the purpose of supervising its staff.

[160] Applicant's counsel wrote back on March 6, 2019 to advise respondent's counsel that the Kahn family would not agree to any transition plan that does not include the provision of Tier 3 ABA at school.

[161] Discussions regarding Grayson's return to school ended at this point.

[162] Ms. Kahn subsequently changed her position respecting what she is seeking for Grayson: she now requests that the respondent pay the costs of Grayson's attendance at Oak Bridge Academy, a private school for children with ASD, at least for the coming school year.

Without Prejudice Correspondence from the Applicant

[163] All communication between the parties regarding accommodations was through counsel following Grayson's expulsion. The record of correspondence is included as attachments to Ms. Van Ooteghem's affidavit. Many communications from applicant's counsel were redacted because they were made "without prejudice".

[164] The record of correspondence shows that when applicant's counsel began to send "without prejudice" responses to the respondent's communications regarding accommodations for Grayson, respondent's counsel made the point to applicant's counsel that it would consider only "on the record" responses sent on behalf of the applicant and that it considered its communications to be "on the record".

[165] During the hearing, applicant's counsel noted on more than one occasion that there had been without prejudice communications but, beyond raising this, he did not make an objection with submissions about what this meant for the "on the record" communications of the respondent or otherwise request a ruling. He did not do so as a formal objection during the proceedings or in final argument.

[166] In the absence of any clear objection or argument from the applicant, I have treated the respondent's communications as being on the record and admissible. I will not draw inferences regarding what the applicant might or might not have said in response to the respondent's emails. However, this does not absolve the applicant from providing evidence that his parents participated positively in efforts to accommodate the applicant in the period following the applicant's expulsion.

ABA

[167] A significant amount of the evidence provided, particularly by the applicant, touched on ABA, which was in many ways the focus of the applicant's case.

[168] ABA has been the subject of litigation in a number of cases - some of which were provided to the Tribunal. Some of these dealt with ABA in the context of ABA in education versus ABA as therapy provided to children with ASD. ABA as provided to children under the Ontario Autism Program is also called IBI (Intensive Behaviour Intervention), although according to the applicant's expert witnesses, it is now referred to as "comprehensive" or "intensive" ABA.

[169] The Ministry of Education's *Policy/Program Memorandum No. 140* ("PPM 140"), titled "Incorporating Methods of Applied Behavioural Analysis (ABA) Into Programs For Students With Autism Spectrum Disorder (ASD)", provides direction to school boards about providing educational services to students with ASD. It states that "school boards must offer students with ASD special education programs and services, including, where appropriate, special education programs using ABA methods."

[170] PPM 140 requires that "relevant methods of ABA" be incorporated into the programs of students with ASD "wherever appropriate." PPM 140 notes that "Use of functional behavioural assessment may also help to identify a student's strengths, needs and learning environment", but does not require the use of functional behavioural assessments in any particular situation. Further, PPM 140 outlines the "Principles of ABA Programming" that "underlie ABA programming that is provided to students with ASD, where appropriate." These include i) The program must be individualized, ii) Positive reinforcement must be utilized; iii) Data must be collected and utilized; iv) Transfer, or generalization of skills should be emphasized.

[171] Evidence received at the hearing disclosed that ABA, whether used in schools or in ABA therapy for children with ASD, recognizes three levels: Tier 1, Tier 2 and Tier 3 relating to the intensity of the child's needs. These levels progress from very

generalized interventions to very individualized interventions. Tier 1 interventions are general and can be used for all students in a class without singling out a particular child: for example, setting up the environment or using visual schedules. Tier 2 interventions are more directed towards a child who needs more support such as small group instruction, a token reinforcement system. Tier 3 interventions are more individualized and targeted to change behaviours in a manner that is observable and measurable. The “self and match” incentive system is an example of Tier 3 ABA. So too is working with students 1:1 in an intensive setting. Tier 3 ABA involves the collection of data, monitoring the interventions and using the data to make decisions about changes to the interventions. Data collection should be done in a manner that ensures fidelity and reliability.

[172] Ms. Treadaway, the BCBA who testified as an expert for the respondent, noted that Ms. Kahn and Ms. Lindblad, repeatedly referred to Tier 3 ABA in their declarations supporting the first Request for Interim Remedy. They appeared to equate Tier 3 ABA to “Comprehensive ABA/Intensive Behavioural Intervention (IBI)”. Ms. Treadaway explained that in the Positive Behaviour Supports model for intervention, Tier 3 refers to the implementation of individualized, collaborative and intensive supports for students engaging in high risk behaviour. However, Tier 3 ABA supports and strategies in a classroom setting are not ABA therapy. Ms. Treadaway stated that a student exhibiting behaviours that may cause a risk to themselves or others in the school setting may benefit from Tier 3 level ABA supports and strategies. However, when a student requires more intensive ABA therapy (comprehensive ABA/IBI), this takes place outside the classroom setting and is provided by community organizations, agencies or private ABA providers who provide therapy to students outside of the classroom environment.

Monarch House

[173] The applicant began attending Monarch House during the week of February 4, 2019. He has received 3.5 hours a day of ABA, 5 days per week. He works 1:1 with a Registered Behavioural Therapist (“RBT”) who is supervised by a BCBA. There may be

other children in the room – which is not a classroom – working one on one with their RBTs. There was no dispute that Monarch House is, as described by Ms. Treadaway, a clinical setting.

[174] No group work was involved in Grayson’s programming at Monarch House. Instruction was in English at all times. Grayson worked with at least 5 RBTs in February and March of 2019 while at Monarch House.

[175] After he started at Monarch House, Grayson initially had a number of incidents of dysregulation including aggression (defined as actual physical contact), verbal protests and elopement. However, this dropped off significantly within a matter of days. Ms. Lindblad said that this was the result of “an appropriate reinforcement system plus programming which included behaviour extinction relating to attention and escape”. This continued, with a few short exceptions where behaviours increased for a short period of time, at near zero rates.

[176] With respect to behaviours in which Grayson was seeking attention (hitting and swearing) or eloping, Ms. Lindblad explained that the extinction program for these behaviours included ignoring these behaviours.

[177] Grayson’s program at Monarch House focused on academics, following an assessment of his skill levels. He was provided with language instruction at a Kindergarten level. Ms. Treadaway noted that the data provided by Monarch House showed that the skills that Grayson was being instructed in (in English) were at a level which he had already mastered, meaning that the academics he was being provided were not challenging for him.

[178] Ms. Treadaway noted that typically, “baseline data” for challenging behaviour is collected at the outset without any intervention. However, this did not happen at Monarch House – instead, interventions were used from the outset, which Ms. Lindblad confirmed. The fact that Monarch House worked to extinguish the challenging

behaviours immediately meant that they could not conduct a functional behavioural analysis to attempt to ascertain the cause of the behaviour.

[179] Ms. Treadaway, who worked in a clinical setting for years prior to her employment by the respondent, explained that in a clinical setting, it is possible to safely set up situations, to manipulate antecedents, to attempt to ascertain the cause of behaviours. This did not happen at Monarch House. Had they done so, they might have included providing instruction to Grayson in French or providing more challenging academic work to determine if these were factors aggravating his dysregulation.

[180] Ms. Treadaway also noted that Monarch House focused its assessment on skills Grayson had already mastered that were academic in nature. She says that in doing so, Monarch House overlooked functional skill areas that he was clearly struggling in such as social skills, peer interactions, following instructions, independent work completion and emotional regulation.

[181] Ms. Treadaway's opinion is that, based on the Monarch House records provided, it would appear that Grayson's low level of dysregulation at Monarch House is probably a function of the highly controlled environment where he works 1:1 with a therapist and no other person combined with the documented minimal demands that are being placed on him.

