

PROVINCE OF NEW BRUNSWICK



Labour and Employment Board

HR-003-01

IN THE MATTER OF THE *HUMAN RIGHTS ACT*, R.S.N.B., 1973, c. H-11

AND IN THE MATTER OF A BOARD OF INQUIRY

BETWEEN:

B.C.,

Complainant

- and -

Province of New Brunswick Department of Education and School District 2,

Respondents

BEFORE:

Judith F. MacPherson, Q.C., Vice-Chair
Gerald Cluney, Board Member
Gregory Murphy, Board Member

APPEARANCES:

On behalf of the Complainant: *Appeared personally*

On behalf of the Human

Rights Commission:

Kelly VanBuskirk
Charles Ferris
Sarina McKinnon

On behalf of the Respondents: *Clyde C. Spinney, Q. C*

DATES OF HEARING:

December 10th to 14th, 18, 2001; February 21, 22, 2002; March 18th to 22nd, 2002; April 17, 18, 2002; May 6th to 10th, 2002; September 9th to 13th, 2002; October 28, 2002, January 29, 30, 2003.

DECISION

I. BACKGROUND

1. The complainant, B.C., on behalf of her son, N, filed a complaint alleging that, in the provision of a service, the respondents discriminated against N on the basis of a mental disability, pursuant to section 5 of the New Brunswick *Human Rights Act*, R.S.N.B., 1973, c. H-1 and amendments thereto (the "*Act*") in that the respondents are "...not providing adequate resources to meet the special needs of our son". The Complaint Form, Ex. C- 1, ("Complaint") identified the respondents as the Province of New Brunswick Department of Education and School District 2, which will hereinafter be referred to as the "respondents". School District 2 has the responsibility for public education in English in and around the City of Moncton, New Brunswick.

2. As a result of pre-hearing procedures during which the parties were encouraged to exchange documents, estimate the amount of time required for the hearing, etc., the hearing was booked for 8 days in December, 2001; but the hearing occupied an additional 20 days.

3. The only preliminary issue raised at the commencement of the hearing was that subsection 20(1.2) of the *Act* was not followed after the referral of the matter to the Labour and Employment Board, but the parties waived their rights to its compliance and recognized that this Board was duly constituted and had jurisdiction to hear and determine this Complaint.

4. The witnesses who testified on behalf of the complainant were the complainant, Arthur Lamrock, Dr. R. Evans, Sharon Dea, Marlene Barkhouse and Dr. D. Yule. The witnesses who testified on behalf of the respondents were Cindy LeCocq, Ken Menchions, Brenda Geneau, Robert Gérard, Katherine Levine, Juanita Mureika, Dr. A. Cyr, Karen Branscombe, Page Cormier, Gordon Porter, Kate McLellan and Terrence King. The exhibits admitted into evidence are listed on Schedule "A" attached hereto.

5. After the complainant had basically closed her case, Mr. VanBuskirk moved for exclu-

sion of witnesses which motion was unopposed by counsel for the respondents and was granted. There was no official recording of the proceedings, as none of the parties had a court stenographer, reporter, etc. present to record the proceedings, nor were the proceedings taped.

II. FACTS

6. Following a careful review and weighing of the evidence presented, the facts are found to be those as set out herein.

7. On September 18, 1987, N was born to the complainant and G.C. in Moncton, where they continue to reside along with N's younger brother, C. In her evidence, the complainant described N as a very active child who was impulsive and a danger to himself and whom they had to watch because N would, for example, as a toddler, get up before them in the mornings and climb up on top of the refrigerator, would open the car door when the car was moving, jump off a high deck, etc.

8. Dr. Yule, a pediatrician, had seen N as a newborn and again at 7 months of age, on referral from Dr. Phelan, his Family Doctor at that time, Ex. C-28.3.

9. In March, 1991, when N was approximately 3 1/2 years of age, his then Family Doctor, Dr. Antle, referred him to Dr. Raymond Murphy, who re-referred him to Dr. Yule "...because of N's behaviour problems which related to hyperactivity usually when he had concentrated sugar", who tried N on the "KP" diet and, in Ex. C-28.3, stated he found N had a:

number of intolerances to pops, artificial juices and to blue dye, ie. ice lollipops. Chocolate also causes problems." Ex. C-28.4.

10. Also Dr. Yule had noted, Ex. C-28.4:

...he did seem to have an intolerance to quite a number of food colourings. Accordingly, his management was initially partly behavioral and partly controlling dietary exacerbations. The problem, however, persisted and we referred him to the Mental Health Clinic shortly before he was to attend school.

11. In December, 1991, as N's "...problems were more marked", Dr. Yule prescribed Cylert, Ex, C-28.4. The complainant's evidence was that the Cylert basically helped N to calm down and lessen his impulsiveness and tendency to put himself into dangerous situations.

12. On April 2nd, 1992, when N was approximately 4^{1/2} years of age, Dr. Yule referred N and it appears "the family", Ex. C-28.4, to the Mental Health Clinic and wrote "ADD", referencing Attention Deficit Disorder, on the referral form, Ex. R-15, under the heading:

"REASON FOR REFERRAL AND OTHER RELEVANT INFORMATION (Please highlight the precise nature of the problem in a few lines along with recent medical history, if known)".

13. Dr. Yule noted under the heading "Is he/she on any medication?" that N was on Cylert. Dr. Yule had previously prescribed Cylert, which medication was referred to by Mr. Arthur Lamrock, a licensed psychologist, as a "psychostimulant... prescribed ...in response to an early diagnosis of an attention disorder", referencing Dr. Yule's diagnosis, Ex. C-26.

14. The complainant testified she did not take N to the Mental Health Clinic because others, who had gone there, told her not to bother. Dr. Yule, in his evidence, said the Mental Health Clinic would further assess N and work with N and his family as required, alleging his diagnosis of ADD was preliminary, although there was no such qualification on Dr. Yule's referral form, Ex. R-15. Mr. Lamrock stated that it is in a child's best interest that a diagnosis of an attention disorder, even if preliminary, be communicated to the school as the more information the school has, the better, and that the school should be told if the child is seeing a psychologist. The complainant did not communicate Dr. Yule's diagnosis of "ADD" to the respondents at the time, alleging that the diagnosis was preliminary. It is noted however, on the Complaint Form, Ex. C-1, that the complainant stated that N "...was diagnosed with Attention Deficit Hyperactivity Disorder at the age of 5".

15. Extracts from N's student file were compiled in one exhibit, Ex. R-1, Tab 11, which the parties referred to as N's "Cum Card" and will be so referred to herein, the originals of the Cum Card School District 2 was allowed to retain, on consent.

16. On April 29, 1992, the complainant filled out a school form entitled "Parent Questionnaire" on which the complainant circled "yes" to every question indicating N was having no problems. The answers set out, among other responses, that N was learning to reason out simple problems such as what to do before crossing the street, Ex. R-1, Tab 11, p 23. At the end of the form where the complainant's name is filled in as the person completing the form, approximately one-half the page had been left blank for "Additional Comments" with nothing having been filled in, Ex. R-1, Tab 11, p 24.

17. On April 29, 1992, the Health Record page of the Cum Card had written in after "allergies" the words "apples and apple juice, oranges and juice May drink lemonaid", omitting reference to many of the intolerances found by Dr. Yule, with nothing written under such headings as "Abnormalities" or "Other" with the page indicating that N's vision and hearing were "ok", Ex. R-1, Tab 11, p.2.

18. Following Dr. Yule's prescription for Cylert, Exs. C-28.3 and C-28.4 in December, 1991, N took the prescribed medication for approximately eight months, until the complainant stopped providing the medication to N.

19. On July 6, 1992, as to Dr. Yule's referral, Ex R-15, to Mental Health, the complainant wrote to the Mental Health Commission, Ex. R-3, thanking them for their reply but stating "we" have decided against the referral at this time and would be enrolling N in school [beginning Kindergarten in September, 1992] and would see how he would cope, stating she had recently read some books , etc. on the topic and the medication he was on seemed to improve his behaviour. On cross-examination, the complainant stated that she thought she would wait and see how N did, take courses herself, and after N started school, thought they would take another route. Also in her evidence the complainant said she thought that Mental Health would put them with a psychologist who would come to the house and stay a long time, beyond the time needed, and the psychologist would become a pest and not be helpful.

20. The complainant testified that she decided to take N off Cylert in September, 1992 before he started Kindergarten as she did not want N to be on medication and she felt it best for N to try

to get through school without medication. She stated she was aware that some ADD students get by without medication. Her actions were noted by Dr. Bakht, Ex. R-2, a Child and Adolescent Psychiatrist who treated N for a time.

21. In September, 1992, N attended Kindergarten in English at Wynwood School in Moncton, with his teacher being Ms. Tower LeBlanc. The complainant described the kindergarten teacher as "good with N" and "worked well with him" to Dr. Yule in the examination of N on August 10, 1995, Ex. C-28.3. The complainant's evidence was that she met with the Kindergarten teacher a lot, estimating it to be ten times in addition to the parent-teacher meetings. During the first parent teacher meeting, Ms. Tower LeBlanc told the complainant, as the complainant described it in her evidence, N exhibited excited behaviour and suggested he may have Tourette's Syndrome and advised the complainant to have this checked out. The complainant did not tell the teacher as to Dr Yule's prior diagnosis of ADD but alleges she told the teacher she had taken N off his medication, although there is no evidence in support of her having so informed the teacher. The complainant testified that, in her opinion, N got through Kindergarten with no problems. The complainant said she did have N checked out for Tourette's Syndrome and he did not have it.

22. On April 19, 1993, Holly Humphrey, Resource Teacher, Child & Adolescent Services of the Mental Health Clinic, wrote to Dr. Yule advising that they were closing their file as, after speaking to the complainant, their services were no longer needed, Ex. R-4.

23. On August 21, 1993, in his clinical note, Ex. C-28.4, Dr. Yule wrote that N's file at Mental Health was closed "...as he was satisfactory". Dr. Yule in his report dated August 22, 1995, Ex. C-28.3, reported that he had been advised that N "...never actually attended the Mental Health Clinic and his file there was closed".

24. Dr. Yule in his report dated August 22, 1995, Ex. C-28.3, reported the that he had been advised that N had done "quite well" in kindergarten and there is no indication the complainant advised him of the Kindergarten teacher's observations. Dr. Yule also reported that there did not always seem to be a consistent response to Cylert from N and that was why Cylert was stopped,

in which no indication was given that Dr. Yule was aware that the complainant wanted N to go to school without medication and so she had taken him off Cylert. Dr. Yule also noted the intolerance N had to various food colourings, pops, ice-creams, chocolate, which he noted "...make(s) him more hyper and give him a change in personality and make(s) him more loud and aggressive", although there is no indication that the complainant advised the respondents of N's intolerances and the effect these had on N's behaviour.

25. It appears the Kindergarten teacher was considering resources for N, noting that N had difficulty, Ex. R-1 Tab lip. 1. The evidence did not contain a Progress Report Form from Kindergarten, as apparently none is prepared.

26. The complainant testified she wanted N to be bilingual and to be in French Immersion and that, towards the end of the year, N's Kindergarten teacher agreed with the complainant to put N in French Immersion.

27. During the time N was enrolled in Kindergarten, he did not receive his medication nor had the complainant informed the School of N's prior diagnosis of ADD.

28. In his August 21, 1993 Clinical note, Ex. C-28.4, Dr. Yule indicated that he had been following N on a re-referral since March, 1991, when N was 3 1/2 years of age, but Dr. Yule notes he had asked to check N at 6 month intervals but he had not seen N "...in any follow-up after August, 1993", Ex. C-28.3, until his examination of N on August 10, 1995 as a result of a referral in August, 1995 from Dr. Stoddard, N's Family Physician since 1991, Ex. C-27.

29. In September, 1993, despite his difficulties in kindergarten in English, N was enrolled at the Arnold H. McLeod School in Moncton, in Grade 1 French Immersion. His teacher was Ms. Cécile Belliveau. N struggled, especially with Language Arts (for achievement and effort, he received experiencing difficulties "ED" and needs improvement "NI", respectively) and Math, NI in effort, Ex. R-1, Tab. 11 p 5.

30. According to what the complainant told Dr. Yule on 10 August 1995, Ms. Belliveau

yelled at N and was apparently on the "verge of a nervous breakdown", Ex. C-28.3. The complainant testified that N worked sometimes over 4 hours at night to try to get his homework done and she tried to help him with it. The complainant described grade 1 as the worst year of N's life. The evidence indicated that the complainant had not contacted the school as to N's difficulties and, as she testified "...until I got the Progress report I did not know..." The complainant reported to Dr. Yule, she was "very dissatisfied with N's progress and he was switched from French Immersion to the English Programme." The evidence indicated that the complainant had not contacted the school as to N's difficulties or the situation as she described it nor was there any other evidence in support of her allegations concerning N's teacher.

31. N's Elementary Progress Report Grade 1, Ex. R-1, Tab 11, pg.5 stated:

First term-Nov. 12th, 1993

I am very concerned with N's progress. His progress in math is not consistent. In dictee and reading, he is experiencing difficulty with simple syllables. He is not using his time efficiently. N needs a great deal of guidance and supervision to do his work. He will have to work harder.

Fourth Term- June, '94

N still finds it very hard. The decision was made that he would change programs in September, '94.

32. On February 4, 1993(sic) 1994, Ex. R-1, Tab 11, p.6, Ms. Belliveau sent home a page setting out the difficulties N was having at school expressing her concerns with how he was struggling. The section on the form for parents' signature and comments was left blank.

33. On April 22, 1994, Ex. R-1, Tab 11, p 7, Ms. Belliveau sent a second page home reiterating the difficulties N was having at school, requiring constant supervision and having poor listening skills and other such problems, e.g., concentrating and N not working to his ability, experiencing difficulties in all areas of French Immersion, easily distracted and having difficulty staying on task. Ms. Belliveau expressed her concerns as to whether N would succeed in Grade 2 French Immersion. Ms. Belliveau thanked the parents for their cooperation in helping N with his homework. The parents' part is again unsigned.

34. In her evidence, the complainant acknowledged she had received both sheets, i.e., Ex. R-1, Tab 11, p.6 and p.7.

35. On April 26, 1994, a school based team meeting information sheet, Ex. C-2, indicates a team meeting was held, requested by the parents, to discuss how N is not working to ability and discuss plans for next year. A section on the information sheet, Academic Problems, noted N was experiencing difficulties in language arts and was low satisfactory in Math. N's poor listening skills and his other problems with concentration were noted. As resources, the school was providing: "extra help after class, Mr. Chiasson (French Monitor) and Don Belliveau (Co-op student). Decision made to do A and A Testing and French testing. Parent Contacts noted many contacts with the father, notes in scribbles and "talked to the mother last week".

36. On May 9, 1994, N was tested by Carolyn Walsh, a psychometrist, Ex. R-1, Tab. 11, p. 14, who administered the WPPSI-R and a Developmental Test of Visual Motor integration, the test results basically indicated N to be average. N commented to Ms. Walsh that he believed he should have been enrolled in kindergarten in French Immersion, Ex. R-1, Tab. 11, p. 14, as N told her he found grade 1 French Immersion hard. Juanita Muerika, a licensed, school psychologist with the Department of Education, testified that, in her opinion, Ms. Walsh was not qualified to administer these tests.

37. On June 2, 1994, the minutes of a school - based team meeting, Ex. C-3, confirm Carolyn Walsh, Sharon Warren, Lorraine Dickens, Cécile Belliveau, Bill Ross and the complainant met to discuss N. Ms. Walsh's testing results, Ex. R-1, Tab 11, p. 14, were reviewed. The Method and Resource teacher, Sharon Warren's, results indicated N's Math was in the fifth stanine, with her suggesting that because Math was taught in English and N's Math results were satisfactory, language was the problem as N's subjects which were taught in French were below average. The team gave the complainant some options including that N enter grade 2 English, which they recommended and the complainant selected. Ex. C-3 indicated that Math should be no problem in Grade 2, but English would have to be done in the summer, so Ms. Warren supplied English books and words and Math books for the summer. Ms. Warren indicated she would look at N for resources in September, 1994.

