

To:  
Mark Fisher, TVDSB Director  
Lori-Ann Pizzolato, TVDSB Chair  
CC: Board of Trustees

September 8, 2022

Chair Pizzolato and Director Fisher,

I am writing to confirm that I delivered a legal memo regarding possible concerns with the Special Education Plan in TVDSB to the board office today. The same memo has been left in an envelope addressed to each of you (2 in total) and marked confidential.

At the SEAC meeting on June 14, I referenced this legal opinion, which some community members and I had contributed to paying for and which I had been briefed on prior to the meeting but did not yet possess. This was due to the tight timelines created by reviewing the plan and the final draft being available only at the start of June. The legal memo was referenced in one of the minority reports received by the board on June 22 (see recommendations to the board, #3, page 41):

*"The Board of Trustees should engage the services of an education lawyer to review the Special Education Plan before considering whether to approve it with respect to any and all references to O. Reg 181/98. As this report will be a public document, providing any legal opinions from counsel would be inappropriate here. However, we are willing to informally share professional opinions received by the community to elaborate on the serious reasons for this recommendation."*

I also reached out several times between the submission of the minority reports to the board and the end of August to invite senior staff to meet or have a phone call to hear the concerns to determine if they would like to view the memo. So far, I have not been taken up on that offer but I understand that the board is seeking a legal opinion.

It is my moral responsibility to ensure that those in leadership in TVDSB have this information at this point, whether or not it has been requested. I have concerns that students in TVDSB have been negatively impacted by contents of the Special Education Plan and urge you to investigate this further. Processes in the plan have been used over the summer and this is highly problematic - the reason I urged the board to seek clarification *before* approving the plan.

Please review the legal memo and be advised that, following receipt, I also engaged the services of another firm with specialization in education and disability law to review the memo. I have been briefed by them but will not be paying for another legal memo. I offer this information as a concerned citizen, given that the responsibility of the board is to serve students appropriately and mitigate risk. I have a responsibility to the committee, as a special education leader, to ensure that students are served appropriately as well. The expectation should be that this memo and any future memos are to serve the entire community and, as such, are not indefinitely confidential.

Thank you,



## MEMORANDUM

**Re:** Identification, Placement, and Review Committee Procedures  
**To:** Elizabeth Mai  
**From:** Jenna Bontorin, per Pooran Law Professional Corporation  
**Date:** June 19, 2022

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We are retained by you, in your personal capacity, to provide you with advice regarding Identification, Placement and Review Committee (“IPRC”) processes and related obligations pursuant to Ontario’s *Education Act* and regulations thereunder. You informed us that you currently sit on the Special Education Advisory Committee (“SEAC”) under the Thames Valley District School Board (“TVDSB”).

This opinion is provided to you in your personal capacity. To the extent that you desire to provide the information outlined herein to the SEAC and/or the TVDSB, the SEAC and TVDSB do not have any solicitor-client relationship whatsoever with Pooran Law Professional Corporation.

### OVERVIEW

We provide this opinion further to your questions regarding proposed IPRC processes that form part of TVDSB’s proposed *Special Education Plan 2022-2023* (the “Plan”). Specifically, this memorandum will address the following:

1. What are the appropriate procedures and principles for the identification and placement of exceptional pupils under the *Education Act*?
2. Can an IPRC presumptively place students in a regular classroom in its initial placement decision (without considering placement in a special education classroom), and then subsequently require parents to submit applications for placement in a special education classroom (if the parents prefer to do so) after the IPRC initially placed said student in a regular classroom?

### BRIEF ANSWER

1. The pertinent provisions of the *Education Act* and its regulations do not provide a presumption in favour of a regular class placement. Generally, an IPRC must first consider the individual characteristics of an exceptional pupil and the appropriate special educational needs that student may require. Based on that determination, the IPRC must then address whether integration in a regular classroom with appropriate

special educational services<sup>1</sup> is in the best interests of the student, while also considering parental preferences. In other words, an IPRC can place a student in a special education classroom as part of its initial placement decision and should consider whether placement in a special education classroom is appropriate as part of its initial placement decision.

