HRTO FILE NO.: 2016-23884-I

HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

J.S. AS REPRESENTED BY HIS LITIGATION GUARDIAN B.S.

Applicant

- and -

DUFFERIN-PEEL CATHOLIC DISTRICT SCHOOL BOARD

Respondent

APPLICANT'S OPENING STATEMENT

---

1. This case is about access to education.

2. Jack Skrt is a bright young boy who likes reading, playing on the monkey bars, and looking at Google maps. Jack has been diagnosed with Autism Spectrum Disorder [ASD].

3. The Skrt's [Beth and Mike] do not seek to have their son's name anonymized. They have found it necessary to disclose Jack's identity in order to crowd source some of the funds required to engage in the case they initiated on his behalf.

4. ASD is properly defined in the DSM-5 ASD Diagnostic Criteria issued by the American Psychiatric Association in 2013.[i] This definition should not be contentious between the parties.

5. Since his diagnosis, Jack's parents have received recommendations from his psychologist that Jack receive ABA programming in order to assist him in his development. ABA is:

> "The science in which the principles of the analysis of behavior are applied systematically to improve socially significant behavior and experimentation is used to identify the variables responsible for behavior change.

This definition contains six key components of ABA. These include:

1. ABA is guided by the attitudes and methods of scientific inquiry
2. All procedures are described and implemented in a systematic, technological manner
3. Not all means of changing behavior qualify as ABA; only those derived from the basic principles of behavior
4. Focus on socially significant behavior
5. Meaningful improvement in important behavior
6. Analyze the factors responsible for improvement[ii]

7. This definition should, likewise, be non-contentious amongst the parties; however the terms IBI and ABA are used by some respondent witnesses to refer to particular services funded by the Ministry of Children and Youth [MCYS]. When referencing the ABA support/remediation that Jack requires the Applicant will be referencing this definition.

8. Jack's parents were told Jack was too high functioning to receive MCYS funding for ABA programming. In other words, according to MCYS eligibility criteria, Jack "wasn't autistic enough" to receive funding for the support his psychologist recommended he receive. Jack's need for ABA does not appear to be a matter of serious dispute between the parties.

9. Like any parents, Jack's want to ensure he has the best opportunities. So far they have found the means to privately fund ABA programming through Monarch House. Jack has attended Monarch House since he was three years old.

10. Since attending Monarch House, Jack has progressed from not being toilet-trained and very withdrawn to making significant gains that will be noted by many witnesses. Despite these gains, Jack has a long way to go in his development.

11. In September 2015, Jack started junior kindergarten [JK] at the Respondent School Board. Beth was informed by Jack's team at Monarch House that he would require accommodations in school in order to have meaningful access to his education. Both Jack's psychologist Dr. Christina Ricciuti, and his BCBA [Board Certified Behaviour Analyst] at Monarch House, Lindsey Gomes, urged Beth to request that Jack receive ABA with the intervention of a school board BCBA. Beth was advised there was nothing vaguely resembling ABA available to Jack through the Board at that time. It did not employ a BCBA. Despite all evidence indicating that it is highly beneficial to start ABA at an early age, the Board expressed the view that it had no responsibility for accommodating his autism-based needs by providing him with ABA.

12. Recognizing the Board was unwilling to provide Jack with accommodation in the form of ABA, despite his proven need for it, Jack's mother attempted to get permission to allow a member of Jack's Monarch House team to accompany him in the classroom. The School

Board declined to give permission, citing various Board and Ministry policies. While it was far from ideal, Jack continued at Monarch House three days a week and started attending school two days a week.

13. Beth did her research and came to realize that there is no Board or Ministry policy which would absolve the Respondent of its obligation under the *Human Rights Code* to accommodate Jack or prevent it from meeting his needs. Like many other students with a disability, Jack has certain disability-related needs. Namely, he requires ABA in order to access his education. The Skrt's commenced a human rights application on jack's behalf.