38. During this meeting, the complainant did not communicate N's prior diagnosis of ADD nor mention she had discontinued N on his Cylert medication before N was enrolled in school. Therefore, throughout N's struggles in Kindergarten and grade 1, N was not on his medication nor was the School informed of his prior ADD diagnosis and there is no evidence that Arnold H. McLeod School was informed of N's prescription for Cylert which the complainant had discontinued. The complainant's evidence was that she was not convinced that N's difficulties were a result of his ADD and lack of medication, as she noted that his difficulties could have been due to the problems which caused him to have an operation that year to have tubes put in his ears and his tonsils taken out.

39. In September, 1994, N entered Grade 2 in core English at Arnold H. McLeod School with Mrs. Carter as his home room teacher. N remained in the English program throughout the balance of his public education in District 2.

40. N's Elementary Progress Report, Grade 2, Ex. R-1, Tab 11, p. 8 stated:

First Term-

N has adjusted very well to the English Program. However he likes to watch other (sic) rather than finish his work on time.

Second Term-

N does quite well when he follows directions. Sometimes I find he thinks he knows what to do or thinks he does and goes along without listening and makes many unnecessary mistakes. This is improving

Third Term-

N needs to be consistent in doing his assignments. He will do ones which is done nicely and the next time you can't make out what it is. He needs to try to be neater.

Fourth Term-

Enjoy your summer

41. In September, 1994, a form was completed entitled "Individual Resource Plan" ("IRP"), Ex. R-1, Tab 11, p. 27-28, and was signed by Mrs. Carter, and S. Warren, N's resource teacher

and the principal, William Ross, setting out various goals, etc, noting, among other items, work to be done on language arts and a list of the materials to be used for N. The complainant testified she was unaware N was on a Resource Plan in grade 2.

42. The complainant reported to Dr. Yule that N's grade 2 teacher shouted a lot and was very loud, but was concerned enough to work with N and, throughout grade 2, N was going to the Resource Teacher on a regular basis and in Dr. Yule's 10 August, 1995 examination of N, he wrote that it sounded as if N will be seeing the Resource Teacher next year also [this would have been grade 3] and with a resource teacher or a tutor, N apparently cooperated well and does well and in school, N tended to be fairly well behaved and there was not much in the way of undisciplined behaviour in those circumstances, but, in the home, N could be very loud, Ex. C-28.3, Dr Yule wrote in his August 22, 1995 report to Dr Stoddard.

43. There was some evidence that the IRP, Ex. R-1, Tab11, p. 27, as well as the others in evidence, Ex. R-1, Tab 11, p. 15 and 18, had not been correctly prepared as, basically, they lacked specificity. Mr. Lamrock was critical of these Rip's, but, when these are compared to some of the IRP's or the "Individual Education Plans" ("IEP's") which were prepared in the School Districts during the years in which he was the Supervisor of Student Services with the responsibility for these documents, there does not appear to be significant differences, Ex. R-10, R-1 1, R-12 and R-13. All witnesses agreed that the more information in such documents, the better. Also, a further debate occurred on the topic of whether a psycho educational assessment must be conducted on a student before issues like needs and resources could be determined. The evidence of Katherine Levine, a licensed, school psychologist with the Department of Education, Ex. R-28, Ms. Branscombe, the Principal of the Lewisville Middle School ("School") which was the last public school N attended before the filing of this Complaint and the teachers was that a psycho educational assessment is not necessary as resources can be put in place after the teachers observe, meet and discuss. Also, the IRP's which were prepared in the School Districts Mr. Lamrock supervised, Exs. R-10, R-1 1, R-12 and R-13, did not appear to indicate such was being, or had been, done despite Mr. Lamrock's suggestion as to this being implied. Ms. Geneau, N's Grade 5 teacher, testified that, of the 9 students in N's grade 5 class on IRP's, a psychoeducational assessment was conducted for one student.

44. In Grade 2, the District twice had the Woodcock test, a formal academic achievement test, administered to N, which according to Ms. Branscombe, indicated on the first test, N was basically in the grade 1 range and on the latter test, was basically in the grade 2 range, Ex. R-1, Tab. 11, p. 27-28. Also, Ms. Branscombe noted that N did show improvement referring to the Method and Resource teacher's notes on the IRP,

Spelling can be done reasonably well when he puts in some study time at home.... N has improved in all areas of reading this year. He has done well to make the transition from French to English. He should be able to keep up with class work next year without resource help. He must do work at home consistently.

45. The complainant testified she had meetings with Mrs. Carter only during the regular Parent Teacher meetings.

46. In Dr. Yule's 10 August, 1995 examination of N, the complainant reported to Dr. Yule that N "...has been quite aggressive towards" her and related an incident where N had a cordless electric drill revved up and chased her and C into the bedroom and locked them in there, Ex.C-28.3. In the complainant's evidence, she described this incident as happening towards the end of N's grade 2 and she stated she was "...on the phone the next day" to Dr. Stoddard.

47. On June 14, 1995, approximately a week or so before the grade 2 final progress report and before school closed for that year, the complainant wrote a note to the teacher, Mrs. Carter, who wrote the following note in the Cum Card: "A note from mother today stating that N had been put on Ritalin and it was the first time she didn't have a problem getting him to settle down and do homework", Ex. R-1, Tab 11, p. 2. There is no evidence that the complainant communicated the difficulties N was having at home, to the School.

48. Dr. Stoddard, the Doctor who gave this initial prescription for Ritalin, wrote that it was apparent to him in March, 1995 that N suffered from "an attention deficit syndrome, and these were all related to behavioural problems at school.", Ex. C-27. There is no evidence that such conclusion was communicated to the School and, in any event, there was little evidence to support Dr. Stoddard's statement of behavioural problems "at school"; in fact, the evidence was

primarily to the contrary. These problems were at home as noted by Dr. Yule, Ex. C-28.3, August 22, 1995 where he had stated:

In school..., he...tends to be fairly well behaved and there is not much in the way of undisciplined behaviour in those circumstances. In the home... he... can be very loud...

49. In N's Elementary Progress Report, Grade 2, Ex. R-1, Tab 11, p. 8, N received "Satisfactory" for "works and plays well with others", "demonstrates self control" and for "courteous".

50. In August, 1995, Dr. Stoddard referred N to Dr. Yule, Ex. C-27, who examined N on August 10, 1995 and then Dr. Yule, Ex. C-28.3, wrote to Dr. Stoddard ..."You tried him on Ritalin at the end of the school year and for most of July". Dr Yule suggests N's dosage of Ritalin be lowered and that the "mother and school" monitor N's response to this, after his new teacher has "two to three weeks to get used to N.", Ex. C-28.3. In his evidence, Dr. Yule testified that he relies on the parents to be the link between his office and the school but there is no evidence that the complainant or anyone requested N's teacher to monitor N's response to the change in his medication despite Dr. Yule's recommendation. Dr Yule, in his 22 August 1995 report, wrote that getting N to do his homework was a "...constant battle and a source of a lot of frustration". Dr Yule observed that the complainant reported to him that she and N's father worked full-time and that N and his father have similar temperaments and have difficulties giving way to each other.

51. Dr. Yule also testified that he was not asked at any time to sign a form authorizing teachers to give medication to N, which the evidence confirmed was necessary before the school could provide N with his medication. The complainant said N could take his medication in the morning before school, at this point.

52. In Dr. Bakht's report dated May 4, 1998, he wrote that he was advised by the complainant that N was off his medication for Kindergarten and grade 1 only, although the evidence is that N was also taken off his medication for almost all of grade 2, Ex. R-2. Dr. Bakht noted that N was "pretty aggressive" in grade 2, Ex. R-2, although there is little evidence N was aggressive at school, rather his aggressiveness was at home.

53. Therefore N went through his Kindergarten, grade 1 and almost all of his grade 2 without the medication prescribed for him by his pediatrician, until approximately mid-June of his grade 2 year and there is no evidence that the complainant communicated to the respondents as to N's prior diagnosis of ADD, despite N's difficulties with his homework, which the complainant, also, did not communicate to the respondents.

54. In September, 1995, N was enrolled in Grade 3 at the Arnold H. McLeod School with Ms. Reid as N's teacher. N's Elementary Progress Report Grade 3, Ex. R-1, Tab 11, p. 9 sets out:

First Term-

N is working to stay on task He does satisfactory work when on task but is easily distracted. He can study a spelling list but has trouble using learned bases to build new words. He needs practice writing sentences. He is doing well in his Math but it is so messy.

Second Term-

N is improving, I am pleased with his efforts to stay on task. His reading is improving and shows that he understands the stories by the way he answers questions and writes about the stories. He is trying hard but still struggles with spelling in his sentences.

Third Term-

N is working to improve in all areas of his work, He needs to slow down and concentrate on the work at hand. Some spelling has been given orally in which he does much better. He has no difficulty with basic facts in Math but does have some problems with understanding written problems. He is still very disorganized.

Fourth Term-

N has worked hard this year but will have to continue to do so. Any time spent on reading and spelling this summer would be a big help for next year. Have a great summer N.

55. The complainant testified she understood that Ms. Reid had a program to give extra help to N which involved N being taken out of class. In the Complaint, Ex. C-1, the complainant stated that N had been receiving remedial help from the school system since Grade 2. On April 17, 1998, the complainant wrote to Dr. Stoddard and Dr. Yule that N had been receiving resource help since Grade 2 on an ongoing basis from the school system, Ex. R-6. Additionally, in a

psychoeducational assessment conducted by Sharon Dea, Ex. C-6, it was set out at p. 2 that N had been receiving resource help since grade 2.

56. In September, 1996, N was enrolled in Grade 4 at the Arnold H. McLeod School with Mrs. Trainor as his teacher. N's Grade 4 Progress Report, Ex. R-1 Tab. 11 p. 10 sets out:

First Term-

N's main weakness this term is his poor listening skills. Many times when a lesson is being taught he is drawing. In Language Arts he is finding language and creative writing difficult. I'm pleased with his spelling this term. I feel that if he could become more attentive in class, he would find his work less difficult. As of late he has been putting more effort into his assignments.

Second Term-

N is not consistent in his attentiveness in class. Right after lunch he finds it difficult to attend to task. As I discussed with you, he is having a difficult time obeying the rules outside. I also find that I have to insist on good work or he will not do his best.

Third Term-

I am especially pleased with N's improvements in his growth as an individual. I can see significant gains this term. He has been doing much better at staying on task.

57. The Progress Report noted, under achievement, some "S-" and an "ED" which would be less than satisfactory, for language arts, math and Social Studies and under effort, N received this as well as Needs Improvement "NI"; although Mrs. Trainer marked N with some "S" for Satisfactory, some "S+" and "VG" for Very Good. The Report, Ex. R-1 Tab. 11 p. 10, only allowed for a limited number of categories, e.g., VG, S, NI, ED and O for outstanding.

58. According to the evidence of Mr. Menchions, Ms. Branscombe and other teachers, parents have the opportunity to ask questions any time on the reports, including at the parent teacher meetings. On Ex. R-1 Tab. 11, p. 10, Mrs. Trainor wrote "...As I discussed with you...", therefore at one point, one or both of N's parents met with Mrs. Trainor. The complainant's testimony was that she and N's father did not have any discussions with anyone at the school during N's grades 3 and 4, other than those at the parent teacher meetings, and that they did not request any additional resources for N.

59. Mrs. Trainor's indicated that N was experiencing difficulties, with attentiveness noted as a main problem, Ex. R-1, Tab. 11, p. 10. According to Ms. Branscombe, teachers' comments and grades in progress reports, in her experience, are accurate and based primarily on teachers' observations of day-to-day work and teachers' comments such as "lacks attentiveness", etc. can apply to many students at grades 3 and 4 with most students having to work consistently. In any event, there was no evidence that the comments written in the "Teacher's Comments" box in the Progress Reports did not accurately reflect the teachers' observations.

60. With respect to the issue as to whether N's Method and Resource records were lost, Ms, Branscombe stated that, when she learned of the Complaint and that all documents were required to be produced, she searched the School and then went to the District office and searched there as well. She forwarded everything she could find to the District Superintendent, by correspondence dated February 2, 2000, Ex. R-1, Tab 11, p.13, enclosing N's Cumulative Record Card and what she believed to be N's Resource file ("Resource file"). She acknowledged that she could not find N's Win-it File, a file in which N's participation in School activities was kept. She stated she was aware that N had participated, at least, in Track and Field, intramurals and the Bookworm Club. The extracts from N's student file, Ex. R-1, Tab 11, appeared to be N's cumulative record card and some of the Resource file and was referred to throughout as N's "Cum Card". There was no exhibit in evidence referred to as the Resource file.

61. Ms. LeCocq, N's grade 6 Method and Resource teacher, testified some of the documents normally kept in the Resource file were in N's Cum Card, e.g., Ex. R-1 Tab 11, pgs. 22 and 26, while some resource documents were missing, e.g., Ms. LeCocq's notes and N's work samples. Ms. LeCocq could not explain why her note, Ex. R-1 Tab. 11 p. 26, was in the Cum Card, as this should have been in the Resource File. Ms. LeCocq stated N's Cum Card represents 1/100th of what N did, as the Lewisville Middle School could not keep "...every piece of paper". Ms. LeCocq explained she left on maternity leave approximately March, 1999, having left her notes with the Supply Teacher Todd Smith asking that he put them in N's Cumulative Record Card at the end of the year and she could only speculate on where N's complete Resource File could have gone, as she had made a search for it and could not find it.

62. According to the evidence of Ms. Branscombe and Mrs. Geneau, N's portfolio of work file was also missing, although they speculated this could have been sent home with N at the end of the school year. Ken Menchions, N's grade 5 Method and Resource teacher, testified that he kept more documents than were in N's Cum Card and some of N's resource documents were missing and that the practice of record - keeping had taken a "back seat" to providing N with the resources needed. Mr. Menchions testified that the file he used for N was kept in the Resource Room. The evidence confirmed that Ms. LeCocq, Mr. Menchions and others provided further resources to N which were not documented in the Cum Card, and that some of N's Method and Resource records were lost. It would appear the documents forwarded as the Resource file by Ms Branscombe with Ex. R-1, Tab 11, p.13 appear to have been placed in the Cum Card because Ex. R-1, Tab 11, p. 22 and 26 were usually kept in the Resource File.

63. As previously stated, the Complaint, Ex. C-1, infers, and it is reasonable to assume, that N received resource help in Grades 3 and 4, despite there being no documentation to this effect, especially considering N's complete Resource File could not be located.

64. Further, a document entitled *Learning Disabilities Educational Programs and Services in New Brunswick* dated September, 2001, Ex. R-1, Tab 29, written by Kathryn (Kate) McLellan, MEd. who specializes in the field of special education, stated, at pg 1:

A Special Education Plan (SEP) is considered when a child is experiencing difficulties over an extended period of time and is not making progress even with the usual kinds of help that a teacher would typically employ in the classroom.

65. It would appear that, although written forms for special education plans were in use, the practice of doing so may not have been universal. Mr. Menchions testified that, at the time of his testimony, he had a student with ADHD in his class who did not have an IRP or any SEP because of the teaching practices being followed in the class consisting of, basically, good teaching practices, to which the student responded.

66. The School placed N's name on the list at end of grade 3 and grade 4 to attend the summer reading program at the Moncton Library, which N attended, according to the complainant's evidence.