[182] In addition, instruction is in English and the parental behaviours which took place at the French Immersion school are not in evidence at Monarch House.

Expert Evidence

[183] Both parties called expert witnesses on the issues of the causes of the applicant's dysregulation, the accommodations provided and/or which should be provided to the applicant.

Applicant's Expert Witnesses

[184] The Applicant called 4 expert witnesses.

[185] Cathy White (Ms. White) is a retired, experienced special education teacher who worked for a public school board in various positions, all related to special education. The limits of Ms. White's expertise and the limits of her expert report were dealt with in two Interim Decisions, 2019 HRT0 979 and 2019 HRT0 1034, which resulted in the striking of many paragraphs of her report because her expertise, as revealed in her CV and in her report, does not extend to intensive/comprehensive ABA. Because her report is somewhat convoluted, a few paragraphs were missed in the exercise of attempting to limit her report to her area of expertise. I gave no weight to any opinion left in the report beyond her expertise.

[186] Ms. White provided evidence about special education and in particular the implementation of PPM 140 and the use of ABA in the delivery of education. She provided evidence about how she had seen ABA used in schools and gave her opinion that Tier 3 ABA could be presented in schools. However, her evidence on this point was very general and her use of the term ABA seems at times amorphous.

[187] In one brief sentence in her report, Ms. White says that Grayson's needs are not being met and he is not fully accessing his education, that the special education supports and programs currently in place do not meet his identified needs.

[188] In the first Interim Decision dealing with the respondent's objection to Ms. White as an expert witness, I concluded the record before me at that time did not establish that Ms. White was either "unable or unwilling" to provide the Tribunal with non-partisan evidence and so found that Ms. White was capable of being an expert witness. However, at the same time I found that there were a number of factors that that raised questions about her impartiality. I stated that I would consider these factors along with any other evidence elicited at the hearing. Those factors were set out at paragraph 35 of that Interim Decision:

- Although applicant's counsel has provided an assurance that the relationship between them is professional, Ms. White's agreement to the posting of a copy of her report written on applicant counsel's website for marketing purposes does diminish the appearance that Ms. White is independent of applicant's counsel;

- Comments in Ms. White's report go beyond what is appropriate and assume a tone of advocacy rather than that of an impartial expert, some of which are as follows [note: the references that follow were struck from the report]:

a) In paragraph 47, Ms. White says "In the evidence and legal documents I reviewed, listed above, I have not seen evidence that would support a position that it would cause the UGDSB undue hardship to meet Grayson's needs by providing intensive ABA programming either by permitting a qualified, external autism service provider to deliver services in-school or by delivering services through their own staff".

b) In paragraph 90, Ms. White references the report prepared by Drs. Koudys and Wells as "a very thorough psycho-educational assessment", states that it is "very unfortunate that the school board did not facilitate this type of assessment sooner" and speculates that if the information in the report had been available earlier, this might "even" have prevented some of the challenging and destructive behaviour". Subsequently, in paragraph 96, Ms. White says, "Dr. Julie Koudys would have the expertise to address the impact that will occur on his development if Grayson was to attend school without this intensive level of ABA programming."

c) In paragraph 98, Ms. White says

"It also must be noted that Grayson's parents are having to make huge sacrifices (time, money, and energy) every day that a school board would never ask, or expect of, other parents (e.g., payment for private education and ABA when he is school age, not having their child attend a full day school program which he is entitled to, and driving him to Monarch House). The burden being placed on the parents is entirely inappropriate. I am not aware of such a burden being placed on other parents of students with special needs

(physical, developmental disability, blind, hard of hearing, etc.)”.

d) In paragraphs 113 and 114, Ms. White says:

Even though the Board went to great lengths and allowed an untenable situation to go on too long to try and meet Grayson’s needs (that have unfortunately resulted in having staff repeatedly injured and expended numerous resources), the Board missed the mark to provide the necessary ABA programming that Grayson requires to be academically, socially and behaviourally successful. The Board is going to need to address this obligation if it is going to meet Grayson’s needs in the future.

Given the above, the Board is required to meet Grayson’s needs and is not currently doing so. Grayson is entitled to have access to his education like all other students.

e) At the paragraph 131 of her report, Ms. White sets out a quote from the Chief Commissioner of the Ontario Human Rights Commission:

All students have the right to an education that allows them to meet their full potential and contribute to society, and yet students with disabilities continue to face obstacles accessing education services in Ontario,” said OHRC Chief Commissioner Renu Mandhane. “Our policy and recommendations call on key players in the sector to take proactive steps to remove barriers and put an end to discrimination in education, so that all students can gain the skills and knowledge they need to succeed.

[189] Having regard to the above factors along with the following reasons, I find that Ms. White is impartial and biased and I have given little weight to her evidence.

- Ms. White purported to claim greater expertise than the credentials and experience disclosed in her report support.
- As noted above, Ms. White permitted applicant’s counsel to post a redacted “report” which she had prepared in another case on his website for marketing purposes. She was cross examined about this at the hearing. Her report was attached as part of a blog titled “Bring evidence-

based ABA to School! A Guide to Advocate for your Child's Access to Education...". Although I accept Ms. White's evidence that she had no intention of marketing for herself but just wanted to provide information to parents of children with ASD, this also points to the conclusion that Ms. White is biased and lacks impartiality. Ms. White's opinion that the special education program and supports provided to Grayson at the French Immersion school did not meet his needs was made as a bald statement with no explanation or rationale to support it. It is also made in the absence of any observations or discussions with school staff about the details of those programs and supports or the modifications being made to the curriculum or reviewing anything other than the IEP. The IEP does not set out in detail the modifications made to individualize Grayson's curriculum or other learning materials prepared to deliver education to Grayson. As an experienced special education teacher, Ms. White would be expected to know this. Her failure to support her assertion with any sort of explanation and her review of only the IEP to make this assertion is a strong indicator of her bias in this case.

[190] Ms. Lindblad is the clinical director of Monarch House and is both a BCBA and a Speech and Language Pathologist. She provided evidence regarding Grayson's experience at Monarch House where she does not work with him directly. She also provided the following opinions:

- The trigger for Grayson's dysregulation was that he was not being provided with the appropriate academics/curriculum to address his needs, including a failure to properly teach him language, concepts, pre-reading skills, spelling and reading/decoding skills.
- Grayson can learn to respond appropriately to a classroom setting and the academic instruction but, at least initially, Grayson needs to be supported by "Tier 3 ABA programming provided by qualified personnel" on his return to school. She says that BCBA's are qualified to provide ABA at the level of intensity Grayson needs. She says that this should be provided in a school setting.

[191] Ms. Lindblad's evidence was given little weight by the CFSRB. In the Interim Decision in which I accepted the findings of the CFSRB, I deferred my decision on how to deal with the findings of the CFSRB on Ms. Lindblad's credibility and reliability until

after final argument. The applicant made no submissions regarding Ms. Lindblad's credibility in final argument while the respondent did.