14. The Board does not rely on an undue hardship defence to justify its refusal to accommodate Jack. It is possible for the Board to provide ABA programming to Jack; it simply refuses to do so.

15. Despite clear communication and strong recommendations from Jack's health care professionals and psychologist that Jack requires ABA programming at school, the Respondent has failed to provide this accommodation to Jack.

16. Rather, the Respondent has informed Beth that it is not obligated to provide ABA programming to Jack or, alternatively, that it is already meeting his needs with the supports currently being provided.

17. The Board's position stems from a fundamental misunderstanding of what ABA actually is.

18. ABA is not therapy. ABA is a scientific, evidence-based methodology that when applied properly and by those who have received adequate training, will assist a person in changing behaviours, which includes acquiring skills the person doesn't have that are socially significant (e.g., skills and knowledge taught in school aka 'education') as well as decreasing problem behaviours (i.e. those which may be barriers to learning as well as severe self-injurious or aggressive behaviours).The Board has alleged that it provides "ABA methods" but it has never defined what it means by "ABA methods". The Board has not offered verifiable evidence to support any of its "methods"; nor is this a recognized term in the field of psychology. The methods used by the Board have changed over time, without reference to Jack's needs and how those needs were changing. The applicant will be calling evidence about the "methods" used at each stage of his education and the harm he experienced as a consequence of not having his needs properly accommodated.

19. Jack is very high functioning, but he has some specific needs arising from his autism. For example, Jack currently has difficulty initiating and sustaining social contact with his peers. Jack also has a tendency to engage in self-stimulating behaviours such as "finger spelling" in the air and making noises such as clicking or humming when he is anxious, overwhelmed, bored or distracted.

20. As a result of these and other behaviours arising from his ASD diagnosis, Jack is unable to access his education. Jack's behaviours prevent him from listening to the teacher, following instructions, engaging meaningfully with his peers and the lessons being taught. Each of these are crucial to the educational development and attainment of a child. Traditional teaching approaches, despite the best of intentions, will not be effective for Jack. His behaviours impede his ability to benefit from such strategies. Jack requires ABA in order access his education.

21. Unlike traditional teaching methods, ABA is designed to address and eliminate the behaviours which prevent Jack from accessing the curriculum. ABA pinpoints the specific distracting behaviours which negatively impact Jack's ability to learn and works to eliminate these behaviours. ABA programming is required in order to eliminate these behaviours so that Jack can engage with the teacher and his peers in meaningful way.

22. ABA would be most effective if performed in the classroom so that Jack's distracting behaviours are replaced with positive, school-appropriate behaviours. Teaching and ABA programming are complimentary. The teaching must continue while Jack is receiving ABA programming so that the new behaviours are learned and mastered in the setting where Jack will be required to interact with his educators and peers in the educational process.

23. Evidence will be called concerning the progress Jack has made and the interventions to which that progress can be attributed. It will be the applicant's evidence that his progress resulted from Jack's continuing to receive ABA at Monarch House. No progress can be attributed to the "methods" applied by Board personnel. Whatever progress Jack made while at school was directly attributable to Monarch House participation in monthly meetings with Board personnel at which it provided the Board with the benefits of the ABA it continued to provide to Jack.

24. Without Monarch House participation, gains never would have been achieved and will not be achieved in the future unless the Board is provides Jack with the ABA he requires.

25. Prior to this participation, and right up to the present, the Board's interventions have caused Jack harm, which demonstrates the Board has been failing to meet Jack's needs. This harm is over and above the harm Jack sustained as a result of having to split his time and shuttle between his ABA at Monarch House and his school. And it is over and above the additional gains that could have been achieved had Jack received ABA as part of his education at school. Receiving bad ABA is not better than receiving no ABA at all. Serious harm can and has been done to Jack. This harm is relevant to the bifurcated portion of the hearing concerning remedy, but it is also clear evidence that Jack's needs have not been accommodated at school.