67. On May 2, 1997, the School had the Canadian Achievement Test ("CAT test") administered to N, along with his peers, Ex. C-4. The results of this test indicated that N's performance was low. With respect to the results expressed as grade equivalents, experts, such as Mr. Lamrock, cautioned against the reliability of grade equivalencies and noted that the composition of the local percentile ("LP"), etc. was not identified in Ex. C-4. According to Juanita Mureika, the CAT test is not one that students take seriously and many do not give it their full effort and, in any event, it measures a student at a point in time; while the teachers' observations, etc. made mostly on a daily basis over the course of a school year are more reliable. According to Ms. Levine, the CAT test is no longer in use, as, for among other reasons, it was found to be unreliable. She also places limited validity on it because it is a grouped test, administered simultaneously to a number of children where factors that can influence test scores are harder to control.

68. Ms. Branscombe stated the results from the CAT test are not reliable and the CAT test is not tied to the New Brunswick curriculum and is no longer in use here, but N's results did indicate that more information was required; which explained why N was given the Wide Range Achievement Test ("Wrat test"), Ex C-5a, at the beginning of grade 5.

69. In September, 1997, N moved to the Lewisville Middle School for Grade 5 with Mrs. Geneau as his teacher. Mrs. Geneau stated she started at the School in 1994-95, having taught grade 5 for 3 years before 1997, had taken courses on teaching students with ADHD and had attended Summer Institutes, similar to those detailed in Ex. C-36. Ms. Geneau recalled she and a number of other teachers had been sent by the Principal, Ms. Branscombe, to a conference in Nova Scotia which dealt with topics such as having students on Resource plans.

70. Lewisville Middle School offered grades 5 to 8 and had more team teaching opportunities, collaborative teaching with 3 classes of grade 5, 2 English with her and Katherine Steeves as the homeroom teachers and 1 French class with D. LeBlanc as the teacher.

71. According to Mrs. Geneau, there were 26 students in N's class, with 10 being excep-

tional. One of the students in the class was autistic and was on an IEP and had a Teacher's Assistant who also helped Mrs. Geneau when that student worked on his/her own. There were approximately 9 students on resource plans whom, Mrs. Geneau testified, she did not label, preferring to individually assess and provide resources specific to their needs. A transitional meeting was held at the beginning of the school year to assist the teachers by introducing them to the needs of each student. Mrs. Geneau described N's class as a "good class".

72. Mrs. Geneau's Teaching Team was called the "Rockets", the grade 6 team, the "Penguins". The classes did a great deal of activities together as a team, with Mr. Menchions as the main Method and Resource teacher, e.g., grades 5 and 6 were broken into 4 units for reading. Mrs. Geneau described the various teaching styles she used being in small groups with 4 to 5 in a group or lecturing or, at other times, circulating amongst the students. Ms. Cormier was on her teaching team.

73. Mrs. Geneau's evidence was that, in September, 1997 before the students arrived, she read the files of each student including the Cumulative Cards. For N, she read the results of N's CAT test, Ex. C-4. Mrs. Geneau testified that she needed more information in order to properly assess N's results in relation to those of other students; but, N's scores gave her reason to observe N closely. N was not the lowest student Mrs. Geneau had and, in her opinion, N was "just below average". She observed N and immediately identified N as experiencing difficulties, and brought him to the School based Team's attention and asked Ms. Branscombe to have N given the WRAT test. Mrs. Geneau's evidence was she did utilize the School based Team, as is suggested in New Brunswick Department of Education *Best Practices for Inclusion*, May, 1994, R-1, Tab 20, p 5.

74. Mrs. Geneau testified she met with the complainant the first day of school that year and several times after that. The complainant described Mrs. Geneau as "really concerned" with N and related that Mrs. Geneau told her it was a pleasure to have N in her class. Mrs. Geneau described N as a cooperative student in class who had to be kept on task, but was not defiant.

75. On September 25, 1997, N was given the WRAT test, Ex. C-5a, by Mr. Menchions. Mrs.

Geneau testified she was already working on an IRP when the WRAT test results came in. The WRAT test results indicated N had problems, in particular, with reading comprehension and writing. The reference to the "WRAT Test Oct 97" on the grade 5 IRP, Ex R-1, Tab 11, p. 15, was to this September 25, 1997 test. The results of the WRAT test, according to Katherine Levine, can depend on many factors including what is going on at home as results can be skewed by outside events and more information would be required, but these show there is a need to monitor. Mr. Lamrock stated the WRAT test really showed nothing as it was not reliable. Mr. Menchions stated that grade equivalencies are most unreliable. According to Ms. Levine, she has never made a decision based on WRAT test results as it is not a diagnostic test, providing only grade equivalencies which have no validity.

76. Although the official IRP form, Ex. R-1, Tab 11, p. 15, was not dated until December 9, 1997, Mrs. Geneau said she started resources immediately, having spoken with all those involved, which Mr. Menchions confirmed.

77. The evidence confirmed the plan developed by Mrs. Geneau, Mr. Menchions and Ms. Branscombe included the following resources for N:

1. Mrs. Geneau provided "extra help" by tutoring on Tuesdays after school in reading and writing, as she testified, she has always offered extra help to students, where she would generally see the complainant at some point in these extra help sessions and she noted N's parents did not ask her to provide additional resources for N. Mrs. Geneau stated, in her opinion, she and the complainant had a good rapport;

2. N had a "Reading Buddy" which was a trained, parent volunteer who came to the School and read with N individually at least 1A hour to an hour one day every week after school, although no witness could recall the name of the Reading Buddy who worked with N;

3. Math resources were provided by Mrs. Bellamy, who taught math and used 2

extra teaching periods to provide these resources every week for N, along with 4 or 5 other students. The complainant confirmed N received math resources;

4. Adapted spelling with Mr. Menchions who developed N's adapted spelling list and taught it to N in a group with 6 to 9 students. Mr. Menchions stated he used the Spell-Bound program at times in teaching spelling because of N's particular difficulty with spelling and further accommodated N by not counting N's spelling mistakes in N's daily work. Mr. Menchions' evidence was that there is a move away from teaching spelling as a separate subject, as spelling develops as a student progresses. The Spell-Bound program was not mentioned in the IRP, Ex. R-1, Tab 11, p. 15;

5. N had "one on one" with Mr. Menchions for writing, at times;

6. N had Language Arts resources with Mr. Menchions;

7. N had a reading program he followed called "Disney Presents", where N could tell the character what to do, not mentioned in IRP, Ex. R-1, Tab 11, p15;

8. N participated in the Reading Recovery Program;

9. Mrs. Geneau and Mr. Menchions suggested work to be done at home including extra reading, the adapted spelling list and writing exercises.

78. With respect to the form entitled "Individual Resource Plan", Ex. R-1, Tab 11, p. 15, for grade 5, Mr. Menchions, Mrs. Geneau and Ms. Branscombe (formerly "Rickard") drafted this IRP. N's prime needs were spelling, reading, writing, and math. The complainant signed the IRP on December 9, 1997. The complainant testified she did extra work with N at home in reading, writing and math and took N to the Moncton Library every summer as recommended by the School.

79. N's Grade 5 IRP stated, Ex. R-1, Tab 11, p. 15:

Student's Strengths:

- good parent and home support
- eager to please
- cooperative
- good student in class

Students Needs:

- poor spelling
- poor writing skills
- WRAT Oct. 1997
- Reading 2E } Reading Comprehension
- Spelling 3B } Math 3E
- low - Math

Pre and Post Testing.

WRAT TEST Oct. 1997
Previous IRP
pg.16:

Objectives;

- To have N working at grade level by end of year
- Adapted spelling program that he can achieve
- Writing m complete sentences & proper punctuation
- Reading Comprehension to improve - SRAS

Materials/Actions:

- Tutoring on Tuesday with Mrs. Geneau (reading & writing)
- Adapted spelling list
- Writing exercises to be done at home
- Math resource with Mrs. Bellamy L.Arts. & Math with K. Menchions
- Reading Buddy Evaluations:
- Teacher assessments
- Portfolio
- Post test – WRAT

80. Ms. Branscombe's evidence was that, although more information on the IRP would have been better, it was just a road map, helpful as a baseline; but not indicative of all that was done as more resources were provided.

81. Mr. Menchions stated he used the Dolch Sight Word Lists as recommended in the New Brunswick *Resource for the Identification and Teaching of Students with Specific Learning Disability*, Ex. R-1, Tab 18, p. 81, as well as the list of accommodations listed on p. 79, where appropriate, and he used colour coded material, reading comprehension material and taught in small groups. Mr. Menchions' testimony was that his priority was to focus on writing, reading comprehension and math. Mr. Menchions estimated N was in small groups with him at least 4 times per week, with pull-outs for intense work approximately 4 times during the year for 2 or 3 weeks at a time. At times, Mr. Menchions and Mrs. Geneau worked together in class or would split the class into groups so as to allow for more time with each student.

82. The evidence of Mrs. Geneau was that N had "a lot of resources" and that no student in her class received more intense help than N who, for the most part, functioned better than the other 9 students on IRP's.

83. Mr. Menchions testified that he taught .5 and Mike Whittleton, another Method and Resource teacher, taught .5 and, between them, the School had a full-time Method and Resource teacher, with other teachers helping, as necessary, Mr. Menchions said he taught in Ms. Geneau's, Ms. Steeves' and Ms. Cormier's classes, after developing his schedule with the Principal and home room teachers. He usually taught in small groups, e.g., no more than 10 in reading and found N to be "mid-pack" amongst the students.

84. Mr. Menchions is a member of a Department of Education Provincial Committee which specializes in coaching teachers to mark and assess Language Arts and this committee instituted extra time, e.g., 15 to 20 minutes, for special needs students to write examinations, if appropriate.

85. With respect to resources, Mr. Menchions testified that N progressed with the resources provided. Mr. Menchions stated he received no contact from N's parents. He explained he discussed N on a regular basis with other teachers, both in the teachers' meetings held a number of times per month, as required, as well as individually. Mr. Menchions' testimony was that he did not consider that N needed psychological or other counselling and he did not witness any

demonstrations of behaviour which could be referred to as oppositional or defiant nor was he aware that any teacher had asked for assistance with N as a result of such reasons.

86. There were differences of opinion as to whether the School should have used the form "Individual Resource Plan" or have used the form "Individual Education Plan" for N. Teachers, such as Mr. Menchions, Mrs. Geneau and Mrs. Cormier, N's Grade 6 home room teacher, and Ms. Branscombe testified their use of the ÎRP for N was consistent with their usage of these. Also, Mr. Lamrock opined there was nothing wrong with using an IRP and an IBP interchangeably, as they are basically the same. Apparently the District no longer uses two different forms, now using one Special Education Plan form, Ex. R-1, Tab. 2.

87. Ms, Branscombe stated N's parents did not communicate with the School as to any wishes they may have had for additional resources for N and there were other resources the School could have provided, e.g., some students received books to take home for extra help. There was no evidence N's parents or N made such requests. Mrs. Geneau testified she had given books on cursive writing to some parents for use at home.

88. Mrs. Geneau saw an improvement as soon as N started getting resources. One of the objectives stated on the IRP, Ex. R-1, Tab 11, p. 16, was to have N working at grade level by the end of the year. Mrs. Geneau and Mr. Menchions said this goal was too ambitious to achieve in one year, but N did make gains. Mr. Menchions' evidence was that N improved over the year as Mr. Menchions observed N's day-to-day work in class.

89. The "Teacher's Comments" in N's Progress Report for Grade 5, Ex. R-1, Tab 11, p. 11, set out the following:

First Term-

N is a friendly child and a pleasure to have in my class. N is experiencing difficulties in most aspects of the gr.5 program. We will continue with the extra help in Math resource, parent- volunteer leading buddy and extra help Tuesdays after school. Daily readings at home would be beneficial

Second Term-

N is a pleasant student who continues to experience difficulties with the grade 5 program. Attention is being given to N's problems but much more effort on his part is needed if an improvement is to be seen this year. (March 20/1998 }

Third Term-

N has worked hard this "year" [which was amended in evidence to read "term."] and will need to continue to read, write and practice Math facts over the summer. Perhaps he could join the reading program at the Moncton Library,

Have a nice summer and good luck in Gr.6

90. The Progress Report noted, under achievement, some "S-", many "ED" and some "S" and "S+" and "VG" which referred to less than satisfactory, experiencing difficulties, satisfactory, satisfactory plus and very good, respectively. Under effort, N received "NT", "S", "S+" and "VG". For growth as an individual, N received "NT", "S-" and "VG", Ex. R-1, Tab 11, p. 11. Mrs. Geneau testified that, to her, "S" meant that N was trying his best, Mrs. Geneau testified that N was "experiencing difficulty" with his homework which was her observation and that some parents will sign the agenda to indicate that the homework is done, even if it is not, but she could not say if that was the reason she marked N as she did for homework.

91. Mrs. Geneau's evidence was that the complainant told her that N was difficult and defiant at home and that the complainant was off work on stress leave. As a result, Mrs. Geneau did not give N much homework until late in the year, as homework was too stressful for N before then.

92. Although various teachers testified that parents have the opportunity to question the Progress Reports at any time, including at the parent teacher meetings, there was no evidence that the complainant or N's father posed such questions to the various teachers in N's grade 5 year.

93. Mrs. Geneau testified that she had a son the same age as N and she would share with the complainant strategies she used to encourage her son to read at home. Mrs. Geneau said she saw no reason to refer N to a Social Worker or counsellor as N acted appropriately at School and, if the complainant had wanted N to see a counsellor, she could have asked Mrs. Geneau to refer N

to one. Mrs. Geneau testified that she listened to the complainant about the complainant's personal circumstances that year and recalled that the complainant was having a bad year. It is noted that, in the complainant's correspondence to Drs. Yule and Stoddard, she sets out in Ex. R-6, dated April 17, 1998:

As you know, for the past 4 years, I have been suffering from chronic anxiety and also depression, and two years ago my thyroid gland stopped functioning- Since then I have had to take a stress leave from work After returning to work, my position, of 18 years, with Imperial oil as Automotive Agency Administrator was eliminated and now I am unemployed

94. The complainant's evidence was that she was stressed at work because of re-structuring. Through her employee assistance plan, she went to a counsellor, Patrick Donahue. Mr. Donahue suggested that her personal stress was coming from N. The complainant said she had described to her counsellor how she could not communicate with N and the counsellor told her to find out "...what's wrong with N". Mr. Donahue recommended that the complainant have a psychoeducational assessment conducted on N and recommended his colleague, Sharon Dea, for this. In approximately December, 1997, the complainant raised the issue of having a psychoeducational assessment conducted on N with Mrs. Geneau. Mrs. Geneau testified that she did not believe she needed this because, with her experience, she has taught other students like N and knows what she has to do to help the student learn. Mrs. Geneau advised the complainant that she could have it done as the District will do so, although it might take a couple of months. The complainant indicated she would get it done through her insurance company. The complainant testified that she and her husband had it done and paid \$700 for it, although there was no receipt in evidence.

95. Sharon Dea, then a Resident in Psychology, conducted a psychoeducational assessment of N on February 11, 1998, signed also by Dr, G. Thibault, licensed psychologist. In the assessment, Ex. C-6, Ms. Dea wrote that N received resource help at school since Grade 2 and, for the last three summers, N received tutoring through the Moncton Library. According to the complainant's evidence, Ms. Dea did not want N on his medication for first of the testing, although N took his medication every morning, and N took his medication at lunch on the day of the testing. The report was not dated, Ex. C-6.