[192] I adopt the finding of the CFSRB that Ms. Lindblad's opinions are unreliable and they exhibit bias and a lack of impartiality. This finding accords with view I have formed based on the following:

- There is clear evidence to support the conclusion that Ms. Lindblad is biased and impartial. Her involvement with the Ontario Autism Association and her statements on social media indicate impartiality and bias. For example, her advising parents to report teachers and school principals to the College of Teachers for professional and ethical violations in order to drive changes to education system respecting ABA and her announcement that she had nominated a parent for an award for advocacy for ABA in schools were found by the CFSRB to exhibit bias and lack of impartiality. Subsequent to the CFSRB's decision, Ms. Lindblad continued to make posts of this nature. In one post, she called for "extraordinary measures" to be taken by parents in their advocacy. In another she stated, "All parents need to register their kids [with ASD who are currently withdrawn or excluded from school] for public school en mass – the system will break".
- Ms. Lindblad's "online" involvement with Ms. Kahn continued after the CFSRB's decision in which their online involvement was noted. This included interaction between them in online chats by "tagging" and "liking" posts made by each other. For example, Ms. Lindblad "liked" Ms. Kahn's post that "It's official we are headed for trial..." referring to this hearing. In cross examination, Ms. Lindblad agreed that she is an "advocate for ABA in general – for those who require it" and that she is active in the ASD community "with our families that come to Monarch House more than anyone else".
- Ms. Lindblad's evidence before the CFSRB was that French was not a factor that aggravated Grayson's dysregulation. She was much less definitive in her expert report filed with the Tribunal: she said that she "cannot confirm that there was a causal relationship" between French and Grayson's dysregulation and that "language of instruction does not appear to be the trigger." After other experts called by the applicant filed reports indicating that French could be an aggravating factor, Ms. Lindblad

reversed her original position at the hearing when she agreed that her position was that French was not the only aggravating factor.

- Ms. Lindblad agreed that it was difficult to draw conclusions about other environments without observing them. However, despite the fact that she did not observe the French immersion school or Grayson in the school environment, she gave the following evidence:

- Ms. Lindblad was critical of Ms. Treadaway for not conducting a functional behavioural analysis to determine the cause of Grayson's dysregulation in September and October of 2018 despite the finding of the CFSRB that an FBA could not be done for safety and capacity reasons.

- Ms. Lindblad said that Grayson's behaviours could have been extinguished by ignoring them despite the finding of the CFSRB – and the obvious fact – that school staff could not ignore or extinguish aggression as severe as displayed in Grayson's dysregulation for safety reasons.

- Ms. Lindblad's opinion that Grayson's dysregulation was triggered by lack of supports and/or inappropriate use of supports at school was based in part on her review of documents provided to her by applicant's counsel. Although she said in her evidence before the Tribunal that she reviewed "the curriculum, they were not programming to meet his language needs within the classroom", Ms. Lindblad's report discloses that she was not provided with a copy of curriculum, modified or otherwise. What she was provided with was the IEP which sets out an overview of Grayson's education plan and does not include details of the modified curriculum used with Grayson. Moreover, Ms. Lindblad did not speak with Grayson's teacher or Ms. Griffiths or Ms. Newman about how his curriculum was being modified, how supports were being provided to him in the classroom or observe how Grayson's program was being delivered.

- Ms. Lindblad stated that her opinion that Grayson's language needs were not being met was also based on assessments that showed him behind in language skills including spelling, reading and written language. However, these assessments were done in English while Grayson's language of instruction had been French. The psycho-educational report of Dr. Kerry Wells and Dr. Julie Koudys filed by the applicant indicated that

Grayson's absences and instruction in French would have had an impact on his academic achievement.

- Ms. Lindblad also, in support of her opinion that the academics and supports provided for Grayson were the trigger for his dysfunction pointed to the fact that Grayson's dysregulation was much reduced once Monarch House began to provide him with an academic program which Ms. Lindblad said met his needs. However, this claim was made without evidence that other factors played a role in the decline of Grayson's dysregulation including instruction in English or a functional behavioural analysis that demonstrated that the academic program and supports he received at the French Immersion school were the trigger.
- With respect to Ms. Lindblad's opinion that Grayson's dysregulation could not have been triggered by exposure to his mother's inappropriate language, there is no indication that Ms. Lindblad was ever advised about Ms. Kahn's behaviour as set out above. In any event, her opinion on this point was clearly influenced by her relationship with Ms. Kahn.
- Ms. Lindblad stated that Grayson's ability to function in other settings supports her conclusion that he has no need for mental health treatment. However, Ms. Lindblad has no qualifications to assess mental health and so exceeds her expertise in making this statement. Moreover, the evidence received in this hearing indicates that the premise for Ms. Lindblad's conclusion is wrong: Grayson was having problems functioning in a community program at the YMCA. Further, Ms. Kahn also stated, in an email dated September 12, 2018 to Ms. Griffiths, that Grayson "after school has seen challenging behaviour".

[193] Dr. Julie Koudys (Dr. Koudys) also provided evidence as an expert witness for the applicant. Dr. Koudys qualified as a psychologist in 2013 and is a clinical psychologist but her primary employment is as a professor in Clinical-Developmental Psychology at Brock University. She is also qualified as a BCBA. She spends one day a week doing clinical practice.

[194] In her report (Koudys report), Dr. Koudys provides an opinion that includes the following:

- The significant improvements in Grayson’s behaviour and academic engagement at Monarch House show that he requires a comprehensive individualized ABA program such as provided at Monarch House.
- Grayson needs ABA designed, delivered and supervised by a BCBA and implemented by someone with training and supervision, used in collaboration and concurrently with educational programming provided by a teacher.
- There is no distinction between ABA therapy and ABA education.
- Grayson was provided with “cookie cutter” behavioural strategies that did not contain all the characteristics of ABA, including the token system.

[195] I gave little weight to Dr. Koudys’ evidence for the following reasons:

- Dr. Koudys lacks impartiality and exhibits bias. Like Ms. White, she permitted a report she had prepared for another case, in which applicant’s counsel appeared for the applicant, to be attached to a blog titled “Bring evidence-based ABA to School! A Guide to Advocate for your Child’s Access to Education...”, on the website of applicant’s counsel. Dr. Koudys agreed that her report and Ms. White’s report were both attached as examples of the sort of reports parents could use in bringing complaints to the Tribunal and that her report was consistent with the objective identified in the blog post. She agreed that the conclusions in the report posted on the website were generically the same as the conclusions in her report regarding Grayson. She also agreed that this compromised her appearance as a neutral expert. Dr. Koudys acknowledged that she was “friends” with Ms. Lindblad on Twitter but stated that she otherwise did not follow her on social media.
- Dr. Koudys cited three studies that she says demonstrate the superiority of ABA (provided in an intensive manner) as an educational approach for children with ASD. However, she agreed that in none of these studies was the ABA being provided to children in classrooms, but rather it was being done in isolated settings.
- Dr. Koudys pointed to Grayson’s experience at Monarch Park to support her opinion that his experience receiving ABA at Monarch House provides “strong emerging evidence of the effectiveness of ABA as an educational strategy for Grayson.” However, in doing so, Dr. Koudys

disregarded the fact that certain of the variables present in the school setting, identified as aggravators of Grayson's dysfunction, were not present at Monarch House and that the absence of all or any of those variables could explain why Grayson was more successful at Monarch House. These variables included instruction in French (which Dr. Koudys agreed could be an aggravator), peers, the classroom environment, or his mother's behaviours. It is clear that while Dr. Koudys is insistent about the importance of "evidence based" ABA and the collection of data, there is a lack of objective evidence to support her assumption that the reason for Grayson's success at Monarch House was the ABA he was receiving there and it does not appear that any genuine analysis was done to ascertain the reasons for Grayson's dysregulation at the French Immersion school.

- Dr. Koudys also disregarded that Grayson had been successful in Grade 1. She also seemed unaware that Grayson had also progressed under the Home Instruction provided by Ms. Soule using his modified curriculum and methods of teaching used by teachers. Both his Grade 1 experience and the Home Instruction provided by Ms. Soule appear to demonstrate that Grayson could access education through the academic program provided by teachers in a school.
- Dr. Koudys did not speak with Grayson's teachers or to his BCBA to obtain a full picture of what Grayson's academic program was or obtain a full history of what happened at the French Immersion school, before expressing views about the behavioural strategies being used or the academic program being provided to Grayson.