2. In light of the above, it is arguably contrary to the *Education Act* and its regulations to presumptively place an exceptional pupil in a regular classroom in an IPRC's initial placement decision without consideration of whether a special education classroom is in the best interests of the child. While the specific issue of parental applications for a special education class has not fully been considered, an IPRC must consider parental preferences and particular needs of the student in its initial placement decision, which includes placement of that student in a special education classroom.

## DISCUSSION

### Identification and Placement of Exceptional Pupils

An IPRC's initial placement decision can be viewed as a twofold process: the first task being identification of a student as an 'exceptional pupil', and the second task to determine the appropriate placement for that student once they are identified as an exceptional pupil. This memorandum does not address the definition of exceptional pupil; rather, the focus herein is appropriate placement processes once an IPRC identifies the student as exceptional.

O. Reg. 181/98 Identification and Placement of Exceptional Pupils (the "Regulation") under the *Education Act*, R.S.O. 1990, c. E.2, provides a mechanism to appeal the identification and placement decisions of an IPRC and it outlines an IPRC's requirements when making a placement decision. Pertinent provisions of the Regulation include:

*14(1) The principal of the school at which a pupil is enrolled,*

- (a) may on written notice to a parent of the pupil; and*
- (b) shall at the written request of a parent of the pupil,*

*refer the pupil to a committee established by the board, for a decision as to whether the pupil should be identified as an exceptional pupil and, if so, what the placement of the pupil should be.*

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<sup>1</sup> *Education Act*, R.S.O. 1990, c. E.2, [Education Act], s. 1: "special education services" means facilities and resources, including personnel support and equipment, necessary for developing and implementing a special education program. At page 61 of the Plan, options for placement for a regular classroom include a regular classroom with indirect support, a regular classroom with resource assistance, and a regular classroom with withdrawal assistance.

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

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

17(2) *If, after considering all of the information obtained by it or submitted to it under section 15 that it considers relevant, the committee is satisfied that placement in a regular class would meet the pupil's needs and is consistent with parental preferences, the committee shall decide in favour of placement in a regular class.*<sup>2</sup> [emphasis added]

“Committee” in section 14(1) means a special education identification, placement, and review committee (IPRC). A plain language reading of section 14(1) therefore indicates that a decision regarding exceptionality and appropriate classroom placement are each to be completed at the initial referral to the IPRC. In other words, “An IPRC makes decisions upon the request of a parent or a principal pursuant to section 14(1) of the Regulation regarding the identification of a student as an exceptional pupil, the category of exceptionality, and the appropriate classroom placement.”<sup>3</sup>

### No Presumption in Favour of a Regular Class Placement

Section 17(1) of the Regulation outlines the considerations to be made upon a referral under section 14; however, section 17(1) does not create a presumption at law in favour of a regular class placement.<sup>4</sup> In other words, an IPRC can appropriately place an exceptional pupil in a special education class as part of its initial placement decision. Section 17(2) of the Regulation further indicates that an IPRC ought to consider all the information it considers relevant (which includes, among other things, any information about the pupil submitted to it by parent)<sup>5</sup> before determining whether placement in a regular class would meet the exceptional pupil's needs.

For example, courts have rejected the argument that section 17(1) creates a presumption in favour of a regular class placement on an appeal from a decision to uphold the placement of an exceptional pupil in a special education classroom.<sup>6</sup> The court's reasoning included:

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<sup>2</sup> O. Reg. 191/98, Identification and Placement of Exceptional Pupils, ss. 14-17.

<sup>3</sup> *Kozak (Litigation Guardian of) v. Toronto District School Board*, 2010 ONSC 2588 [*Kozak v. TDSB*], at para 14.

<sup>4</sup> *Kozak v. TDSB*.

<sup>5</sup> O. Reg. 191/98, Identification and Placement of Exceptional Pupils, s. 15.

<sup>6</sup> *Kozak v. TDSB*.