96. According to Ms. Dea's evidence, she found N's intelligence to be the "lower end" of average. The results of the tests she administered indicated N's ability to read simple English words was in the 13th percentile; N's reading comprehension, 21st percentile; N's listening comprehension, 42nd percentile; N's understanding of Math problems, 30th percentile; N's ability to do math operations, 12th percentile and N's spelling, 9th percentile which was the lowest score he achieved. The evidence of Ms. Levine was that, while the average range is between the 25th to the 75th percentile, low average is considered to be a separate range which is immediately below the 25th percentile.

97. Ms. Dea did not consult with the School nor N's home room, or any other, teacher before preparing her report. When asked why she had not done so, her evidence was that she could not recall why she had not consulted any professionals at the School, i.e., teacher, principal, administrator, on this assessment as she did so on other assessments, although sometimes she gave the parents an option on this. Ms. Dea stated she had not brought her file with her to the hearing, so she was unable to check her file for any information in this regard.

98. Ms. Dea's recommendations, having been written without any consultation with the School, included such items as N have an agenda, Ex. C-6, pg. 14, item 21, when, in fact, N had an agenda that was in regular use. She concluded that N's intellectual ability was below average, lower end of average on word knowledge and ability with relationships between words was low average range. Also, Ms. Dea found N had attention problems with a learning disability in reading and difficulty retaining isolated information. N's learning problems were noted as being intensified by his attention problems, but N's technical aptitude appeared strong. Ms. Dea's report did not relate any problems N and his family were experiencing at home.

99. Ms. Dea's recommendations were not directed to anyone in particular; but, on reading the report, it is apparent that recommendations were intended for the home or the school, with some for both, the home and school. Ms. Dea noted N required remedial assistance in reading and stated that he would always have trouble spelling because of poor decoding skills. She also recommended counselling.

100. Ms. Branscombe testified that much of what Ms. Dea recommended was already being done by the School, although not written on an IRP and not documented, e.g., N was seated in a less distracting place, with the front of the class not always being the least distracting place.

101. On April 15, 1998, the complainant wrote to Dr. Yule, stating that N's medication, "Risperdal", affected N's ability to think and diminished his energy. In that correspondence, she wrote that "we" sent N to school unmedicated for a few days and, when speaking to Mrs. Geneau afterwards, the teacher, having found N fidgeting and lacking self-esteem, had two other students sit with N to keep him on track. To compensate for N's different behaviour, the teacher told the other students N was just tired because N had been up late playing with his new puppy. Two of N's other teachers also noted N's lack of enthusiasm and poor printing and inquired of Mrs. Geneau. In the same correspondence, Ex. R-5, the complainant also wrote that N's swearing increased when he was not medicated, although there was no evidence N swore at School. The complainant asked Dr. Yule to consult with Dr. "Back"(sic) as the complainant did not know what to do, Ex. R-5. The complainant's evidence was that, during this period in 1998, N's behaviour was getting more complex, showing anger and defiance, for example, if N was put in his bedroom, he would take the back off the bedroom door, which behaviour caused Dr. Yule to prescribe Risperdal.

102. On April 17, 1998, the complainant wrote to Drs. Stoddard and Yule, stating N was 2 years delayed academically noting Ms. Dea's report, despite N receiving resource help since grade 2 on an ongoing basis from the school system, explaining, for the past 4 years, she had chronic anxiety, depression, a non-functioning thyroid gland and had been on stress leave from work before her unemployment, as noted earlier, Ex. R-6. After describing this, she wrote that she believes N needs "one on one "education and that "It has become physically and mentally exhausting dealing with N's frustration and anger" and requests Drs. Stoddard and Yule to write a letter recommending N attend Landmark East School ("Landmark") for N's benefit "and mine", Ex. R-6. Neither physician recommended N attend Landmark, although, after N was enrolled there and succeeding, Dr. Stoddard wrote a letter suggesting it "might benefit" N, which letter will be discussed below, Ex. C-27.

103. On May 1, 1998, Dr. Yule wrote to Dr. Bakht asking that he see N "for behaviour problems" and Dr. Bakht did so within 4 days, Ex. R-2.

104. On May 4, 1998, Dr. Bakht wrote to Dr. Yule stating that he had seen N with his mother on that day during which interview the complainant advised Dr. Bakht that N had been struggling at school and a resource teacher had been helping him and cited Ms. Dea's report, Ex. C-6, with respect to N having attention problems and a learning disability, Ex. R-2. Dr. Bakht noted that the complainant advised him that she had been laid off from her job after 18 years and was looking for work, that her husband was very "busy". The complainant advised Dr. Bakht that N had been on Cylert at four years of age for eight months and that she had discontinued this before kindergarten and N was off the medication for kindergarten and grade one at which point N was prescribed Ritalin, although the evidence confirms N was off his medication for almost all of grade 2, and he noted that N had been "pretty aggressive from grade 2". Also, although Dr. Bakht stated N's mother has been waiting for a psychiatric assessment for the last 2 years, there was no evidence of N being on such waiting list. The complainant stated Dr. Bakht saw her and N at first 3 times a week, but Dr. Bakht's report set out he would see N again in 4 weeks time. The complainant did not recall the date of the first appointment with Dr. Bakht. Dr. Bakht noted that Dr Yule had tried resperidone 5 mgs two times per day approximately one month earlier and because N's reaction was to sleep most of the time, the complainant had discontinued it. She advised Dr. Bakht that, after N came home from school, he would swear at both his parents and brother, be very defiant, not listen, be very hyperactive and restless. In addition, during this time, N would eat poorly, eating breakfast, skipping dinner, and ate little for supper and had bed-wetting problems for which N was treated with anti-depressants. Dr. Bakht's DSM diagnosis was that N had Attention Deficit Hyperactivity disorder combined type, a parent-child relational problem and "the" learning disorder and noted that borderline intellectual functioning has to be considered, Ex. R-2. In addition, Dr. Bakht recommended, among other things, that N should continue to receive remedial teaching at school and take Ritalin SR (slow release) 30 mg in the a.m. and an additional 10 mg after school, which was an increase of 10 mg after school.

105. After school one day before the school year ended in 1998 for approximately 1 hour as

Mrs. Geneau recalled in her evidence, she met with the complainant and Ms. Dea, who testified she could not recall specifics of the meeting. Mrs. Geneau said Ms. Dea presented her report and recommendations and Mrs. Geneau listened carefully for anything that she could do to help N. Mrs. Geneau asked Ms. Dea if she recommended the School keep N in grade 5 next year to work on his skills, to which Ms. Dea said not to keep N back. According to Mrs. Geneau, Ms. Dea did not enclose the Article referred to in item 10, Ex C-6 and most of Ms. Dea's recommendations had already been implemented in any event, as they basically comprised good teaching practices which were being followed by Mrs. Geneau and the other members of the team. Mrs. Geneau told the complainant and Ms. Dea which recommendations were not being done by the School, e.g., #8 taped stories, # 14 notebook, etc., but did not indicate the School could not do these. Mrs. Geneau recalled she had written a couple of entries the black note book, Ex. C-7, but did not recall what happened to it afterwards; but, if the black note book had been again brought to her attention, she would have used it, although the complainant's evidence was that the complainant only made a couple of entries in the black note book. On careful review of Ex. C-6 Item 14, Ms. Dea's recommendation was that "he" (N) should keep a notebook.

106. With respect to counselling, Mrs. Geneau's evidence was that, after she told the complainant and Ms. Dea that N did not demonstrate negative behaviour at School, neither one asked for a referral for N for counselling, nor did the complainant do so at any other time that year. Mrs. Geneau said she explained the School had a counsellor come in to the School earlier that year to speak about school related issues such as bullying, study habits, etc. As to Ms. Dea's recommendation #20 of a behaviour program, Mrs. Geneau advised she had a behaviour program ("PAT") that she followed which worked well by rewarding students for their good behaviour by allowing them to pursue an activity they enjoyed, which she described as highly effective with N. As to extra-curricular activities, N was in Track and Field, Book Club and Bookworm, etc. Mrs. Geneau stated she believed that N was making progress and benefiting from the resources and that Ms. Dea's recommendations were taken into consideration in teaching N. Mrs. Geneau stated the complainant did not discuss Ms. Dea's report with Mrs. Geneau after that meeting.

107. Since conducting the psychoeducational assessment, Ex. C-6, Ms. Dea has become a licensed psychologist and was declared an expert in the field of psychoeducational assessments

and their implications.

108. On June 1, 1998, Mr. Menchions administered the WRAT test to N once again, which, according to Mr. Menchions, showed that N had made gains in reading and spelling, not in Math, and that the team had hoped for better; although Mr. Menchions' and Mrs. Geneau's evidence was that they do not rely on grade equivalencies as an accurate measure of a student's progress, as one has to consider all factors of the student's life at that time. Mr. Menchions also explained how the WRAT test can be manipulated, although he did not do so, but offered this explanation as another reason that it is not reliable and is nothing more than a tool for teaching assistance, Ex. R-1, Tab. 11, p. 18. and Ex. C-5a.1.

109. Mr. Menchions' testimony was that the School provided appropriate individualized resources to N to accommodate N and his specific needs, and that Mr. Menchions did not require a psychoeducational assessment before knowing the particular resources required to help meet N's individual needs.

110. Following Grade 5, N received extra help during the summer by following the reading program at the Moncton Library recommended by Mrs. Geneau in the Progress Report, Grade 5, Ex. R-1, Tab 11, p.11.

111. Mrs. Geneau stated she did not believe N needed a TA and that the complainant never told her that she was considering sending N to Landmark.

112. Mrs. Geneau testified that N's needs were being met and she followed the applicable, suggested accommodations listed on pg 79 of the New Brunswick *Resource for the Identification and Teaching of Students with Specific Learning Disability*, Ex. R-1, Tab 18, authored in part by Kate McLellan, chair.

113. In September, 1998, N was enrolled in Grade 6 at the Lewisville Middle School with Ms. Page Cormier as his home-room teacher. The registration form, undated, filled out by the complainant indicating that N was on Ritalin and resperdal, and, on which for the part requesting

the parent indicate the subjects in which N may need extra help: "reading + math" and sets out that N had attended Lewisville Middle School the year before, Ex, C-12. Ms. LeCocq testified that the transition meeting is held in June when a student is going from one class to another.

114. The class basically consisted of 27 students, 20 of whom were on Special Education Programs, with 2 on IEP's with 2 Teacher's Assistants "TA's" and 18 on IRP's, so altogether 20 students with SEP's. At the School, there were 4 grade 6 classes and 3 were French Immersion. Ms. Cormier testified it was common for her to teach exceptional students, with the usual class size being 26 to 28 students with up to 32, as some may be replaced during the year, usually 1 to 3 on IEP'S with 10 to 15 on IRP'S requiring either modified or accommodated programs. Ms. Branscombe testified that the School could always use more resources and, for that year, she got another .5 Method and Resource teacher for the School; consequently, additional resource time was provided. What resources the School had were moved to Ms. Cormier's class that year and the Method and Resource teachers worked with the Team assigned to that class as much as needed, although the Team dealt with 3 different classes, according to Ms. Branscombe's evidence. Ms. Branscombe described the structure of Ms. Cormier's class as more traditional, less active, with no significant disciplinary problems. Ms. Branscombe's evidence was there were 2 TA's in that class, one was with a student who was relatively higher functioning so she was able to help other students as well and, in any event, TA's generally helped with more than 1 student. Ms. LeCocq's evidence was that the TA's worked with N on the Alternate spelling program and reading. Ms. LeCocq said it was unusual for 1 teacher to have 2 TA's in the class.

115. Ms. Cormier graduated from Mount Allison University in 1963 and taught for awhile part-time while raising a family, received a Bachelor of Education in 1975 from the Université de Moncton, but from 1987 supply taught and then went back full-time. She had some teaching at Moncton High School which involved teaching some special needs students. Mostly she taught grade 6 to core English, but also taught English and math to French Immersion students. She has taken seminars in teaching exceptional students, ADHD, Tourette's, etc. and has material on teaching exceptional students. In teaching exceptional students, Ms. Cormier testified her experience is her biggest asset, as she has to find what works with each individual student, to know what supports are available to her, what teammates are available to her, etc. She

teamed with Mrs. Geneau and Ms. Steeves who taught grade 5 so when their students came to her class, she testified this provided her with the opportunity to have knowledge of the students.

116. Ms. Cormier described her approach to discipline and class management as emphasizing fairness, consistency, being specific, giving clear directions and repetitions. She described her class as orderly and structured, with her having control over her class. When her students finished their activity, she had something else for them to do, as she posted an activity list. Ms. Cormier stated she did not receive any comments from other teachers or school administrators that her classroom had problems, and instead, received only positive feedback. She maintained that more than the average number of resources were going into her class to help her. When teaching was occurring, the class was organized and sufficiently stable to facilitate that and had the necessary method and resource strategies to provide the structure and routine to maximize learning.

117. Ms. Cormier described N as, basically, cooperative, attentive, a student who had friends at school, participated in activities with the other students without incident, made efforts to learn and worked with the extra resources provided to him and from her observations, N seemed to enjoy school. She denied any suggestion that N had shut down or was ignored or overlooked by her. N did have to double check his math and write his home work down each night. Her evidence was that N did not particularly display disruptive behaviour and she had no major incidents with N.

118. Part way through the respondent's witnesses, on April 18, 2002 when Ms. Branscombe was on cross-examination, the complainant produced N's grade 6 Agenda, Ex. C-32. Both parties had been required, in the pre-hearing process, to disclose to the other party the documents in their possession on which they were relying, although it is noted this disclosure was not mandatory. The Agenda was produced after some of the respondent's witnesses had testified and, given the order for the exclusion of the respondents' witnesses, the respondents' remaining witnesses had no opportunity to review it. For example, Ms. LeCocq's testimony was that she had not seen N's Agenda since N was in grade 6, approximately 3 years earlier and could not fully comment on it. It is noted the Agenda was in the control of the complainant throughout that

time and there was no objection to its admissibility except the submission that it was not reliable, with it containing white-out, etc.

119. Ms. Cormier testified that she called N's home in September, 1998 and made the complainant aware of resources and told her that she was available to provide extra help when requested and to call her to make such requests or discuss concerns in this regard and the complainant never came to her with any such requests or concerns during the year. Ms. Cormier said she had read N's cumulative card and Ms Dea's report at the beginning of the school year. She stated it is a "2-way street" as it takes the home and the school and, if a parent does not participate, it could hinder the student's success. In the Agenda, Ex. C-32, on September 8, 1998, the complainant thanks Ms. Cormier for calling and asks that N be placed near the front of the class, which Ms, Cormier claimed she did, such that, when N would be off task, Ms. Cormier could bring N back. Apparently, desks get re-arranged at times, depending on the project, etc.

120. Ms. Cormier's evidence was that she got resources going at the beginning of the school year, after reading the cumulative card and Ms. Dea's report and consulting with those involved.

121. After the progress report was sent out and a Parent Teacher meeting was held, the complainant inquired if other students had greater needs than N, to which Ms. Cormier replied in the affirmative. According to Ms. Cormier, the complainant never came to class for a class visit but she did, at times, pick up N at school and would have casual conversation with Ms. Cormier when she was standing at the door watching the students at the lockers.

122. As to the Grade 6 resources received by N, according to Ms. LeCocq, Ms. Cormier spoke to Ms. LeCocq concerning a special education plan to meet N's needs and they collaborated and the "Penguin" team discussed N to prepare and monitor N's IRP. According to Ms. LeCocq, the team consisted of teachers such as Mrs. Geneau and the other resource teachers such as Mr. Mencións who met weekly to discuss N and the other SEP students. Ms. LeCocq's evidence was that, in early to mid-October, 1998, she called the complainant to introduce herself as N's Method and Resource teacher and to advised her of N's resources, ask her opinion and to advise that if she had any questions to call her. The IRP was to assist with working with N, a tool on

which to build. N's IRP, Ex. R-1, Tab 11 p. 18, was drafted by Ms. LeCocq, Ms. Cormier and Ms. Branscombe, with other teachers consulted, and it is in Ms. LeCocq's handwriting. The IRP was signed and dated on November 24,1998. The evidence was that the resources began near the beginning of the school year. Ms. Cormier said the complainant signed the IRP without comment.