[196] An updated psycho-educational assessment report (the "Wells/Koudys report") was prepared jointly for the applicant by Dr. Kerry Wells and Dr. Koudys. Dr. Wells, having qualified as a psychologist in 2014, has experience as an educational psychologist. In fact, he was employed by the respondent for several years before leaving to begin his private practice as a clinical psychologist.

[197] In large part, the report prepared by Dr. Wells and Dr. Koudys confirmed the Newby-Clark report with the addition of a diagnosis of a Learning Disability. In their assessment they ruled out that Grayson has any co-morbid mental health issues. Their report includes a recommendation that strategies based on the principles of ABA be

utilized to develop more social communication behaviours and minimize the aggressive and disruptive behavior. In this context, they recommended that Grayson be referred to the Ontario Autism Program. The Wells/Koudys report also recommends that Grayson's educational program be "based on the principles of ABA" but does not say that Grayson requires either Tier 3 ABA or intensive/comprehensive ABA as part of his educational program in order to access education.

[198] Dr. Wells and Dr. Koudys note at the outset of their report that Grayson was referred to them to evaluate whether, in addition to autism, he meets the diagnostic criteria for learning disability or mental health issue. Further, they say, "it was also requested that the impact of external factors, such as Grayson's attendance at French language school and parental behaviour be considered."

[199] With respect to the issue of French, they say, "It is important to note that Grayson's absences from school and instruction in French will have had an impact on his academic achievement." They later say that "it is believed that Grayson may be more successful in an academic program that is offered in English". However, they do not opine on either the impact of French on Grayson's dysregulation or consider the impact of parental behaviour.

[200] The information sources utilized by Dr. Wells and Dr. Koudys are listed in their report. The only interview they conducted was with Ms. Kahn. Further, Ms. Kahn was the source of information used in assessment tools that required parents to answer questions. A "Social Communication Questionnaire" was completed by Monarch Park. Four documents from Grayson's Ontario Student Record were reviewed: the IEP, the most recent IPRC report, and report cards from Grade 1 and 2. However no other information from the school staff was provided to Dr. Wells and Dr. Koudys, including the affidavits of school staff filed in the CFSRB or the CFSRB's decision. Nor did Dr. Wells and Dr. Koudys, speak directly with any of the respondent's staff or visit the French Immersion school.

[201] Questions arise about the accuracy of their report as a result of not being provided with complete information. For example, under Relevant Background, the psycho-educational report states,

(...) in the summer between Grade One and Grade Two, he attended camp with support and was reported to be successful. However, his mother did note that Grayson had some ongoing behavioural difficulties (e.g. swearing, hitting peers, not listening) when he attended the YMCA drop-in programs.

[202] This does not entirely accord with the evidence before the Tribunal that Grayson was asked to leave the summer YMCA camp and that his aggression increased over the over the summer, including hitting people when he was frustrated, and hitting his mother for the first time. Nor is there any indication in the report that Dr. Wells and Dr. Koudys were advised of the level of Grayson's dysfunction at the French Immersion school in September and October of 2018. They were clearly not advised about what school staff reported about Ms. Kahn's behaviour.

[203] In cross examination, Dr. Koudys was asked about the views expressed by Ms. Kahn at the hearing that school staff were "gaslighting" her. Dr. Koudys said that this would cause her concern for Ms. Kahn, for Grayson and for everyone, if that was Ms. Kahn's perception. Further, when Mr. Raey's affidavit evidence of the incident with Ms. Kahn, on September 18, 2018, was read to Dr. Koudys, she expressed surprise and agreed that this would be expected to cause stress for Grayson.

[204] Dr. Koudys agreed in cross-examination that if the information she received from Ms. Kahn was not correct, this could vitiate the results of the assessment. She also agreed that "potentially", if there were other issues present, such as anxiety or ADHD, that other treatments apart from intensive ABA might be indicated.

[205] Dr. Wells and Dr. Koudys ruled out the existence of any co-morbidities such as anxiety or ADHD. This was challenged by Dr. Smith whose evidence is outlined below. I accept Dr. Smith's evidence that the assessment done by Dr. Wells and Dr. Koudys into

the question of whether Grayson has any co-morbid mental health conditions was deficient and for that reason their conclusion cannot be relied on.

Respondent's Expert Witnesses

[206] Dr. Gareth Smith, a developmental paediatrician, testified as an expert witness for the Respondent. Following the completion of his training as a medical doctor in the West Indies, Dr. Smith completed his four-year paediatric residency at the Hospital for Sick Children in Toronto and subsequently received his Paediatric Fellowship in 1986. In following years, the focus of his practice moved toward Developmental Behaviour Paediatrics involving the diagnosis and management of children with a variety of developmental disabilities, including ASD. In 1996, he was offered the position of Developmental Paediatrician at the Child Development Centre ("the Centre"), Hotel Dieu Hospital in Kingston and three years later was appointed Medical Director of the Centre. He ran a clinic at the local Autism Program facility one day a week for several years, and then acted as Developmental Paediatric Consultant to their team until 2010, when he started seeing new patients with ASDs at the Centre. He is also an Associate Professor of Paediatrics at Queen's University.

[207] At the Centre, Dr. Smith works with multi-disciplinary teams, including OTs, SLPs, Psychologists, Social Workers, Play Therapists and Physiotherapists in the diagnosis and management of children with ASD. He not only participates in the diagnosis of ASD but follows most of these children until they graduate from secondary school. Dr. Smith's primary role is to identify co-morbid medical or psychiatric issues, including ADHD, sleep-related disorders and anxiety among a number of other disorders which, Dr. Smith says, are well recognized and common co-morbidities and which could aggravate or cause emotional dysregulation in children with ASD. To summarize, Dr. Smith's qualifications are extensive and include publications and participation in research projects involving ASD.

[208] In a Request for Order during Proceeding ("RFOP") the applicant asked that Dr. Smith be found to lack the qualifications/expertise to criticize the Wells/Koudys

report or the Koudys report. The applicant's request that the evidence of Dr. Smith be restricted was dismissed, "with the understanding that this order does not preclude the applicant from arguing about the weight to be accorded to Dr. Smith's evidence." However, in cross-examining Dr. Smith, the applicant did not challenge his expertise in any significant way. Nor did the applicant make any submissions about the weight to be accorded to Dr. Smith's report in final argument and, in fact, relied on evidence given by Dr. Smith in final argument.

[209] Given Dr. Smith's extensive experience as a developmental paediatrician working with children with ASD, I have given significant weight to his evidence, including his evidence criticizing the Wells/Koudys report and Dr. Koudys' report. It is clear that Dr. Smith has completed or participated in as part of a multi-disciplinary team many, many more assessments of children with ASD than either Dr. Wells or Dr. Koudys and in particular assessments regarding the existence of co-morbidities.

[210] Dr. Smith provided a series of reports, all of which were filed at the hearing. The first dated March 8, 2019, related to the first Request for Interim Remedy ("RFIR"), the second was a more extensive report filed on April 15 in accordance with the Tribunal's direction that detailed affidavits/expert reports be filed by that date, the third, dated May 6, 2019, was filed in response to the Wells/Koudys report and the final report, dated May 30, 2019, responds to the applicant's RFOP seeking to limit his evidence.