“Under section 17(1) ... the Tribunal must first identify the actual characteristics of the exceptional student and the appropriate special educational needs required by the student. Based on that determination, the Tribunal must then address whether integration in regular class is in the best interests of the student in that it will ‘enable [the exceptional student] access to the learning environment [the student] need[s] in order to have an equal opportunity in education’ (see para. 69 in *Eaton*, supra). If the Tribunal determines that integration will not have this effect, then the Tribunal must assess other placement options that will best satisfy this standard. Such an approach may provide a “decision-tree”, but it does not create a presumption at law in favour of integration in a regular class.”<sup>7</sup>

As a further example, another Ontario court decision upheld a student’s placement in a special education classroom, to which the student’s parent had objected.<sup>8</sup> The court held that the *Education Act* and the Regulation had been complied with for a number of reasons, including the fact that the school board “considered [the student’s] educational needs and the range of placements to meet those needs, including the special education programs and services to be provided in those placements,” as well as the parent’s preference.<sup>9</sup>

Ontario courts have referenced a Supreme Court of Canada decision that indicates the applicable test in determining the appropriate placement of an exceptional pupil is whether it is in the best interests of the child.<sup>10</sup> Regarding special education, the Supreme Court reasoned:

“In some cases, special education is a necessary adaptation of the mainstream world which enables some disabled pupils access to the learning environment they need in order to have an equal opportunity in education. While integration should be recognized as the norm of general application because of the benefits it generally provides, a presumption in favour of integrated schooling would work to the disadvantage of pupils who require special education in order to achieve equality.”<sup>11</sup> [emphasis added]

The legislation, when read in conjunction with relevant case law, indicate that there is no presumption at law in favour of a regular class placement. It can also be argued that it is in the best interests of the exceptional pupil to have a full range of classroom placements considered during an IPRC’s initial placement decision, including a special education classroom.

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<sup>7</sup> *Kozak v. TDSB*, at para 58, citing *Eaton v. Brant (County) Board of Education*, [1996] S.C.J. No. 98 [*Eaton*].

<sup>8</sup> *Ismail v. Toronto District School Board*, [2006] O.J. No. 2470 (Divisional Court) [*Ismail v. TDSB*].

<sup>9</sup> *Ismail v. TDSB*, at paras 51-52.

<sup>10</sup> *Eaton*; See also *Ismail v. TDSB* and *Kozak v. TDSB*.

<sup>11</sup> *Eaton*, at para 69.

## Applications for Placement in Special Education Classes

The language in the Plan indicates the following under “Standard 5: The Identification, Placement, and Review Committee (IPRC) Process and Appeals”, at page 30:

*When making a placement decision, the Committee shall consider whether placement in a regular class, with appropriate Special Education services, would meet the student’s needs and is consistent with parent(s)/guardian(s) preference (Reg. 181/98, Part IV, Sec. 17(1)), before considering the option of placement in a Special Education Class.*

*Applications for placement in Special Education classes are made upon the recommendation of the Program Development Team (PDT). Application packages are prepared by the school team in consultation with parents. Applications for placement in these programs are reviewed and confirmed by the System Special Education Application Review Committee. Offers of placement are communicated to the principal. The IPRC will determine whether placement will be in a regular class or in a Special Education Class.*

It is our assessment that the first paragraph above is appropriate; however, it is not clear whether the “applications for placement in special education classes” in the second paragraph above occurs during an IPRC’s initial placement decision, or afterwards.

To the extent that the second paragraph applies after an IPRC presumptively places an exceptional pupil in a regular classroom in its initial placement decision (without considering placement in a special education classroom), this procedure could be challenged as being non-compliant with the *Education Act* and its regulations. Following the IPRC’s identification of a student as an exceptional pupil, the IPRC should consider the student’s particular individual needs in conjunction with parental preference in order to determine the appropriate placement of the exceptional pupil in the best interests of the child.

We recommend clarifying with the TVDSB whether ‘applications for placement in special education classes’ occur as part of an IPRC’s initial placement decision. To the extent that this part of the Plan means that consideration of placement in a special education class takes place only after an IPRC presumptively places an exceptional pupil in a regular classroom in its initial placement decision, this could likely contravene the proper application of the *Education Act* and its regulations.

We would be happy to discuss the foregoing with you at your convenience.