123. Ms. LeCocq did a pre-test and she worked with N for awhile to determine N's level, explaining the special procedures taken to develop N's alternate spelling program, Ex. R-1, Tab 11, p. 26, Lesson plans, September 17, 1998, which is in Ms. LeCocq's hand-writing and Ms. LeCocq wrote "Assessed and placed on alt. Spelling program Level 3 green", the books for which were apparently in the Resource room. Ms. LeCocq said she used the Dolsh word list, when appropriate. She read N's psychoeducational assessment, Ex. C-6, and kept a copy. Mrs. Bellamy gave math resources to Ms. Cormier's class a couple of times a week and they split up the class, Ms. LeCocq stated N got math resources and made some gains in math and these resources were not on the IRP, Ex. R-1, Tab 11,Pg.18 which read:

Student's Strengths

- supportive parents
- polite
- cooperative
- helpful to other classmates
- good student behavior

Student's Needs:

- improve, writing, spelling, reading and organizational skills

Pre and Post Testing

- June 1998 WRAT-R Reading 3E
 Spelling 4B
 Arithmetic 3E

Objectives:

- increase Reading level
- improve Reading Comprehension
- improve fluency in oral Reading
- increase sight vocabulary and word attack skills
- write complete sentences with proper punctuation

-copy h w from board independently

Materials/Actions-

- Learning Buddy
- Adapted L. Arts program
- Adapted Spelling Level 3
- Resource Time 1-2 periods a week (small group)

Evaluations:

- Re-test in May

124. Ms. Branscombe also helped prepare the IRP and, in her evidence, said this should have included more information, as more was done for N. Ms. LeCocq said there were other resources which were not documented on N'S IRP in Grade 6, e.g., peer tutors, the computer-based *Spell-Bound* program, power packs, multi level and language arts groups that N participated in, etc. Ms. LeCocq stated that much was being done, just not documented as there was poor record-keeping. Ms. LeCocq said the IRP was a starting point and, as things changed, resources were changed in accordance with N's needs, but she was not there at the end of year. Ms. LeCocq prepared a more detailed List of Resources from what information she could recall approximately April, 2001, Ex. R-1, Tab 8. Ms. Cormier taught adapted spelling and reading. Mrs. Bellamy also taught reading to N in grade 6. With respect to comments in the Agenda, Ex. C-32, wherein N did not bring home the proper books, Ms. LeCocq noted that one solution would have been for the School to have supplied an extra set of books to N which could have been done if requested, but was not requested.

125. N had a Reading Buddy in grade 5; but Ms. LeCocq called it a "Learning Buddy" in grade 6. Ms LeCocq trained the Learning Buddies. In 1998, a women from PEI came to tram them also and provide them with a variety of things they would need to do their jobs. As N was retested on the WRAT test in June 1998, she did not retest N on the WRAT test in September, 1998, but she did some testing using a variety of tests. Ms. LeCocq recalled N at the Learning Centre with others, writing tests, receiving individualized teaching time, power packs, etc.

126. Ms. LeCocq said, if the point of an exercise was to get N to express his own ideas, she did not criticize N for grammatical or spelling errors. Ms. LeCocq said she had colour coded and

pre-cut card board displays in the classroom.

127. In Language Arts, students were grouped into 5 divisions depending on their ability so their needs could be met. Ms. LeCocq testified they did not use Grade Levels as meeting the students' needs was more complicated than that.

128. Mr. Menchions also provided resources to Ms. Cormier's class when N was in grade 6, and gave resource help to N then also, as he had a "couple of extra periods in his time table", he sometimes taught in the class room and, at other times, he had pull-outs where a small group of students were taken out of class for short or intense work on a subject. N had Math pullouts which allowed him to work on a specially designed computer program to enhance his math skills. Mr. Menchions agreed with Mr. VanBuskirk that, in order to teach students with learning disabilities resources are required, such as method and resource teachers, lower class sizes, teaching teams, cooperation with parents, etc. Mr. Menchions was available to meet with the parents of any student he worked with as a method and resource teacher, but the parents of N did not request any meetings with him at any time.

129. Ms. LeCocq explained that the Penguin team was not the same as the School-based team which included experts such as a psychologist, etc. In 1998, in the last 2 months of the school year, Ms. LeCocq renamed the former "Resource Room" the "Learning Centre". In Ms. Cormier's class in 1998-99, Ms. LeCocq worked Monday, Tuesday and Thursday and was mainly responsible for 2 classes of grade 5 and 1 class of grade 6, basically serving the English students. On the Penguin team, her case-load was 35 students, i.e., 3 students with IEP's with the balance on IRP's. With the 18 students in Ms. Cormier's class being on IRP's, most only required slight accommodation as they were higher functioning which could be as simple as, for example, sitting up front due to vision problems. Some students required a Modified program, for example, the student may have an easier Math program with the balance of the regular curriculum. Most of the time, she tried to keep the students with their classroom teacher and their peers, in a collaborative model. She recalls 4 or 5 students having extreme difficulties and, even those students were kept with their peers as much as possible. She would either have a small group in class or take a group of students to her room to go over new concepts. Ms. LeCocq

testified that, sometimes she took 1 student and did 1 on 1, but she tried to avoid this, as it was best to use her time to take all those students who needed help with what she was teaching. Her room was next door to Ms. Cormier's classroom. Although technically she was to also provide services to French Immersion students, she did not do so, as she organized a system for peers to do this, with adult learning buddies and this worked so well, she never went to French Immersion, spending her time in the English classrooms. She recalled that Jennifer Brown was the other Method and Resource teacher who worked on days when Ms. LeCocq was not there. Along with them, others providing resources that year were 3 or 4 other teachers who taught full-time but had some periods of resource time, e.g., Mrs. Steeves and Mrs. Geneau, as well as, Ken Mencións and Mike Whittleton and others as well, depending on students' needs. These teachers were briefed by the home room teacher. Ms. LeCocq stated she and Jennifer Brown communicated by leaving each other notes.

130. Ms. Branscombe testified that she attended Penguin meetings at times and in one meeting, she was told N needed resources and she ensured N got those resources, although she also recalled N being discussed at some School-based meetings.

131. Ms. LeCocq said she determined N's level of achievement by observation of N through his daily work, tests, etc.

132. Ms. Cormier stated that school is only one aspect of a student's life and that grade levels are not reliable; but, through observation, she can determine whether a student is behind his peers or is progressing and she does not require a psychoeducational assessment to do this. Ms. Cormier testified the School will provide whatever is necessary to assist a student to progress, e.g., resources, a psychoeducational assessment, etc. In her experience, many times, such assessments simply confirm what she already knew.

133. Ms. Cormier testified the WRAT test is not definitive, it depicts one point in time, and results can be skewed for many different reasons depending on the day.

134. N's resources included 2 TA's in the class, a trained Learning Buddy 2 x 1/2 hour weekly

to read to or have N read and work on decoding skills, etc. The Learning Buddy would come back to Ms. Cormier's class at end of the session to report what N accomplished and what N had left to be done and get her ideas. At the time of testifying which was September 11, 2002, Ms. Cormier did not have a specific recollection of the name of N's Learning Buddy. N had an adapted language arts program. Ms. Cormier testified she first worked with N to identify his needs through observation, determine his abilities and his weaknesses and work on those, and for this, she did not need a grade level to teach N and that, although she has had students with similar disabilities to N's, each student is different and requires individualized resources.

135. Although on the day Ms. Cormier testified, she could not recall a specific conversation she had with Ms. LeCocq concerning N, her evidence was that Ms. LeCocq was in her class room continually throughout most of N's grade 6 year and they spoke often and she was certain they spoke of N's needs for resources which Ms. LeCocq and others, such as the TA's, helped her to provide.

136. Ms. Cormier testified that, to increase N's reading level they encouraged reading at home and at school, letting N read whatever he found interesting and she provided books for N to read and did not receive comments from home or N complaining the books were too difficult, etc. If N's parents had asked to meet with her, Mrs. Cormier said she would have done so to address their concerns as she has an "open door policy". If N's parents had asked for changes, Ms. Cormier said she would have called in the team and collaborated as she consulted everyone, including the parents, to provide appropriate learning opportunities for N. Ms. Cormier testified she used appropriate resources for N and met N's needs.

137. Ms. Cormier testified she gave home work every night except weekends and N had the ability to write down his home work and she could not excuse him for not doing so because of his mental disability as he could take responsibility for that every night, which she tried to get N to do, and she asked the TA's to help her monitor this, and she told N's parents. Also, she testified she stayed after school and either N or N's parents could have called her or others for home work or N could have done some home work before school in the mornings. N's parents did not call Ms. Cormier for N's home work nor did they, or N, advise her that N's homework

was illegible. It is noted in the grade 6 Progress Report- First term, Ex.R-1, Tab 11, p. 20, Ms. Cormier wrote that N was to take careful attention to copying down his lessons every night. Ms. Cormier qualified her comment that N is slipping which she wrote in N's Agenda, Ex. C-32, on November 26, 1998 to refer to the fact that he was "slipping academically".

138. Ms. Cormier testified, for misbehaving students, she would take them into the hall and speak to them quietly and that usually worked. She also posted classroom rules. The teachers and administrators who testified and had first-hand knowledge of Ms. Cormier's classroom described it as organized, a positive learning environment in which Ms. Cormier was in control of the class despite the number of students on special education programs and the resources required for them, some of which were not in the classroom.

139. The complainant testified she knew N was receiving resources from Mr. Menchions and Mrs. Bellamy, but did not know Ms. LeCocq and that she had met N's Learning Buddy coincidentally.

140. Ms. LeCocq's evidence was that there was a change in the view that spelling be taught as a separate subject as now the more prevalent view is to take a more holistic approach as spelling is incorporated into writing and they do not use grade levels because these do not give an accurate view. Ms. LeCocq said she agreed with the role set out in the New Brunswick Department of Education *Best Practices for Inclusion*, May, 1994, Ex. R-1, Tab 20, for Method & Resource teachers as providing primary collaborative, consultative support to the class room teacher. Ms. LeCocq said she used pre and post reading strategies and certain other techniques. Ms. LeCocq said tutoring was available for N either at lunch or after school and that the Agenda is for the student, parent and teacher to be able to understand it and, if every single mistake is corrected, the student forms the opinion that all of their work is bad and may shut down which would hinder language development and writing skills. Ms. LeCocq provided her students with a language arts journal in which she did not correct spelling and saw no problems with what N wrote and, to promote N's creativity, she would not correct N's spelling. Ms. LeCocq said N was pulled out of class 2 to 3 times per week for various subjects. N did not come up at Penguin meeting for behaviour problems as N behaved appropriately at School and she did not see any

anger management issues with N. The Penguin team did discuss resources for N.

141. Ms. LeCocq stated she attended monthly district meetings with Terrence King to collaborate and network on the different strategies required for students with exceptionalities, such as pull-outs, other resources, etc.

142. Ms. LeCocq did not get requests from N's parents for any communication with them.

143. It is noted that when, on October 27, 1998, the complainant wrote "please verify home-work before N leaves." in N's Agenda, Ex. C-32, Ms. Cormier's response was "I will try" and then the complainant writes on October 30, "Please do not keep him after school I can't pick up and it's too far for him to walk". Ms. Cormier testified she used the Agenda to communicate with N's parents, which is evident in the various notes she made in the Agenda and, other than the Parent Teacher Meetings and the hallway chats described above, the complainant did not contact her before she signed the IRP on November 24, 1998. On December 3, 1998, Ms. Cormier wrote to ask the complainant to meet with her as N's home work was not being done, Ex. C-32, and estimated she met 4 or 5 times with N's parents. As to the December 4 entry re N getting wet, Ms. Cormier explained she's a parent of three boys and N was typical in not staying out of a big puddle at the back of the school ground.

144. On December 16, 1998, Ms. Cormier stated the author of "N got this finished - he missed an math activity period to get caught up" was Sandra Steeves, a teacher's assistant who provided additional resources to her class, including N.

145. Ms. Cormier stated the complainant asked her one day, estimating it was approximately December, 1998, when she was at the lockers, what she thought of Landmark, to which Ms. Cormier replied that it was a school for the severe learning disabled and very expensive and that she had limited knowledge and she did not know if N would qualify. The complainant told her that she knew of a someone in Saint John who had their child attend there and they were satisfied. The complainant did not otherwise discuss enrolling N at Landmark with Ms. Cormier.

146. In N's Grade 6 Progress Report, Ms. Cormier wrote the following in the Teacher's Comments, Ex. R-1, Tab 11, p.12:

First term-

N is a well behaved young man He has to work hard in all aspects of school work. In order to gain strength N is on an altered spelling and reading program, has a parent-volunteer leading partner, and receives resource help His work is very difficult to read-I would like him to always take time to do his neatest handwork Careful attention must be made for copying down all his lessons every night Good work N on S St Poster

Second Tem-[this term extends between approximately December, 1998 until March, 1999 according to Ms. Branscombe.]

N is a cooperative and well behaved student who tries hard in class I thank you for your concern and involvement m his progress. The lower marks this term are a result of the difficult period after Christmas which resulted in instruction time being lost N is working hard to catch up Your support m monitoring all school assignments is appreciated Science project work was very good, lower L. A. mark reflects effort on reading journal entries Keep up your effort N

Third Term-

I have enjoyed working with N this year His attendance at summer enhancement camp will help prepare him for success at the next grade level Have a safe and happy summer.

147 Ms. Cormier explained that N was below grade level, especially in the 2nd term. In the 2nd term, for achievement, N's grades were ED or S- in every subject except Science, Art and Physical Education and he was commended on his Science project. These grades and the accompanying comments indicate he is struggling and having some difficulties, referring to lost instruction time after Christmas. Under "growth as an individual", his effort marks are satisfactory or above for "works and plays well with others", "uses time efficiently", "demonstrates self control" and "courteous". Overall for Language Arts, the progress report indicates his grade is S-, but Ms. Cormier explained that language Arts also includes public speaking, comprehension, etc. She said on the Progress Report S- means borderline, lowest end of satisfactory, which semantically is close to "Needs Improvement", and the complainant did not ask her what these meant.

148. In January, 1999, the complainant's evidence was that N would not go to school and kept

the family up all night kicking the walls, screaming and terrorising them at home. They were trying to get him admitted to hospital. Dr Bakht prescribed anxiety medication. The complainant alleged this was partly triggered by separation anxiety in N not wanting to separate from her and go to school. She denied she spoke to N about attending Landmark at this time or even that N may have overheard a conversation at home on this. N missed approximately 17 to 20 days of school in January, 1999. Upon N's return to school, Ms. LeCocq testified she spoke to N. As N had told Ms. LeCocq he liked to go to school, Ms. LeCocq did not know what to do. The Penguin team, of which she was a part, referred N to the School-based team which referred N to the School psychologist, with the referral form including the names of Ms. Dea, Dr Bakht, Dr. Yule and Dr. Stoddard, Ex. R-27n, and on which Ms. Cormier is noted to have made the referral on January 12, 1999. Ms. Branscombe testified she organized a meeting of the School-based team and the parents to devise a plan to put resources in place to facilitate N's return to school and to ensure his absence would have minimal impact on his school work, despite Ms. Branscombe not being able to find a specific reference to N in the minutes of the School-based team meetings that she could find. Ms. Branscombe testified the School-based team monitored N and N got the resources he needed, e.g., a psychologist, Dr. Cyr, the guidance counsellor, Heather Synder and the Social Worker, Gail Wright, etc. Ms. Branscombe wrote to the School Superintendent on February 2, 2000, Ex. R-1, Tab 11, p.13, that:

During the month of January 1999, N became a problem at home for his parents... he would refuse to come to school and on several occasions, ...it would be necessary to assist [N's father and the complainant] with this problem. The Social Worker assigned to our school, Gail Wright, was asked by our team to support the family by going out to the car, and helping N come in to the school. She would then meet with him before he went to class...