[211] Unlike Dr. Wells and Dr. Koudys, Dr. Smith was provided with many of the materials filed in this Application. This included materials filed by the parties in respect of the applicant's first RFIR including declarations of Ms. Kahn and affidavits and declarations of school staff and others, all filed at this hearing. He was also provided with Ms. Lindblad's report, the CFSRB decision, the Newby-Clark report, correspondence between counsel regarding Grayson's return to school from January 23, to March 6, 2019, the Wells/Koudys report, the Koudys report, certain clinical records relating to treatment received by Grayson at Monarch House, and certain clinical records relating to Grayson's assessment by Dr. Wells and Dr. Koudys.

[212] Dr Smith provided the following evidence about ASD, behavioral dysregulation and co-morbidities:

- Behavioural dysregulation is not currently recognized as a core feature of ASD but is acknowledged in many research findings as a frequent coexisting condition. There are a multitude of recognized conditions that together or alone can result in significant dysregulation of behaviour in children with ASD, including: significant sensory dysfunctions, Anxiety, Mood Disorder, sleep deprivation/disorder, ADHD, and others.
- Over 40% of children with ASD have a sleep disorder and become behaviourally dysregulated. Anxiety co-exists with ASD in up to 85% of children with ASD, while ADHD coexists in 65-85% of children with ASD. Both can exacerbate emotional dysfunction.

[213] With respect to the significant increase in Grayson's dysregulation in Grade 2, Dr. Smith's evidence was as follows:

- The fact that some techniques that had worked for Grayson in Grade 1 no longer worked suggests that something changed over the summer and a closer look at Grayson's experiences over the summer between Grade 1 and 2 should have been conducted. Dr. Smith stressed that children with ASD have long memories.
- In an autistic child with severe behavioral dysregulation and a significant learning disability, any stressor can cause further dysregulation. To put Grayson in French immersion could have been the "straw that broke the camel's back".
- Almost any child functioning at Grayson's level of cognition who witnessed his mother yelling and swearing as Grayson did would likely experience intense anxiety which would likely aggravate behavioural dysregulation. Moreover, the behaviour of Ms. Kahn, described in the affidavits (summarized in part above), was "not only potentially VERY detrimental to Grayson but also to all the other students ... exposed to such lack of control by an adult."
- The change in EAs during the first couple of weeks may have been an issue of inconsistency that could have contributed to Grayson's dysregulation but after a while, children with autism learn to adjust to inconsistencies that are consistent.

[214] Dr. Smith's opinion is that the Loop of School plan provided the best chance of success for Grayson. "if this plan had been implemented, [Grayson] would have been working with dedicated staff 1 on 1 in an isolated environment with the guidance and support of a Board BCBA with a view to arresting and reversing the destructive spiral of behavioural dysregulation over the previous weeks."

[215] Respecting the Wells/Koudys report's determination that Grayson had no co-morbid mental health issues, Dr. Smith pointed to the statistics (set out above) regarding the existence of certain co-morbidities found in children with ASD. He pointed out that the assessment and conclusions reached by Dr. Wells and Koudys were deficient for a number of reasons outlined in his report, some of which are as follows:

- Although the report says that there were no developmental concerns initially noted by his mother, the next sentence states that Grayson did not say his first words until around 17 months and did not walk until 18 months, which does raise developmental concerns. Dr. Smith says that any child who has no words until 17 or 18 months should be assessed for either a hearing impairment or ASD and should have the rest of his development thoroughly evaluated. Further, not walking until 18 months is a clear indication of developmental delay in the motor domain. Therefore, Grayson was displaying developmental concerns within the first 18 months, contrary to Dr. Wells' and Dr. Koudys' statement.
- Further, the fact behaviours started to surface quite significantly in daycare, where Grayson is reported as "having to be first" and did not handle transitions well, raises concerns since "competitiveness" is a recognized characteristic of children with OCD/anxiety and ADHD, but not ASD except where these co-morbidities are present.
- The Wells/Koudys report indicates that "Grayson always wants to be near his mother" and would follow her around the house and seemed to "panic" when separated, and that Grayson began to verbally threaten others, including his teachers and other students. Dr. Smith believes that these statements strongly suggest significant anxiety, in particular separation anxiety.
- Dr. Smith noted that the report about Grayson's sleep is given in a negative way, that "Grayson is reported not to be a good sleeper" and his

mother frequently has to put him to bed and sleep with him. Dr. Smith says that this is further suggests separation anxiety.

- Dr. Smith stated that to rule out mental health co-morbidity, “it is absolutely essential to use the appropriate screening tools.” He notes that the Achenbach test relied on by Dr. Wells and Dr. Koudys specifically states that those scales should not be used to make any diagnosis. Instead, information from multiple sources must be taken into consideration. Dr. Smith states that, as a minimum before ruling out ADHD, or anxiety, the following should be utilized: MASC (second edition); the ADIS-C/P, RCMAS, and possibly the SCARED scales. He points out that none of these was used.
- Dr. Smith says that the psychological evaluation done by Dr. Wells and Dr. Koudys “can certainly diagnose a learning disability, and autism spectrum disorders, but falls far short of meeting the criteria for excluding anxiety, mood disorder, developmental coordination disorder, sleep disorder...”.
- Dr. Smith is also critical of the statement that “ABA interventions have also been shown to be effective in many areas including general and special education (all levels), autism spectrum disorders, intellectual and developmental disabilities, attention deficit disorder, movement disorders, behavioural disorders ...” Dr. Smith says that ABA is clearly evidence based for ASD but its uses in ADHD and movement disorders, and so on, is purely anecdotal at this point. Further, he says that its use even in emotional dysregulation by itself is being questioned since cognitive behavioural approaches are being shown to be far more effective, especially in more severe cases.

[216] Dr. Smith was clear that he was not diagnosing Grayson with any co-morbidity, but was making the point that in evaluating the information with which he was provided, he saw signs of possible co-morbidities that required that a proper assessment be done, through a comprehensive interdisciplinary evaluation. He was also clear that if co-morbidities were diagnosed, that treatment other than ABA or just ABA might be required.

[217] Ms Treadaway was the other expert witness called by the respondent. Ms. Treadaway has a diploma in Early Childhood Education, a degree in Psychology, a

Masters in Education, a Post Graduate Certificate in Applied Behavioural Analysis and is a BCBA. She was hired by the respondent as an ABA Facilitator in 2016. Prior to that, she had an extensive background working with a community IBI provider, ErinoakKids Centre for Treatment & Development, in various capacities which involved her in the supervising the delivery of IBI services to clients in the community.

[218] I have taken into account the fact that Ms. Treadaway is employed by one of the parties in considering her evidence. However, as did the CFSRB, I found her evidence to be credible and preferable to the evidence provided by Ms. Lindblad, the other BCBA who testified in this hearing. I found Ms. Treadaway's evidence to be straightforward and that, where she provided opinions, she backed them up with reasoning that relied largely on facts. The research she cited in support of positions she took was not challenged.

[219] Ms. Treadaway's evidence was largely responsive to Ms. Lindblad's evidence.

[220] Ms. Treadaway disputed Ms. Lindblad's statement that Ms. Kahn's inappropriate behaviours and language towards school staff in Grayson's presence could not have aggravated Grayson's dysregulation. Ms. Treadaway stated that, like all children, children with ASD can mimic the behaviours and language of those in their environments, including their parents. Ms. Treadaway said that it seems likely that some of Grayson's own expressed hostility towards the respondent's staff could have been learned from his mother, that she models this behaviour for him in her interactions with the respondent's staff.

[221] Regarding Ms. Lindblad's position that instruction in the French language was not an aggravator of Grayson's dysfunction – a position which Ms. Lindblad ultimately changed – Ms. Treadaway said that the French language was becoming more challenging for Grayson because, as he moved on in his school years, the French spoken by the teacher and his peers was becoming more and more complex.