26. Jack's work at Monarch House has benefited his development immeasurably, but it is not a substitute for proper accommodations in the school setting. There are certain behaviours which cannot effectively be mastered in the Monarch House setting. For example, mastering

behaviours such as paying attention when the teacher is talking, raising his hand when he knows the answer to a question, and engaging with his peers in group work are skills which he cannot learn effectively in the Monarch House setting.

27. Currently, Jack is not receiving ABA programming at his school. The provision of ABA programming requires a BCBA who oversees the programming and adjusts it as required, as well as a Registered Behaviour Technician [RBT] who works directly with the student gathering data on the progress towards mastery of the goal and engaging with the student when required to re-direct the student towards the proper/desired behaviour.

28. After the settlement of Jack's Request for Interim Order, during Jack's SK year, the Board hired a BCBA. While she is said to be functioning as a BCBA with Jack, she is not being allowed to function in that role. Apart from being a matter of professional responsibility for BCBA's, it is recognized and accepted that "supervision by the BCBA determines the outcomes for the child". For example, the Board BCBA does not provide sufficient oversight to Jack's programming or the work of the ERW [education resource worker or "education assistant"] in order to meaningfully supervise and/or revise the program to meet his needs. Even if the BCBA were permitted to function as a BCBA, because the Respondent does not have any instructor therapists or registered behaviour therapists to work directly with Jack, the "data" collected regarding Jack's progress towards mastering goals is inaccurate, unreliable, and therefore unusable. Despite the best of intentions, the ERW is merely going through the motions.

29. ABA methodology is scientific and evidence-based. The ERW currently working with Jack does not have sufficient training to administer the programming based on the requisite scientific understanding.

30. The Board has suggested it provides Jack with "ABA methods". With respect, "ABA methods" is not a recognized term. One either provides ABA, or provides something that may loosely resemble ABA ["Bad ABA"]. Just as Jeffrey Moore required a particular form of "intensive remediation" based on his particular learning disability designed to meet his needs, for which the half-measures offered by his Board of Education were no substitute [see *Moore v. British Columbia (Education)*, 2012 SCC 61], so it is for Jack. The science behind it must be understood and it must be performed in a rigorous manner. Without the proper training, the ERWs working with Jack are unable to provide such programming despite their best efforts. The ERWs simply lack the requisite training and knowledge. As such, the Respondent *does not* provide Jack with ABA.

31. As a result of the Respondent's failure to provide Jack with ABA, it has failed to accommodate his needs. Despite what the Respondent suggests, Jack's needs cannot be met by a patchwork of other supports. For example, speech and language therapy, occupational therapy, physiotherapy, or any combination thereof, will not suffice to replace Jack's the ABA Jack requires. While Jack has not yet received the Konstantareas Report, it would appear that the Board is belatedly coming to recognize this.

32. While its implications may be broad, Jack's case is actually quite simple. His ASD diagnosis results in behaviours which interfere with his ability to access his education; he therefore requires ABA in order to eliminate these behaviours and allow him to meaningfully access his education. The Board lacks the qualified persons to provide ABA programming, and forces its BCBA to work in violation of her professional responsibilities to Jack. The Board is not providing Jack with ABA and is not providing him with meaningful access to his education. This constitutes a failure to accommodate, which in turn constitutes discrimination.

33. The Applicant has only recently received the Respondent's witness statements and one expert report. It still has not received its other expert report. It has therefore not had the opportunity to discuss let alone Jack's responding evidence with his witnesses, including pre-eminent experts and academics Dr. Joel Hundert, Professor Maurice Feldman, and Margaret Spoesltra.

34. Jack's witnesses will also comment on the currency and expertise of the Respondent's experts.

35. Despite being at this disadvantage, it is already clear that the Applicant can and will respond to the following erroneous assertions made on behalf of the Respondent:

- Maintenance of the scientific validity of ABA methods is inconsequential to outcomes for students with autism;
- It is not practicable to deliver ABA in the classroom, and in particular that it will interfere with delivery of the prescribed curriculum;
- ABA is not being and has not been delivered in Ontario classrooms; and
- It is provincial policy to prevent ABA from being delivered in Ontario classrooms and it has not actively participated in the delivery of ABA in schools.