149. From all accounts, N was eased back to school gradually. At first, Ms. Cormier prepared his work which N did in a reading room with a resource teacher, assisted by the guidance counsellor at times, as per Ms. Cormier's evidence. N returned to class without incident. Mrs. Geneau stated she was in the office one morning and learned that N was in his parents' van. She went out to the van and talked to N who told her he did not want to go to school. She just talked to N and he walked into the School with her. Mrs. Geneau said it was the first time she had heard N say he did not want to go to school.

150. The psychologist, Dr Cyr, noted, in his file, Ex. R-27k, it was reported to him that for the past 2 weeks, (no date on file entry), N was angry all the time and tired and the note says "can't control". The only file entry that was dated by Dr. Cyr was February 2, 1999 which stated a conference was planned for later that day, that N indicated everything was good for the last two weeks, and the teacher saying major problems in the last two weeks, but good in class today. Dr Cyr had left messages for Dr. Bakht and the parents to contact him. The teacher reported that N did not want to see Dr Cyr and consequently made himself sick, Ex. R-27k Ms. Cormier recalled a School-based team meeting with Dr Cyr, Gail Wright and the complainant as well as others. Dr. Cyr testified N suffered stomach cramps as a side effect from the risperdal prescribed by Dr. Bakht.

151. On January 17, 1999, the complainant wrote to Ms. Cormier that N was having tests and Dr. Bakht put N back on the medication dosage Dr, Yule had put him on and they would wait and see if N gets better ..."N is looking forward to going to school Monday." ..."I also wanted you to know that it wasn't the total daily dosage that had been changing every 5 weeks. It was different dosages at different times during the day.", Ex. R-1, Tab 11, p.30.

152. Also, it is noted the complainant wrote, on January 24, 1999, Ex. R-27o, to Ms. Cormier as follows.

Mrs. Cormier

N has been seen 3 times by Doctors in the last 2 weeks N's blood tests came back OK

We were told that N is experiencing panick attacks. Which would explain the inability to stop crying m the morning, feeling week (sic) and also feeling short of breath

Dr Bakht has prescribed something temporarily for the mornings to help N get back on track

As for the stomach cramps, they are a side effect from the risperdal which he started taking a few months ago

N will only be taking the Ritalin daily along with the anxiety medication (temporarily)

There will be a 10 mg tablet of Ritalin m N's lunch bag everyday for him to take at lunch time

Thanks
[B.C.]

153. The complainant testified that N reintegrated into school so there was no need for him to be hospitalized and N's behaviour was appropriate at school and she did not tell the School of the problems they were having at home as she said these would not concern them.

154. Ms. Cormier's evidence was that the note Mrs. Amos, one of the TA's in her class, wrote on January 29, 1999 "N had a great day" and that she was proud of him, having spent first class in the room off the office and the rest of the day, in class and, as well, Mrs. Amos was also identified as the initials in N's Agenda on February 3, 1999, Ex. C-32. According to Ms. Branscombe, the TA's did help N. On March 11, 1999, Ms. Cormier wrote "see envelope" referring to the letter with respect to a pull-out with Ms. LeCocq, signed by Ms. Branscombe, Ex R-1, Tab 11, p. 22.

155. In response to the complainant's January 29, 1999 letter to her MLA Hon. J. Lockyer, requesting funding for Landmark, Hon. B Richard, the then Minister of Education, replied on February 23, 1999 advising funding is no longer provided for students to attend schools such as Landmark and, for the last several years, extra funding is provided for children with learning disabilities through the Excellence in Education Initiatives and that she should contact Terry King, Supervisor of Resource Services in District 2, Ex. R-1, Tab 40, which the complainant admitted she did not do.

156. In February, 1999, the complainant's evidence was that she went ahead with N's enrollment at Landmark, regardless of whether anyone would help them.

157. On February 2, 1999, Dr. Bakht referred N to Mental Health for ADHD and Oppositional Defiance Disorder and noted that N had gone out of control and was physically aggressive towards his parents who could not cope with him and stated there were no resources at home and the change of medication was not helping, Ex. R-8.

158. On February 8, 1999, Ms. Cormier wrote in the Agenda "see envelope from Mrs. Wright". Ms. Branscombe explained that the Agenda note referred to Mrs. Wright who was the

School Social Worker who sent literature home to the parents to assist N's family at home. Ms. Cormier stated that Ms. Wright did have contact with N's family. On February 9, 1999, Ms. Cormier wrote in the Agenda "Reading Journal must be done 4 nights a week and passed in on Fridays. I don't believe N has passed in one for the last 4 weeks. Remember to bring Val. invitation (N says he couldn't finish as the computer at home was being used)", Ex. C-32.

159. On February 14, 1999, Ex. R-27e.1, the complainant wrote the following:

Mrs. Cormier
Gail Wright
Dr Cyr

N was very sick with a sore throat this week, that is why he did not go to school Wed-Fri.

We also had made trips to Doctor Bakht's office, Monday, Wednesday and Friday

N is not taking the anxiety medication anymore

Dr Bakht has put N back on risperdal. Things are much better at home with N being on risperdal. But this we think is the medication that caused N to have the anxiety (and cramps), this is a no win situation

Just to let you know, the Doctor has prepared the necessary forms to have N admitted to the hospital if the situations escalates to the point we were at recently.

I know it must be difficult and hard for you to understand what's going on because unless you actually are living with and raising a child with the kind of problems N has, all you can do is try to understand.

N 's dosage now-
.5 Risperdal am
20 mg sr Ritalin am
10 mg Ritalin noon
10 mg Ritalin 4 pm
5 mg Risperdal 6 pm

Sincerely
[B.C.]

160. On February 15, 1999, Ms. Cormier wrote "Thanks for the note. I have passed it on to Dr Cyr.", Ex. C-32.

161. On February 22, 1999, Ms. Cormier testified she had the Request for Student Services

Form prepared to request anger management for Nat the behest of N 's parents, Ex. R-1, Tab 11, p. 21. The form was signed by her, the complainant and Ms. Branscombe, and sets out: "concerns with anger management and behaviour - provide support to N and family" and in the section to be completed by the parent, the complainant wrote "N needs to have help and encouragement from his teacher. N is under a specialist's care. N is ADHD with learning disabilities..." The Specialist is filled in as "Dr. Bakht", Ex. R-1, Tab 11, p. 21.

162. As to School-based team meetings, Ms. LeCocq recalled speaking to Dr Cyr about N and other professionals involved with N at a School-based team meeting. Neither Ms. LeCocq nor Ms. Branscombe could explain why they could not find minutes of these meetings with N's name in them.

163. In March, 1999, Ms. LeCocq, who left on maternity leave, was replaced by Todd Smith and Ms. LeCocq said she met with him 2 days before she left to brief him. Although Terrence King's evidence was that Ms. LeCocq was replaced by Jennifer Brown, those witnesses who were at the School testified that Todd Smith replaced Ms. LeCocq and Mr. Smith's Resume, Ex R-1, Tab 1, c, is consistent with this.

164. The complainant stated a form was mailed to the Lewisville Middle School by Landmark. On March 9, 1999, Ms. Cormier testified she filled out this form on which she noted N was struggling, was weak in certain areas and was below grade level, referencing the lost instruction time after Christmas, Ex. R-1, Tab 6. She informed them of some resources he received as well as the referral to the School-based team and the parents' request for anger management strategies. Although Ms. Cormier did complete the form, the complainant did not contact her with respect to this form at any time.

165. By correspondence dated March 11, 1999, Ms. LeCocq's intense resource plan for N for a 2 week power pack for Language Arts and Math is set out, and she assigned homework on work sheets when the student did not finish in class, Ex. R-1, Tab 1 1, p. 22. The March, 1999 pull-out involved approximately six to nine students the entire day.

166. Ms. LeCocq said she would not describe N as manipulative as she did not see this conduct in N and did not agree with Dr. Cyr's February 2, 1999 note to this effect, Ex. R-27p.

167. According to Ms. LeCocq, as to why she had written on March 23, 1999 in N's Agenda, Ex. C-32, that this was the 3rd out of 4" day N did not have his homework done, that he had detention on Thursday and that he had refused to participate in math class that day, she could not recall it specifically. It is noted that just beside Ms. LeCocq's entry are the initials "BC" as shown also on the March 22, 1999 entry, both in red pen; yet, on the next day March 24, 1999 is an additional entry in blue pen which purports to be written by the complainant which suggests that it is "probably hard for you to understand N" and suggests that Ms. LeCocq be "positive with him and he will adjust and cooperate easier" with the complainant's initials at the end. It is noted that this purports to be written the same day as the note from the complainant in the Cum Card, R-1, Tab 11 p 25, in which she states that:

I have been working with the school and Doctors trying to help N as much as possible.
If things do not improve with N's progress we will be sending him to Landmark East
private school for ADHD LD students

with the complainant's noting on the form "NO" to a "Request for a meeting with the teacher" which Mr. VanBuskirk submitted was the complainant's written notice to the respondents of contemplated enrollment of N at Landmark; as otherwise, the complainant admits she did not consult with the teacher or administration before the said enrollment. The complainant admitted she did not advise the School she registered N at Landmark, except one day she happened to meet Ms. Warren, a resource teacher, and mentioned it to Ms. Warren who responded that it was a great school and wished her good luck. The complainant could not provide details of the work to which she was referring in her "working with the school..." comment, Ex. R-1 Tab 11 p. 25.

168. Ms. Cormier testified she continually checked on N in the last term, to ensure that he was not frustrated because of his absence from school, as she was concerned N might have felt embarrassed by his absence from school and she took measures to assist with N's return. Ms. Cormier also expressed that she was sensitive to the fact that "students in grade 6 do not like to be singled out from their peers... and ...want to be treated like the rest"; while she maintained that she recognized that N had special needs that had to be accommodated. She would try a certain

strategy and, if it did not work, she would try another, monitoring and offering alternate strategies, as necessary.

169. Ms. Cormier testified that, on April 27, 1999, she wrote "N was able to work with resource teacher for 1 period to try to catch up on math", on April 29, 1999 she wrote "250 No home work tonight" as she said this was a reward for good effort and, similarly on May 3, 1999, she wrote "Good effort on book talk". Ms. Cormier testified that, generally, N attempted his home work but usually did not finish it, also that N had spent 2 or 3 hours in one evening on a project he was directed to do over time, although she reminded N not to leave it until the last minute, that happened with N, which was unnecessary. Ms. Cormier told N's parents to have N do what he could at home and it was ok not to finish and the complainant said to her "... you have no idea what it's like living at home with N" with the complainant referring to N 's younger brother who was going through school with relative ease.

170. In April, 1999, according to the evidence of the complainant, she took N to Landmark for a visit.

171. On August 8, 1999, the complainant wrote to Dr. Bakht, Ex. R-7, explaining there was no government funding for Landmark, requesting a recommendation that N needed to attend there, and, at the top of Ex. R-7, the complainant hand-wrote that Dr. Bakht refused to recommend that N should attend Landmark, stating N should attend the Wesleyan Academy, a private, day school in Moncton. In her evidence, the complainant described that she went to his office and stood in the doorway on approximately September 24, 1999 and later she went back and brought someone with her, a former co-worker, as she thought he could "straighten it out" and the co-worker tried to persuade Dr. Bakht to refer N to Landmark and Dr. Bakht agreed to get back to her and 2 days later, she got a call from Dr. Bakht's office saying he would not recommend N for Landmark and she denied threatening Dr. Bakht.

172. Ms. Cormier's evidence was that, where appropriate, she followed Ms. Dea's recommendations such as the trained Learning Buddy, assigning groups for reading, daily silent reading, assigning daily reading at home, parents to initial home work daily, class discussions on what

was read, students required to read in class, students encouraged to have dictionaries, parents could proofread student's work or use spell check on computer, spelling rules taught and in the Agenda, Ex. C-32, pg 98, adapted spelling, guidance counsellor taught organizational skills, taped home work could be requested on the School's tape recorders, use of semantic mapping, the math book with examples on the other side of a page, mapping strategies used, oral testing used, exercises repeated, math rules taught and were in the back of Agenda, Ex. C-32, pg 100, math taught using subvocalization, mnemonic strategies taught, cognitive strategies used, use of Agenda encouraged, N seated where least distractions, eye contact maintained, posters used to reinforce subjects, extra teaching time offered, extra time to complete work, colour coding used at times; with other accommodations, e.g., staying later to write home work down or providing extra set of books, available if requested, but were not.

173. As to correcting N's Agenda, Ms. Cormier commented that the home could have corrected it, but, to her, there were other, more important needs for N.

174. With respect to the black book note, Ex. C-7, Ms. Cormier did not recall it until it was shown to her and then she identified her hand-writing in an entry and stated that, if the complainant had wanted her to continue to use this, it should have been brought back to her with such comments and she would have used it and noted the complainant had only made a couple of entries in it herself.

175. With respect to counselling, Ms. Cormier stated N was not a behaviour problem at School, except when N had difficulty attending school, he saw the school psychologist, guidance counsellor and social worker, and, other than that, she did not observe N as one who needed counselling or a specific behaviour program and, in any event, the complainant did not request this; otherwise counselling was available to N anytime through the guidance counsellor. Ms. Branscombe gave similar testimony stating that, even though Dr. Cyr had left the School, resources continued for N as required.

176. Ms. Cormier testified she walked around her classroom, providing assistance to students and when she saw N struggling, she gave him extra help immediately as she said there are many

versatile methods to accomplish teaching tasks. She also stated what she wrote was accurate, that N had made gains in grade 6 and that other students had greater needs than did N, whom she estimated to be about middle of the class in the amount of needs he had compared to the others in the class and she did not consider that N needed a special institution.

177. The complainant explained she did not want the School to give N his medication so as to not single N out.

178. As to N's writing samples, e.g., Ex.C-41-43, there were no witnesses who could testify as to these sheets, e.g., having given them to N to complete or having marked them, etc. and the evidence of the teachers and Ms. Branscombe was that, basically, a small sample of N's work does not give an accurate indication, as not every student is at the same level every day and N's portfolio of work would be required, which Ms. Branscombe could not find. Also, Ms. Branscombe's evidence was that general statements, such as those on Ex. C-33-35, are not curriculum-based and depend on the individual student. Ms. Branscombe's evidence was that the School was aware of N's needs and all worked together to meet those needs with the required resources, services and referrals provided to N based on what was seen as being N's needs by observing him day-to-day and said N's parents could have requested further resources for N or a meeting at any time with anyone at the School to discuss same, but did not do so.

179. The complainant alleged that Ms. Cormier screamed at a child, threw a book at another child and shoved N into his desk but she had no specifics such as names, etc. of these allegations and also alleged Ms. Cormier caused red marks on N's belly, but she did nothing about this.

180. During the summer, 1999, the complainant's evidence was that she took N to the Summer Enhancement Program "...recommended by Mrs. Cormier and the team"...which was to help students build on their Math and Language Arts, as well as social skills, and was cost-free.

181. In September, 1999, N started attending grade 7 at Landmark which is a not-for-profit school in Wolfville, Nova Scotia and, for more than 20 years, has specialized in educating students with ADHD and learning disabilities and, according to the evidence of the complainant,

costs approximately \$20,000 per year, although the Landmark Brochure sets out Tuition and Boarding Fees for 7 days/ week as \$21,880 for Middle School Completion Program, Ex. C-9, as well as a number of other fees. N was tested by the Landmark Standardized Testing, in September, 1999, Ex. R-9, and the grade equivalencies indicated that N scored mainly at the grade 5 level except spelling, with one score being 6.6. Marlene Barkhouse, a teacher at Landmark, stated, similar to the caution on Ex. R-9, it is often not correct to draw conclusions based on grade equivalencies, a view with which all experts agreed.