[222] Ms. Treadaway disputes Ms. Lindblad's assertion that Grayson's dysregulation in September and October was caused by inappropriate supports. Ms. Treadaway says that the accommodations and supports provided for Grayson were appropriate and points out that Ms. Lindblad has failed to identify which supports did not work or why.

[223] Ms. Treadaway disputes Ms. Lindblad's assertion that data collected by Monarch House support Ms. Lindblad's views regarding the cause of Grayson's dysregulation. Ms. Treadaway's review of the data provided by Monarch House shows that the reports produced by Ms. Lindblad do not support Ms. Lindblad's views and, further, that there are significant records missing. Ms. Treadaway was not challenged on this evidence or shown documents that contradicted it.

[224] Ms. Treadaway included in her report the results of her research regarding ABA in a school setting. She says that there is a significant amount of research available documenting the effectiveness of comprehensive and intensive ABA in clinical (therapy) settings. There is also a great deal of research documenting the effectiveness of ABA procedures/methods (differential reinforcement, extinction, prompting, prompt fading, chaining, shaping, antecedent manipulations, modelling, etc.) in highly controlled environments. However, there is that little to no evidence exists documenting the effectiveness of intensive (comprehensive) ABA therapy in school settings.

[225] Ms. Treadaway also points out that safety issues can preclude the provision of ABA at the Tier 3 level in schools where, as in this case, the student's dysregulation puts others and the student them self at risk of harm. This is because, as Ms. Lindblad noted, and Ms. Treadaway agrees, behaviour extinction is best achieved by ignoring the behaviour, given that the function of the behaviour is to achieve an end, such as gaining attention or escaping a situation the student does not like. However, as Ms. Treadaway points out, ignoring Grayson's behaviours would have created a risk of harm to others or to Grayson. The respondent's staff was further limited by the fact that they did not have parental consent to use restraints.

ANALYSIS

Legal Framework

[226] The legal analysis for establishing discrimination in education cases is set out in the Supreme Court of Canada's decision in *Moore v. British Columbia (Education)*, 2012 SCC 61 ("*Moore*"). The Court stated, starting at paragraph 33:

As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

There is no dispute that Jeffrey's dyslexia is a disability. There is equally no question that any adverse impact he suffered is related to his membership in this group. The question then is whether Jeffrey has, without reasonable justification, been denied access to the general education available to the public in British Columbia based on his disability, access that must be "meaningful": *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624, at para. 71; *University of British Columbia v. Berg*, 1993 CanLII 89 (SCC), [1993] 2 S.C.R. 353, at pp. 381-82. (See also *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, 2000 SCC 27 (CanLII), [2000] 1 S.C.R. 665, at para. 80; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15 (CanLII), [2007] 1 S.C.R. 650, at paras. 121 and 162; A. Wayne MacKay, "Connecting Care and Challenge: Tapping Our Human Potential" (2008), 17 *E.L.J.* 37, at pp. 38 and 47.)

The answer is informed by the mandate and objectives of public education in British Columbia during the relevant period. As with many public services, educational policies often contemplate that students will achieve certain results. But the fact that a particular student has not achieved a given result does not end the inquiry. In some cases, the government may well have done what was necessary to give the student access to the service, yet the hoped-for results did not follow. Moreover, policy documents tend to be aspirational in nature, and may not reflect realistic objectives. A margin of deference is, as a result, owed to governments and administrators in implementing these broad, aspirational policies.

But if the evidence demonstrates that the government failed to deliver the mandate and objectives of public education such that a given student was denied *meaningful* access to the service based on a protected ground, this will justify a finding of *prima facie* discrimination.

[227] This analysis has been accepted by the Tribunal in cases where discrimination in the provision of education services was alleged: *RB v. Keewatin-Patricia District School Board*, 2013 HRTO 1436; *LB v. Toronto District School Board*, 2016 HRTO 336; *UM v. York Region District School Board*, 2017 HRTO 1718; *JS v. Dufferin-Peel Catholic District School Board*, 2018 HRTO 1284; *HB v. Halton District School Board*, 2018 HRTO 1729.

[228] Applying this analysis to the *Code*, the onus lies on an applicant to prove that because of a protected characteristic, they were denied meaningful access to education contrary to their right, under s. 1 of the *Code*, to equal treatment in education services. The burden then shifts to the respondent to either prove that the discrimination did not occur or to establish that a defence exists under s. 11 or s. 17 of the *Code*.

[229] Section 11 of the *Code* provides that it is an infringement of the *Code* to implement a requirement, qualification or factor that, while on its face is not discriminatory, results in the exclusion, restriction or preference of a group identified by a protected ground. However, s. 11 also sets out two exceptions: where either the requirement, qualification or factor is “reasonable and *bona fide* in the circumstances” or the *Code* specifically permits the discrimination, no infringement of the *Code* will be found. But, in order to rely on the exception that the requirement, qualification or factor is “reasonable and *bona fide* in the circumstances”, a respondent must first establish that the applicant cannot be accommodated without undue hardship, considering the cost, outside sources of funding, if any, and health and safety requirements.

[230] Section 17 provides that if a person is “incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right” only because the person has a disability, the person’s rights under the *Code* are not infringed. However, again, in order to rely on this section, the respondent must establish that the applicant

cannot be accommodated without undue hardship, considering the cost, outside sources of funding, if any, and health and safety requirements.

[231] Having regard to the above, the questions to be answered in determining whether the respondent discriminated against the applicant contrary to the *Code* in this case are as follows:

- i) Has the applicant established that he was denied meaningful access to his education because of his disability?
- ii) If so, has the respondent established that the reason the applicant was denied meaningful access to education was because he was unable to fulfill the requirements necessary to do so because of his disability or that the requirement that prevented his meaningful access to education was reasonable and *bona fide*?
- iii) If so, has the respondent established that it was unable to accommodate the applicant?

Has the Applicant Established that he was Denied Meaningful Access to Education?

[232] As noted in *Moore*, the applicant must demonstrate that the respondent failed to deliver on the mandate and objectives of public education such that he was denied meaningful access to the educational services delivered by the respondent based on a protected ground - in this case, disability.

[233] There is no dispute in this case that Grayson has the disabilities of ASD and a Learning Disability.

[234] The applicant says that the respondent denied him meaningful access to education because it failed to provide him with an academic/educational program that addressed his needs, including the supports he required to access the educational program. He says that this failure dates back to November 2016, when he was in Senior

Kindergarten. He says that his parents were required to obtain an Occupational Therapist assessment in his Senior Kindergarten year and then a psycho-educational assessment prior to Grade 1 when the respondent did not do so. He says in Grade 2, the lack of an appropriate academic/educational program and educational supports caused him to become severely dysregulated ultimately leading to his expulsion. He says that he requires comprehensive ABA to be able to access education because of his disabilities – ASD and a Learning Disability -- and that he was not provided with this. He says, therefore, that he was denied meaningful access to education throughout his time at the French Immersion school.

[235] I find, however, that the evidence establishes that the academic program and educational supports in place for the applicant met the requirements for providing meaningful access to education for Grayson in SK, Grade 1 and up until about mid-September of his Grade 2 year.

[236] Although Ms. Kahn raised concerns about some of Grayson's behaviours in Senior Kindergarten, Ms. Newman assured her that Grayson's triggers were known and that the school had put things into place to deal with the unwanted behaviours as much as possible.

[237] In response to Ms. Kahn's request for a psycho-educational assessment, Ms. Newman advised Ms. Kahn that the respondent did not typically test students before Grade 3 since earlier testing is not usually accurate. (In this regard, I note that Grayson's learning disability was not diagnosed until his second psycho-educational assessment in March 2019.) Ms. Kahn proceeded to obtain a psycho-educational assessment which did diagnose Grayson with ASD.