36. The Tribunal has directed that this case be split into two distinct pieces. In accordance with the Tribunal's orders, the Applicant will demonstrate:

    a. That as a result of his ASD diagnosis, he requires ABA—by ABA he means Applied Behaviour Analysis which is the scientific, evidence-based methodology used to assist persons with ASD to learn and maintain socially and in this case, educationally appropriate and desirable behaviours.
    b. ABA can only be provided by persons qualified and trained to provide such programming. As ABA is a scientific method based on evidence, a person administering ABA programming must understand what ABA is, the science behind it, how to properly collect the evidence which provides the basis for the programming, and so on. Like any other scientific methodology, one cannot watch a youtube video or attend a cursory class with an overview on the subject and then

claim to be able to administer the technique or program. Proper training and experience is required in order to provide ABA programming.

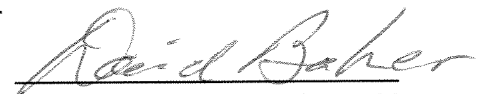
37. The Applicant will demonstrate that he requires ABA in accordance with the above points in order to have meaningful access to his education.

38. The Applicant will then demonstrate that the Respondent has failed to provide ABA programming. Indeed the Respondent is unable to provide ABA programming because it lacks personnel with sufficient training and experience in ABA who would be capable of administering such a program. While it does have a recently qualified BCBA, it does not permit her to practice in conformity with the mandatory standards of her profession and in a manner that enables her to meet Jack's needs for ABA remediation.

39. The Applicant will then rely on some of the evidence provided in the phase one liability hearing and call additional evidence; then it will present arguments pertaining to remedy. The remedy he seeks is compensation for the discrimination he has faced, special damages for the need to seek out his own accommodation and non-monetary remedies in the form of ABA programming in school at the level of intensity he requires it for as long as he requires it.

40. As a result of his ASD diagnosis, Jack requires ABA in order to have meaningful access to his education. The Respondent has failed to provide this accommodation to the Applicant and thus has discriminated against the Applicant. The Applicant seeks an order from the Tribunal that the Board has failed in its accommodation obligations. He will then seek a remedy which will compensate him for the Board's failure.

All of which is respectfully submitted this 11 day of October, 2017.



David Baker LSUC# 17674M
Andrea Sobko LSUC# 72741T
Bakerlaw
4711 Yonge Street, Suite 509
Toronto, ON M2N 6K8
Tel. 416-533-0040 ext. 222
Fax: 416-533-0050
Email: dbaker@bakerlaw.ca
asobko@bakerlaw.ca
Lawyers for the Applicant

---

[i] DSM 5 ASD Diagnostic Criteria (American Psychiatric Association (2013). Diagnostic and Statistical Manual of Mental Disorders (Fifth ed.). Arlington, VA: American Psychiatric Publishing.)

Diagnostic Criteria

A. Persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently or by history (examples are illustrative, not exhaustive, see text):

1. Deficits in social-emotional reciprocity, ranging, for example, from abnormal social approach and failure of normal back-and-forth conversation; to reduced sharing of interests, emotions, or affect; to failure to initiate or respond to social interactions.

2. Deficits in nonverbal communicative behaviors used for social interaction, ranging, for example, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication.

3. Deficits in developing, maintaining, and understanding relationships, ranging, for example, from difficulties adjusting behavior to suit various social contexts; to difficulties in sharing imaginative play or in making friends; to absence of interest in peers.

Specify current severity:

Severity is based on social communication impairments and restricted repetitive patterns of behavior (see Table 2).

B. Restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following, currently or by history (examples are illustrative, not exhaustive; see text):

1. Stereotyped or repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypies, lining up toys or flipping objects, echolalia, idiosyncratic phrases).