182. According to the testimony of Katherine Levine, Landmark would have had the same test results expressed in percentiles and standard scores and, as these were not provided, she was unable to draw any conclusions with respect to N's performance versus his ability as these test results could well have been in the average range (except for spelling) or comparable to N's intellectual ability. Ms. Levine testified that, in any event, one requires a formal Ability Achievement Discrepancy Analysis ("AADA") to establish a discrepancy between ability and academic achievement which, she said, she could find no evidence of having been conducted on N.

183. None of the expert witnesses recommended that N attend Landmark, despite requests for same, e.g., Ex. R-6, R-7, although Dr. Evans and Mr. Lamrock basically said, because N was at Landmark at the time and achieving success, they would recommend N continue there. Dr. Stoddard wrote Dr. Evans on November 12, 1999, Ex. C-27, that he had formed the opinion that N had attention deficit syndrome "all related to behavioural problems at school" when the evidence is to the contrary that N did not have behavioural problems at school, rather N's behavioural problems were at home. Also Dr. Stoddard's comments that N "...had the usual problems with teachers and other children" is not supported by the evidence which was to the contrary. Following this, on Ex. C-27, Dr. Stoddard says he felt that N "might benefit" in attending Landmark and, after he reviewed N's report card from Landmark stated, that it had been a good decision. From review of the information from Landmark, N was successful there.

184. The experts including Mr. Lamrock set out that the public education system can offer the services required to accommodate N's special needs.

185. On December 13 (sic), 1999, N's parents wrote the then Minister of Education Elvy Robichaud who replied to them on December 8, 1999 noting "several years ago, Department of Education withdrew financial support for students at Landmark", Ex. C-14 and Ex. R-1, Tab 39b, and the Province of New Brunswick supported the philosophy of inclusion for exceptional students into the regular school system and recognized the unique needs of children with learning disabilities within this model.

186. On December 13, 1999, Ex. R-1, Tab 39d, the complainant wrote to the Hon. Claudette Bradshaw, MP, who replied on December 16, 1999, Ex. R-1, Tab 39c by correspondence to Minister of Education Robichaud, who replied by forwarding a copy of his December 8, 1999 correspondence, R-1, Tab 39b, on January 6, 2000, Ex.R-1, Tab 39a.

187. By way of background, since approximately the mid-1990's, the Province of New Brunswick has had a policy of inclusiveness within the public education system, which is to basically assign all students to the regular classroom and provide the resources necessary to enable each student to learn appropriately. The historical background for this policy was explained in the evidence of Gordon Porter, formerly a Director of Student Services for School Districts 10, 12 & 13 for over 20 years, etc. and an expert in special education, Ex. R-16, now a professor at the University of Maine. Although there was an objection to Mr. Porter testifying as he had been appointed to the New Brunswick Human Rights Commission in August, 2001, it was ruled he could testify as he was appointed after the Commission had directly dealt with this Complaint and he had no personal knowledge of this Complaint and his evidence was solely for the purpose of explaining the development of the move to inclusiveness in the public education system As is set out by Dennis Cochrane, the then Superintendent of Schools for District 8, in correspondence to a Mis. P (name blacked out), R-1, Tab 41, dated February 26, 1998:

In 1980 New Brunswick entered into an agreement with the other Atlantic provinces establishing procedures for school districts to apply for funds for residential schooling for students with severe learning disabilities. The Atlantic Provinces Special Education Authority (APSEA) agreed to act as the supervisory body for the agreement. However, both Newfoundland and P.E I withdrew in the late 80's or early 90's. Nova Scotia and New Brunswick terminated their agreements in 1995. The province had two students at Landmark East when the decision was made and continued to fund then attendance until

1996. However, no new applications were accepted starting in the 1995-96 school year.

New Brunswick and Nova Scotia both felt too much money was being spent on too few students. In 1991 the Excellence in Education initiative provided additional funding for program support for students with learning disabilities. The funding spent on residential schooling has also been redirected to the districts. Presently, through Excellence in Education Learning Disabilities Initiatives and the Special Needs budget we are now able to provide a variety of services to learning disabled students. Services that are utilized take the form of resource and method teachers, tutorial programs, teacher assistant support, and technology support both in hardware and software programs.

In our present system, learning is organized for all students based on their individual needs. We are confident that through serving LD students within their community schools and using a variety of services available to them, we are providing the most enabling environment for their social and educational growth.

188. By correspondence dated July 23, 1998, the then Minister of Education, Bernard Richard, wrote to Millie LeBlanc, President, Learning Disabilities Association of New Brunswick, Ex. R-1 Tab 36:

School districts and schools are provided with special education funding as well as with money targeted for learning disabilities. These funds are expected to be used to provide assessment services, adaptive and remedial programs, assistive technology when appropriate, and various materials and resources for learning disabled students. It is expected that schools, through their student services teams, will appropriately identify students with learning disabilities and provide the appropriate interventions in order to assist these students with their difficulties.

189. On February 22, 1996, the then Minister of Education James E. Lockyer wrote to School District 2 setting out the following, Ex. R-1, Tab 45:

...I will state that once our commitment to supporting students attendance at Landmark East is complete in 1997, these funds will be made available to school districts for the purpose of providing further assistance to students who have identified learning disabilities. This is a recognition of the support required for school districts to meet the diverse needs of children with this disability.

190. The complainant signed this Complaint Form, Ex. C-1, on January 24, 2000, noting the respondents' names as the Province of New Brunswick Department of Education. Elvy Robichaud (Minister) and NB School District # 2 Jim Stevenson Superintendent and setting out the period of discrimination as "February 1998 to present". There is no evidence the complainant followed the appeal process as described in the New Brunswick *Education Act*, Ex. R-1, Tab. 66

nor any evidence this was brought to her attention.

191. In May, 2000, Dr. Evans, a Child and Adolescent Psychiatrist who was treating N at Landmark, prescribed additional medication for N as N needed more medication at night, according to the complainant's evidence.

192. In June 2000, N was retested by Landmark with their Standardized Testing, Ex. R-9, and the grade equivalencies indicated that N scored in the range of grade 6, with some fluctuations.

193. In September, 2000, N was enrolled again at Landmark in Grade 8.

194. In correspondence from Christian Whalen of Department of Education to Carl White of the Human Rights Commission dated November 3, 2000, the Department states its view that N can succeed within the public school system and welcomes an opportunity to meet N's parents to set up a special education plan, Ex. R-1, Tab 53.

195. On November 29, 2000, the respondents prepared a Special Education Plan for N, Ex. R-1, Tab 2, for his return in January, 2001, which was discussed at the meeting with the complainant and Mr. White and offered a lengthy list of items and, according to Terrence King, the offer of more resources was open-ended as one of the fundamental principles is collaboration with parents, etc. in order for the SEP to be properly adapted to N's needs, although the respondents refused to pay for private residential schooling in another province. Robert Gérard stressed that it was critically important that the parents and the District collaborate and communicate openly with each other in a relationship based on trust. Mr. King's evidence was that he took the complainant to 2 alternative learning centres in the District, but she refused to see a 3rd one, saying that, if the respondents could not offer "one-on-one", then they could not provide the same services as Landmark and she would not consider any of the programs or placements the respondents had to offer.

196. According to the evidence of Ms. Levine, a child's intelligence is only one predictor of success in school! and that other factors that contribute to positive academic achievement in

school include such factors as social functioning, emotional functioning, behaviour, anxiety, stress, motivation, interest, "personality, and also correlating to success in school are such factors as birth order, early childhood stimulation, being read to, being spoken to, the kind of toys with which a child plays, structured play or creative play, certain parenting skills, the mother's educational level, stability of the family unit, mental health of family, alcoholism in the home, depression in the mother, parental attitude and concern with education, participation of the parents in the child's education, certain teaching styles in the classroom affect children differently, a child's attention capacity, etc. and she stressed that this list was not exhaustive.

197. Robert Gérard, the Assistant Director of Educational Programs and Services Branch of English language services with the Department of Education, testified he is responsible for student services including special education services. With respect to comments from Robert Gérard that N's academic needs were not met, this view was generally in reference to specific definitions of meeting a student's needs as suggested by Mr. VanBuskirk and, in any event, such responses were not based on the facts outlined herein. Mr., Gérard testified there were other services which could have been provided to meet N's needs. Mr. Gérard stated that the public education system could meet N's needs and that he has worked with many parents to ensure appropriate resources were put in place to meet special needs and was willing to do everything possible to see that this was done for N. Ms. McClellan testified she found no delay in the provision of resources to N.

198. With respect to N's disability, Arthur Lamrock, consulting psychologist declared an expert in the assessment of mental disorders and the teaching of children with attention-deficit/hyperactivity disorder (ADHD) and attention disorders and learning disorders, testified, that he was the Supervisor of Student Services for many years with School District 18 with the responsibility for administration and program development for exceptional students and amended his Curriculum Vitae, Ex. C-23, to reflect his many years in this position until June, 1996, At the request of the complainant, Mr. Lamrock had conducted testing of N, which lasted over 8 hours over 3 different days during times when N had taken his medication and also when N had not taken his medication. Mr. Lamrock found that N had an attention disorder, but did not find that N had a learning disability. In his November, 2001 report, Ex. C-26, Mr. Lamrock concluded that

"N's overall intellectual functioning falls toward the lower end of the average range...", Ex, C-26, page 4 and at page 5, that "N is a 14 year old grade nine student with average overall intellectual functioning and generally commensurate academic skills. [N's] "...behaviour meets the Diagnostic Statistical Manual IV (DSM-IV) criteria for Attention Deficit/Hyperactivity Disorder (AD/HD), Combined Type, and while these behaviours are reduced with his current level of medication, some residual affects do persist"...and that N would continue to require his medication and that it seemed prudent to recommend that, as N has achieved success at Landmark, N continue there, Ex. C-26, p.6.

199. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed, or DSM-IV cited in the complainant's Book of Authorities, Tab 51, recognizes ADHD as a mental disorder. The respondents admit that N has an attention disorder and that they have a duty to make a reasonable accommodation for N's mental disability and take the position that they satisfied that duty and argue that the complainant retains the burden of proof in this matter to prove otherwise.

III. RELIEF SOUGHT

200. The Human Rights Commission submitted the complainant should receive a declaration that N has been discriminated against, special damages for the costs of the psychoeducational assessment of N, Ex. C-6, and basically N's tuition fees and all other costs incurred associated with N's attendance at Landmark, as well as those associated with the completion of N's education at Landmark, based on a finding that the respondents are unable to accommodate N within the system, and, in the alternative, an order that the respondents accommodate N in the system by consulting with Dr. Evans and abiding by his recommendations and providing the required resources to meet N's needs on a trial basis and, should it be determined that N's needs are not able to be met and that N is not accommodated, an order for special damages for the all costs associated with the completion of N's education at Landmark and an order for compensation to the complainant and N for consequential emotional suffering, including that resulting from injury to dignity, feelings or self-respect, as well as pre-judgment and post-judgment interest and such further and other relief as the Board deems appropriate.

IV. LAW

201. The Human Rights Commission cited the following jurisprudential authorities; *Jubran v. North Vancouver School District No. 44* [2002] B.C.H.R.T.D. No. 10; *Ross v. New Brunswick School District No. 15* [1996] 1 S.C.R. 825; *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.* [1985] 2 S.C.R. 536; *Robichaud v. Canada (Treasury Board)* [1987] 2 S.C.R. 84; *Zurich Insurance Co. v. Ontario (Human Rights Commission)* [1992] 2 S.C.R. 321; *Attis v. New Brunswick School Dist. No. 15* (1991), 15 C.H.R.R. D/339 (N.B. Bd.Inq.); *Commission scolaire régionale de Chambly v. Bergevin* [1994] 2 S.C.R. 525; *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817; *Law Society of British Columbia v. Andrews* [1989] 1 S.C.R. 143; *C.N.R. v. Canada (Human Rights Commission)* [1987] 1 S.C.R. 1114; *Parcels v. Red Deer General & Auxiliary Hospital and Nursing Home Dist. No. 15* (1991), 15 C.H.R.R. D/257 (Alta. Bd.Inq.); *Gadowsky v. Two Hills (County) School Committee No. 21* (1980), 1 C.H.R.R. D/184 (Alta. Q.B.); *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497; *Miele v. Famous Players Inc.* [2000] B.C.H.R.T.D. No. 6; *Brock (Litigation Guardian of) v. Tarrant Film Factory Ltd.* [2000] O.H.R.B.I.D. No. 5; *Gibbs v. Battlefords and Dist. Co-operative Ltd.* (1996), 21 C.H.R.R. D/87 (SCC); *McAllister-Windsor v. Canada (Human Resources Development)* [2001] C.H.R.D. No. 4; *Odell v. Toronto Transit Comm. (No. 1)* (2001), 39 C.H.R.R. D/200 (Ont. Bd.Inq.); *MacBean v. Plaster Rock (Village)* [1975] N.B.H.R.B.I.D. No. 2; *Waterman v. National Life Assurance Co. of Canada (No. 2)* (1992), 18 C.H.R.R. D/176 (Ont. Bd.Inq.); *Hendry v. Ontario (Liquor Control Board)* (1980), 1 C.H.R.R. D/160 (Ont. Bd.Inq.); *Regina v. Bushnell Communications Ltd. et al.* (1974), 45 D.L.R. (3d) 218 (Ont. HC); *Ontario (Human Rights Commission) v. Etobicoke (Borough)* [1982] 1 S.C.R. 202; *Holden v. Canadian National Railway* (1990), 14 C.H.R.R. D/12 (FCA); *Horion v. Niagara (Regional Municipality)* (1987), 9 C.H.R.R. D/4611 (Ont. Bd.Inq.); *Canada (Dept. of National Health and Welfare) v. Chancier* (1997), 29 C.H.R.R. D/300 (FCTD); *Shakes v. Rex Pak Limited* (1981), 3 C.H.R.R. D/1001 (Ont. Bd.Inq.); *Basi v. Canadian National Railway Co.* (1988), 9 C.H.R.R. D/5029 (CHRT); *Ewtushik v. Newfoundland (Department of Health)* [1998] N.J. No. 234; *Uzoaba v. Canada (Correctional Service)* (1994), 26 C.H.R.R. D/361; *Lapointe v. Restigouche Health Service Corp.* [1997] N.B.L.A.A. No. 19; *British Columbia (Public Service*

Employee Relations Commission) v. *British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)* [1999] 3 S.C.R. 1; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* [1999] 3 S.C.R. 868; *Turnbull v. Famous Players Inc.* [2001] O.H.R.B.I.D. No 20; *Vlug v. Canadian Broadcasting Corp.* [2000] C.H.R.D. No, 5; *Irvine v. Canada (Canadian Armed Forces)* [2001] C.H.R.D. No. 39; *Vanton v. British Columbia (Council of Human Rights)* (1994), 21 C.H.R.R. D/492 (B.C.S.C.); *Airport Taxicab (Malton) Assn. v. Piazza* (1989), 10 C.H.R.R. D/6347 (Ont. CA); *Canada (Attorney General) v. Morgan* (1991), 21 C.H.R.R. D/87 (FCA); *Foreman v. Via Rail* (1980), 1 C.H.R.R. D/233 (C.H.R.R.T.); *Cameron v. Giorgio & Lim Restaurant* (1993), 21 C.H.R.R. D/79 (NS Bd.Inq.); *Canada (Attorney General) v. McAlpine* (1989), 12 C.H.R.R. D/253 (FCA); *Torres v. Royalty Kitchenware Limited and Guerico* (1982), 3 C.H.R.R. D/858 (Ont. Bd.Inq.); *DeJager v. Canada (Department of National Defence)* (1987), 8 C.H.R.R. D/3963; *Re: Tri-Gil Paving and Construction Ltd.* [1997] N.B.H.R.B.I.D. No. 1; *Cameron v. Net-Gor Castle Nursing Home and Neslon* (1984), 5 C.H.R.R. D/2170 (Ont. Bd.Inq.); *Bell Canada v. Communications, Engery and Paperworkers Union of Canada* [1998] F.C.J. No. 1609; *Naraine v. Ford Motor Co.* [1996] O.H.R.B.I.D. No. 23; *International Longshore & Warehouse Union (Marine Section, Local 400 v. Oster* [2002] 2 F.C. 430 (TD); *Leonardis v. Canada Post Corp.*, [2002] C.H.R.D. No. 24; *Cadillac Fairview Corp. v. Saskatchewan (Human Rights Commission)* [1999] S.J. No. 217; *Anton (Guardian ad litem of) v. British Columbia (Attorney General)* [2002] B.C.J. No. 2258.