[238] However, there is no evidence the respondent was ignoring Grayson's behaviours or failing to make necessary accommodations so that Grayson could access his education program during this period. Nor is there any evidence that he was not accessing education throughout this period.

[239] Grayson successfully completed Grade 1, a fact agreed to by his mother in the expulsion hearing before the CFSRB. Further, there is no dispute that Grayson's first week or so in Grade 2 - at least up until September 10 - was successful. I accept the evidence of Sarah Griffiths, the SERT at the French Immersion school, that appropriate academic programming was in place for Grayson, including modifications to curriculum so that the programming addressed his levels. I also note her evidence that she and Grayson's teacher met after school and spent a good deal of time to ensure that Grayson's academic program addressed his learning needs.

[240] The evidence, however, does make clear Grayson was increasingly unable to access education in a meaningful way after September 10, 2018 when his dysregulation suddenly and rapidly escalated in severity.

[241] The applicant's expert witnesses have used his experience at Monarch House to support their conclusions that the academic/educational program and supports being provided to him were deficient, were the cause of his dysfunction and that he required instruction through intensive/comprehensive ABA. Grayson's dysregulation did diminish quickly when he started at Monarch House and then remained at very low levels at Monarch House. The applicant's experts point to the facts that Grayson was provided with an academic program presented through instruction based on Tier 3 ABA principles, that his dysregulation reduced and that he was progressing. The applicant's experts say that all of this supports a finding that Grayson requires comprehensive ABA in order to be able to meaningfully access education. However, the evidence does not support this conclusion.

[242] First, the change in Grayson's pattern of dysregulation at Monarch House cannot be attributed just to the use of Tier 3 based instruction. There are far too many other variables involved. The environment at Monarch House was a "clinical setting" which was very different from the environment in the school. Grayson's mother was very supportive of the program at Monarch House (in contrast to her lack of support during Grayson's Grade 2 year and during Ms. Kingshott's Home Instruction) and there is no evidence that she engaged in inappropriate behaviours at Monarch House. Further

Grayson was being instructed in English, not French, at Monarch House. Moreover, Grayson's "success" in instruction he was receiving seems to have been in part due to the fact that he was learning skills he had already been taught.

[243] Second, the argument that the Monarch House experience demonstrates that Grayson needed the type of Tier 3 instruction provided there to have meaningful access to education ignores that Grayson was successful in Grade 1 and that this success continued into Grade 2 until at least September 10. Further, it ignores the success of the Home Instruction provided by Ms. Soule, which was in English and in circumstances where Grayson's mother was supportive of the Home Instruction. During the period of Home Instruction by Ms. Soule, Grayson's dysregulation was similarly minimal to the extent that it did not interfere in his instruction and he was progressing academically based on instruction by a teacher using modified curriculum.

[244] I therefore reject the evidence of the applicant's experts, none of whom spoke with any school staff member involved in teaching Grayson, reviewed the modified curriculum provided to Grayson and most of whom I have found lack impartiality, that Grayson's academic program and supports were not appropriate to meet his learning needs or were the source of his dysregulation.

[245] There were factors that acted as aggravators of the dysfunction – the straw that broke the camel's back, as Dr. Smith says. These factors include French language instruction, the switching of the token reinforcement system for the self and match system and Ms. Kahn's behaviour.

[246] The applicant points to inconsistency in the EAs working with Grayson in the mornings after the EA assigned to work with Grayson was injured on September 3. Over the next two weeks, until Ms. Nickerson began as the morning EA on September 17, a number of successive EAs rotated into the position, until they, variously, were injured, became ill or refused to work. While this might have been a factor in Grayson's dysfunction, it was beyond the respondent's control. Further, consistency had been

restored by the time Grayson's dysregulation really began to escalate in the second half of September.

[247] Other factors could be responsible for aggravating or perhaps even causing Grayson's severe dysregulation. There is a statistical probability of the existence of a co-morbidity in cases of dysregulation as severe as Grayson's. Dr. Smith's evidence makes clear that there is a real possibility that his dysregulation is the result of a co-morbidity and that it would be in Grayson's best interests that this be explored further through a multi-disciplinary assessment.

[248] I have rejected the applicant's contention that his dysregulation was caused by the respondent's failure to provide ABA in the classroom. Although I have rejected the applicant's argument as to the cause of his dysregulation, I accept that he was increasingly dysregulated in Grade 2. I also accept that from mid-September 2018 on, the applicant did not have meaningful access to the educational services delivered by the respondent and that his disability was a factor. Therefore, a *prima facie* case of discrimination exists.

Has the Respondent Established that the Applicant was Denied Meaningful Access to Education because he was Unable to Fulfill the Requirements Necessary to do so as a Result of his Disability or that the Requirement that Prevented his Meaningful Access to Education was Reasonable and *bona fide*?

[249] The burden now shifts to the respondent. The analysis under sections 11 and 17 of the *Code* ends in the same place. In order to rely on the defence provided in either section, the respondent first must show that it accommodated Grayson to the point of undue hardship. While not identifying which of the two sections it is relying on, the respondent has focused its arguments on accommodation. So too did the applicant. Consequently, it appears that there is no dispute that one of these two sections applies in this case.

[250] The most applicable section is s. 17 – that, as a result of his dysregulation, Grayson was unable to fulfill the requirements attending the right. He was unable to

fulfill the requirement that he remain in class in order to receive his academic program and, ultimately, he was unable to remain in school without creating an unacceptable safety risk for himself and others which is also a requirement of attending school in order to access education.

[251] The more important question in this case is whether the respondent accommodated or made efforts to accommodate Grayson's needs to the point of undue hardship.

Has the Respondent Established that it was Unable to Accommodate the Applicant?

[252] There are two distinct periods to be considered when answering this question – first the period leading up to the expulsion and second, the period following the expulsion. Both engage issues of undue hardship (health and safety) and the applicant's participation in the accommodation process.

Period Leading up to the Expulsion

[253] The evidence establishes that when Grayson started Grade 2, the Behaviour Plan which had been successful in Grade 1 carried over. Grayson's first week or so of Grade 2 was successful under this plan. However, when the reinforcement system changed, Grayson's dysregulation suddenly escalated.

[254] The evidence shows that the respondent took steps to attempt to deal with this, starting with bringing in the BCBA who had created the Behaviour Plan. She immediately discontinued the new reinforcement system and brought back the old one as well as taking steps to put in place a new plan. Grayson was absent from school on vacation for a week at the end of September and beginning of October and on his return efforts to manage his behaviour continued but his dysregulation became worse. Ultimately, on October 22, 2018, after Grayson's dysregulation continued to escalate in severity, to the extent that he was unable to effectively remain in class for significant

periods and had become a safety risk to students, staff and himself, the respondent convened a meeting with Grayson's parents and a number of the respondent's staff. It was clear that a different approach had to be taken to try to deal with Grayson's dysregulation.

[255] At the October 22 meeting, it was agreed that a plan would be developed to try to help Grayson to be successful and that he would be kept home in the interim. The next day, a very lengthy meeting was held involving school staff and senior staff of the respondent, including professional staff. Out of this meeting came the Loop of School plan.

[256] Before finalizing this plan, a meeting was held with Ms. Kahn as well as with Grayson's private ABA provider and a representative of Kerry's Place both of whom contributed ideas that were incorporated into the plan and both of whom approved the plan. The plan would build success for Grayson by having him attend school "successfully" for a shorter period and then for increasingly longer periods. It would include 5 hours a week of home instruction. The plan was one that had been used successfully in other cases. Dr. Smith's view was that this plan had the best guarantee of success for Grayson.