2. Insistence on sameness, inflexible adherence to routines, or ritualized patterns or verbal nonverbal behavior (e.g., extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, need to take same route or eat food every day).

3. Highly restricted, fixated interests that are abnormal in intensity or focus (e.g, strong attachment to or preoccupation with unusual objects, excessively circumscribed or perseverative interest).

4. Hyper- or hyporeactivity to sensory input or unusual interests in sensory aspects of the environment (e.g., apparent indifference to pain/temperature, adverse response to specific sounds or textures, excessive smelling or touching of objects, visual fascination with lights or movement).

Specify current severity:

Severity is based on social communication impairments and restricted, repetitive patterns of behavior (see Table 2).

C. Symptoms must be present in the early developmental period (but may not become fully manifest until social demands exceed limited capacities, or may be masked by learned strategies in later life).

D. Symptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning.

E. These disturbances are not better explained by intellectual disability (intellectual developmental disorder) or global developmental delay. Intellectual disability and autism spectrum disorder frequently co-occur; to make comorbid diagnoses of autism spectrum disorder and intellectual disability, social communication should be below that expected for general developmental level.

Note: Individuals with a well-established DSM-IV diagnosis of autistic disorder, Asperger's disorder, or pervasive developmental disorder not otherwise specified should be given the diagnosis of autism spectrum disorder. Individuals who have marked deficits in social communication, but whose symptoms do not otherwise meet criteria for autism spectrum disorder, should be evaluated for social (pragmatic) communication disorder.

Specify if:

With or without accompanying intellectual impairment

With or without accompanying language impairment

Associated with a known medical or genetic condition or environmental factor

(Coding note: Use additional code to identify the associated medical or genetic condition.)

Associated with another neurodevelopmental, mental, or behavioral disorder

(Coding note: Use additional code[s] to identify the associated neurodevelopmental, mental, or behavioral disorder[s].)

With catatonia (refer to the criteria for catatonia associated with another mental disorder, pp. 119-120, for definition)

(Coding note: Use additional code 293.89 [F06.1] catatonia associated with autism spectrum disorder to indicate the presence of the comorbid catatonia.)

Table 2 Severity levels for autism spectrum disorder

Severity level	Social communication	Restricted, repetitive behaviors
Level 3 "Requiring very substantial support"	Severe deficits in verbal and nonverbal social communication skills cause severe impairments in functioning, very limited initiation of social interactions, and minimal response to social overtures from others. For example, a person with few words of intelligible speech who rarely initiates interaction and, when he or she does, makes unusual approaches to meet needs only and responds to only very direct social approaches	Inflexibility of behavior, extreme difficulty coping with change, or other restricted/repetitive behaviors markedly interfere with functioning in all spheres. Great distress/difficulty changing focus or action.

Level 2

"Requiring substantial support" Marked deficits in verbal and nonverbal social communication skills; social impairments apparent even with supports in place; limited initiation of social interactions; and reduced or abnormal responses to social overtures from others. For example, a person who speaks simple sentences, whose interaction is limited to narrow special interests, and how has markedly odd nonverbal communication. Inflexibility of behavior, difficulty coping with change, or other restricted/repetitive behaviors appear frequently enough to be obvious to the casual observer and interfere with functioning in a variety of contexts. Distress and/or difficulty changing focus or action.

Level 1

"Requiring support" Without supports in place, deficits in social communication cause noticeable impairments. Difficulty initiating social interactions, and clear examples of atypical or unsuccessful response to social overtures of others. May appear to have decreased interest in social interactions. For example, a person who is able to speak in full sentences and engages in communication but whose to- and-fro conversation with others fails, and whose attempts to make friends are odd and typically unsuccessful. Inflexibility of behavior causes significant interference with functioning in one or more contexts. Difficulty switching between activities. Problems of organization and planning hamper independence.

[ii] Cooper, Heron, and Heward (Cooper J.O, Heron T.E, Heward W.L. Applied behavior analysis (2nd ed.) Upper Saddle River, NJ: Pearson; 2007)