[257] I find that the respondent took reasonable steps to deal with Grayson's dysregulation in a timely manner and that the Loop of School plan was part of this. Further, I find that the Loop of School plan was a reasonable accommodation.

[258] The only person who did not agree with the plan was Ms. Kahn. Her reasons for disagreeing at the time appeared to relate to the fact that Grayson's time at school would be too short before she would be required to pick him up. However, since the plan depended on starting Grayson out successfully in short but increasing increments, and the plan was supported by all involved in developing it, including Ms. Kahn's private BCBA and her contact at Kerry's Place, I find that there was no reasonable basis for Ms. Kahn's rejection of the Loop of School plan.

[259] An applicant, who in this case is represented by his mother, has an obligation to co-operate in accommodation process, which includes a “duty to facilitate the implementation” of a proposal for accommodation that is reasonable. See *Central Okanagan School District No. 23 v. Renaud*, 1992 CanLII 81 (SCC) (*Renaud*); *YB v. Conseil des écoles publiques de l’Est de L’Ontario*, 2017 HRTO 492; *Fisher v. York University*, 2011 HRTO 1229 (“*Fisher*”).

[260] In rejecting the Loop of School plan, Ms. Kahn failed in her obligation to co-operate in the accommodation process. In so finding, I note that parents do not have the right to dictate the accommodations which their children will be provided with to access education. While parents do have the right to provide input as part of the accommodation process – which Ms. Kahn did in this case – they must accept reasonable accommodations offered by the school board. See *UM v. York Region District School Board*, 2017 HRTO 1718; *Fisher*.

[261] After rejecting this plan, Ms. Kahn requested that Grayson either be suspended or excluded. Given the serious injury to Ms. Bowers, a letter was sent to the Kahns on behalf of Ms. Newman, advising that Grayson was suspended pending an investigation into a potential recommendation to expel. Three options for Grayson’s education in the interim were offered, including a placement in a special education class at his home school. A further option of Home Instruction was offered, and Ms. Kahn accepted this option. The respondent put Home Instruction into place. I find that the respondent in making these offers, continued to make reasonable efforts to accommodate the applicant.

[262] Ms. Newman determined that Grayson’s continued presence in the school posed a safety risk and recommended expulsion. The respondent accepted this recommendation.

[263] The applicant did not argue at the hearing that the expulsion was discriminatory, contrary to the *Code*. While the analysis done by the CFRSB in determining whether to uphold an expulsion does not include an analysis under the

Code, it does effectively involve the considerations that would be included such an analysis. I have accepted the findings of the CFSRB and in doing so accept and agree with the implicit finding that the expulsion does not contravene the *Code*.

[264] It is important to note that the circumstances in which the suspension leading to the expulsion and the expulsion occurred were exceptional in this case. The CFSRB found that Grayson’s continued presence at the French Immersion school created “an unacceptable safety risk.” He clearly could not continue in the placement he had been in without undue risk to the safety of others and himself. His mother rejected the accommodation which might have allowed him to return safely. She also made clear that she rejected any requirement that she would pick Grayson up if he became too severely dysregulated for the school to manage unless Grayson was suspended or excluded. In the circumstances, accommodation without undue hardship at the French Immersion school could no longer be provided by the respondent.

[265] It is also important to note that from the point of suspending Grayson, the respondent continued to offer reasonable options for him to continue his education. In addition, Home Instruction was offered during the period of the suspension and subsequent to the expulsion when his parents chose not to accept any of those options. I find that the respondent complied with its obligation to at least attempt to provide reasonable accommodation to the applicant.

Period Following the Expulsion

[266] The respondent did not expel the applicant from all schools, just from the French Immersion school. In its decision the respondent advised the applicant’s parents that he would be returned to his “home school” (i.e. neighbourhood school). Immediately after issuing the expulsion decision, the respondent offered 3 placements to the applicant, one of which was located at the home school and was called a “Program Services Intervention Class.” Ms. Kahn made no inquiry about this class until after the expulsion appeal was heard by the CFSRB in January.

[267] In the interim, the respondent continued in its efforts to get Grayson back into school and provide appropriate accommodations for him. Ms. Donaldson made efforts to convene a CCC on November 23, 2018 that would have included not only a number of the respondent's staff but representatives of Kerry's Place, the Kahns' private ABA provider and other community supports of the Kahns. This CCC did not proceed when the Kahns refused to attend. Thereafter, the Kahns, through their counsel, declined to attend any of the meetings proposed by the respondent to discuss Grayson's return to school. Their wish to first obtain assessments is not sufficient justification for failing to do so. As the respondent pointed out, assessments were not a necessary precursor to starting the discussions about getting Grayson back to school. The important thing was to get the dialogue started so that potential placements and accommodations could be canvased. Moreover, the fact that the exchange of correspondence between the parties concerning assessments was floundering, was in itself an important reason to meet. Letters between counsel regarding a possible assessment of Grayson by a psychiatrist became mired in details and conditions on which the assessment would/could take place. Meanwhile applicant's counsel pressed for an assessment by Ms. Lindblad, paid by the respondent, even after applicant's counsel advised that she was being retained as an expert by the applicant.

[268] From January to March, counsel engaged in an exchange of correspondence in which the applicant sought information about the placement being offered at the home school. The details of this placement are set out above and it is clear that what the respondent proposed is very similar to the Loop of School placement in terms of an individualized approach utilizing ABA methods. It also has Tier 3 elements. I find that this placement was a reasonable accommodation.

[269] The one thing this placement did not offer is comprehensive ABA, which applicant's counsel throughout the hearing seemed to refer to as Tier 3 ABA. However, the evidence shows that Grayson does not need Tier 3 ABA that includes comprehensive ABA in order to meaningfully access education. His experience up until mid-September 2018 and the period of Home Instruction provided by Ms. Soule shows

that the academic program and supports which the respondent provides through its teachers, with the support of its BCBA professionals, can provide meaningful access education for Grayson so long as his mother is supportive. The evidence also shows that instruction will be much more successful if it is provided in English.

[270] Applicant's counsel finally rejected the placement offered by the respondent in March. I find that this constitutes a rejection of a reasonable offer of accommodation by the respondent. As noted above, the Tribunal has held in education cases that a party does not have the right under the *Code* to insist on the accommodations that they want where other reasonable accommodations are available and are offered by the respondent.

[271] The evidence establishes that, in rejecting the respondent's repeated invitations to meet to discuss Grayson's return to school, the applicant failed to engage in the accommodation process in any meaningful way. Moreover, the applicant failed to accept reasonable accommodations offered by the respondent. Therefore, I must dismiss the Application.

[272] I cannot conclude without observing that if Grayson is to return to one of the respondent's schools, it will be critical that the parties find a way to put aside their differences and work co-operatively and collaboratively towards Grayson's success at school. This will involve planning and time because of the length of time Grayson has been out of school. It will also involve CCCs that include the professionals at Monarch House who have been working with Grayson, in order to obtain their input and co-operation. As part of their obligation in the accommodation process, it may also involve Grayson's parents obtaining the type of assessment Dr. Smith recommended if Grayson's dysregulation continues to be an issue. Finally, Grayson's successful return to school will require Grayson's parents' support of reasonable accommodations offered by the respondent.

DECISION

[273] The Application is dismissed.

Dated at Toronto, this 8th day of August, 2019.

A handwritten signature in cursive script that reads "Brenda Bowlby". The signature is written in dark ink and is positioned above a horizontal line.

Brenda Bowlby
Member