202. The Respondents cited the following jurisprudential authorities: *McKinney v. University of Guelph* [1990] 3 S.C.R. 229; *Rombaut v. New Brunswick (Minister of Health and Community Services)* [2001] N.B.J. No. 243; *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143; *Robichaud v. New Brunswick School Board No. 39* [1989] N.B.J. No. 49; *Lewis (Next Friend of) v. York Region Board of Education* [1996] O.H.R.B.I.D. No. 25; *Board Education Hendrick Hudson Central* [1982] SCT-QL 2656; *Eaton v. Brant County Board of Education* [1997] 1 S.C.R. 241; *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. 624; *Enoch v. Ontario (Human Rights Commission)* [1997] O.J. No. 4555; *Riches v. British Columbia (Human Rights Commission)* [1999] B.C.J. No. 2556; *Matheson v. Presbytery of Prince Edward Island* [2001] P.E.I.J. No. 109; *Ayangma v. Prince Edward Island (Human Rights Commission)* [2002] P.E.I.J. No. 20; *Greenwood v. Alberta (Workers Compensation Board)* [2000] A.J. No.

1360; *Nova Scotia (Workers' Compensation Board) v. O'Quinn* [1997] N.S.J. No. 44; *University of British Columbia v. Berg* [1991] B.C.J. No. 3125.

V. ISSUES

203. The issues to be determined in this matter are:

- A) Does N have Attention Deficit Hyperactivity Disorder ("ADHD")
- B) Is ADHD a mental disability pursuant to the New Brunswick *Human Rights Act*?
- C) Is public education a service pursuant to the New Brunswick *Human Rights Act*?
- D) Did the respondents violate section 5 of the New Brunswick *Human Rights Act* by either discriminating against N on the basis of a mental disability or denying N an accommodation, service or facility available to the public on the same basis?
- E) Can the respondents accommodate N's needs within the system?

VI. ANALYSIS

a) Does N have Attention Deficit Hyperactivity Disorder ("ADHD")

204. The facts as set out herein, in particular Mr. Lamrock's findings, indicate that N has ADHD. The documentary evidence indicates that N was diagnosed as suffering from ADHD at an early age and received medication and other treatment for this.

b) Is ADHD a mental disability pursuant to the New Brunswick *Human Rights Act*?

205. Section 2 of the New Brunswick *Human Rights Act* defines "mental disability" as:

- (a) any condition of mental retardation or impairment,

- (b) any learning disability, or dysfunction in one or more of the mental processes involved in the comprehension or use of symbols or spoken language, or
- (c) any mental disorder;

206. The fourth edition of the American Psychiatric Association's Diagnostic and Statistics Manual of Mental Disorders ("DSM-IV) identifies attention-deficit/hyperactivity disorder. The definition of ADHD contained in DSM-IV) states:

A child whose inattention and hyperactivity-impulsivity cause problems may have this disorder. Symptoms appear before the age of 7 years and are inconsistent with the subjects's developmental level and severe enough to impair social or academic functioning.

In the predominantly inattentive type, characteristic symptoms include distractibility difficulty in sustaining attention or following through on instructions in the absence of close supervision, avoidance of tasks that require sustained mental effort, failure to pay close attention to details in schoolwork or other activities, difficulty in organizing activities, not listening to what is being said to him or her, loss of things that are necessary for assignments, and forgetfulness in daily activities.

In the predominantly hyperactive-impulsive type, characteristic symptoms are that the person inappropriately leaves his or her seat in classroom or runs about, fidgets or squirms, has difficulty in engaging in leisure activities quietly, has difficulty in awaiting turn in games, and blurts out answers to questions before they are completed.

The two types maybe combined.

207. Based on the foregoing, it is found that ADHD is a mental disability as defined in section 2 of the New Brunswick *Human Rights Act*.

c) Is public education a service pursuant to the New Brunswick *Human Rights Act*?

208. All parties agreed that the relevant service is a service under the *Human Rights Act*, R.S.N.B. 1973, c. H- 11, s. 5. In *Attis v. New Brunswick School District No. 15* (1991), 15 C.H.R.R. D/339 (N.B. Bd. Inq.), adjudicator Brian Bruce found public education in public schools constitutes a public service and therefore the *Human Rights Act* is applicable to the actions of a school board and its employees.

d) Did the respondents violate section 5 of the New Brunswick *Human Rights Act* by either discriminating against N on the basis of a mental disability or denying N accommodation, service or facility available to the public?

209. The complainant alleges that the respondents discriminated against N pursuant to subsection 5(1) of the New Brunswick *Human Rights Act*, which provides as follows:

5(1) No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall

- (a) deny to any person or class of persons any accommodation, services or facilities available to the public, or
- (b) discriminate against any person or class of persons with respect to any accommodation, services or facilities available to the public,

because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation, or sex.

210. The service which the respondents provide to New Brunswick students is mandated by the New Brunswick *Education Act*, S.N.B. c. E-1.12. With regards to students with disabilities, the *Education Act* provides as follows at sections 11 and 12:

11(1) The superintendent concerned shall determine the placement of pupils in classes, grades, programs, services and schools according to the needs of the pupils and the resources of the school district.

11(2) For the purposes of placement, kindergarten shall be considered the first year of public education.

11(3) The parent of a pupil or an independent pupil may, in accordance with the regulations, appeal a decision made under subsection (1) or section 12 in respect of the placement of the pupil.

11(4) A decision made by a superintendent under subsection (1) shall be made

- (a) subject to any policies or directives of the District Education Council concerned, and
- (b) only with respect to pupils who are enrolled in a school in the school district or who reside in the school district for which the superintendent is appointed or reappointed.

12(1) Where the director of education concerned, after consulting with qualified persons, determines that the behavioural, communicational, intellectual, physical, perceptual or multiple exceptionalities of a person are contributing to delayed educational development such that a special education program is considered by the director of education to be necessary for the person, that person shall be an exceptional pupil for the purposes of this Act.

12(2) The director of education concerned shall ensure that the parent of a pupil is consulted during the process of the determination referred to in subsection (1), and in the process of developing special education programs and services for the pupil.

12(3) The director of education concerned shall place exceptional pupils such that they receive special education programs and services in circumstances where exceptional pupils can participate with pupils who are not exceptional pupils within regular classroom settings to the extent that is considered practicable by the director of education having due regard for the educational needs of all pupils.

12(4) Where an exceptional pupil is not able to receive a special education program or service in a school due to

- (a) fragile health, hospitalization or convalescence, or
- (b) a condition or need which requires a level of care that cannot be provided effectively in a school setting,

the director of education concerned may deliver the program or service in the pupil's home or other alternative setting.

211. The *Education Act* defines "school" in section 1 as "a structured learning environment through which public education is provided to a pupil" and "public education" as those educational programs and educational services extending from kindergarten to graduation from high school, provided by the Minister under this *Act* to persons who are of school age:

212. Justice Jean in an oral decision in *Robichaud v. New Brunswick School Board No. 39* [1989] N.B.J. No 49 speaking on the theme of inclusion which subsection 12(3) of the *Act* mandates, found at page 3:

It provides that a school board shall place exceptional pupils such that they receive special education programs and services in circumstances where exceptional pupils can participate with pupils who are not exceptional pupils. Specifically, exceptional pupils shall be placed within regular classroom settings to the extent that it is considered practicable by the school board having due regard for the educational needs of all pupils. This is the main objective.

213 Writing on similar provisions found in Ontario's *Education Act*, R.S.O. 1990, c. E.2, in *Eaton v. Brant County Board of Education* [1997] 1 S.C.R. 241 Chief Justice Lamar, for a majority of the Supreme Court of Canada held at paragraph 77:

We cannot forget, however, that for a child who is young or unable to communicate his or her needs or wishes, equality rights are being exercised on his or her behalf, usually by the child's parents. Moreover, the requirements for respecting these rights in this setting are decided by adults who have authority over this child. For this reason, the decision-making body must further ensure that its determination of the appropriate accommodation for an exceptional child be from a subjective child-centered perspective, one which attempts to make equality meaningful from the child's point of view as opposed to that of the adults in his or her life. As a means of achieving this aim, it must also determine that the form of accommodation chosen is in the child's best interests.

214. Provinces, such as New Brunswick, have enacted Human Rights Acts to protect and promote the human rights of their citizens. These Acts have traditionally been granted quasi-constitutional status. In *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.* [1985] 2 S.C.R. 536, Justice McIntyre, for the unanimous Supreme Court of Canada writing on the *Ontario Human Rights Code* found at paragraph 12:

It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the *Code* than the narrowest interpretation of the words employed. The accepted rules of construction are flexible enough to enable the Court to recognize in construction of a human rights code the special nature and purpose of the enactment...and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary - and it is for the courts to seek out its purpose and give it effect.

215. Writing on the objectives of the New Brunswick *Human Rights Act*, Brian Bruce for the New Brunswick Board of Inquiry in *Attis* found at paragraph 58:

The general objective of the *Act* is a fundamental one - that of fostering respect and equal treatment for all persons without regard to the individual's race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status or sex .. At the same time, however, in addition to its objective of eliminating discriminatory conduct generally, human rights legislation has identified specific areas in which discriminatory conduct is prohibited. For example, s. 3 of the *Act* prohibits discrimination in the hiring or continuing employment of individuals, s. 5 prohibits discrimination with respect to any accommodation, services, or facilities available to the public...

216. Justice McIntyre, in *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143, after reviewing multiple authorities on the topic, at page 173 found as follows in an attempt to define the concept of discrimination:

I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

As well Justice McIntyre held at page 168:

It is not every distinction or differentiation in treatment at law which will transgress the equality guarantees for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions.

217. In *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497, Justice Iacobucci offered further refinement to the *Andrews* definition of discrimination in the context of an analysis under s. 15(1) of the *Canadian Charter of Human Rights and Freedoms* where he held at paragraphs 51-53:

...It may be said that the purpose of s 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society.

As noted above, one of the difficulties in defining the concepts of "equality" and "discrimination" is the abstract nature of the words and the similarly abstract nature of words used to explain them. No single word or phrase can fully describe the content and purpose of s. 15(1). However, in the articulation of the purpose of s 15(1) just provided on the basis of past cases, a focus is quite properly, placed upon the goal of assuring human dignity by the remedying of discriminatory treatment.

What is human dignity? There can be different conceptions of what human dignity

means. For the purpose of analysis under s 15(1) of the *Charter*, however, the jurisprudence of this Court reflects a specific, albeit non-exhaustive, definition...Human dignity means that an individual or group feels self-respect and self-worth It is concerned with physical and psychological integrity and empowerment Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits It is enhanced by laws which are sensitive to the needs, capacities and merits of different individuals, taking into account the context underlying these differences Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.

218. Discrimination need only be a factor in the respondents' actions, it need not be the governing factor. To that end, Adjudicator R.W. Kerr of the New Brunswick Board of Inquiry held in *MacBean v. Plaster Rock (Village)*, [1975] N.B.H.R.B.I D No. 2 at paragraph 15 as follows:

Since one possible finding is that more than one reason existed for the decision respecting the complainant, one question which arises in this case is whether, for there to be a violation of the *Human Rights Code*, a reason prohibited by that statute must be the sole, or at least the primary reason for the decision A review of the purpose and provisions of the *Human Rights Code* compels the conclusion that it is sufficient to constitute a violation of the *Code* that a prohibited reason was one of the reasons for the decision.

219. The standard of proof for a complaint under the New Brunswick *Human Rights Act* is the ordinary civil standard of proof on the balance of probabilities. Section 20 (6.1) of the *Act* provides:

Where, at the conclusion of an inquiry, the Board does not find, on a balance of probabilities, that a violation of this *Act* has occurred, it shall dismiss the complaint.

220. The onus is on the complainant to establish a prima facie case of discrimination. In *Ontario (Human Rights Commission) & O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 Justice McIntyre of the Supreme Court of Canada at paragraph 28 held the following, concerning a prima facie case and the burden of proof:

To begin with, experience has shown that in the resolution of disputes by the employment of the judicial process, the assignment of a burden of proof to one party or the other is an essential element...But as a practical expedient it has been found necessary, in order to ensure a clear result in any judicial proceeding to have available as a "tie-breaker" the concept of the onus of proof. I agree then with the Board of Inquiry that each case will come down to a question of proof, and therefore there must be a clearly-recognized and clearly-assigned burden of proof in these cases as in all civil proceedings... He who

alleges must prove... Therefore, under the *Etoibicoke* rule as to burden of proof, the showing of a prima facie case of discrimination, I see no reason why it should not apply in cases of adverse effect discrimination. The complainant in proceedings before human rights tribunals must show a prima facie case of discrimination. A prima facie case in this context is one which covers the allegations made, and which, if believed, is complete and sufficient to justify a finding in the Complainant's favour in the absence of an answer from the Respondents.

221 It is clear the complainant has the burden of proof, on the balance of probabilities, to prove a violation of the *Act* has occurred.

222. An inquiry into a complaint of discrimination involves a comparative process. In *Gibbs v. Battlefords and District Co-operative Ltd.*, (1996), 27 C.H.R.R. D/87 at paragraphs 29-30, Justice Sopinka for the Supreme Court of Canada found:

A finding of discrimination based on the imposition of a burden or the withholding of a benefit must be rooted in a comparison of the treatment received by a person with the treatment received by other persons. As McIntyre J stated in *Andrews*, supra at 164 [D/5739, para 41746]:

The concept of equality has long been a feature of Western thought... It is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises.

In my opinion, it is appropriate in the circumstances of the present case to compare the benefits received by the mentally disabled with those received by the physically disabled...

223. The Human Rights Commission submits the appropriate comparator groups are N's classmates; namely, both those who had intellectual abilities similar to those of N but who do not have a disability, and those who had disabilities different than N's form of ADHD. The Human Rights Commission submits that N was not provided the necessary accommodations he required as a student with a mental disability. The respondents refer to a comparison between N and "regular pupils". On the subject of comparator groups in *Granovsky v. Canada*, [2000] 1 S.C.R. 703, Justice Binnie observed at paragraph 47

Such identification has to bear an appropriate relationship between the group selected for comparison and the benefit that constitutes the subject matter of the complaint...

The comparators suggested by the Human Rights Commission have an appropriate relationship to the subject matter of the Complaint considering the nature of the service the respondents provide. For the remainder of this award, this Board will use, as comparator groups, N's classmates who had intellectual abilities similar to those of N but who do not have a disability and N's classmates who had disabilities different than N's form of ADHD and refer to both groups collectively as "classmates".

224. When a student is identified as exceptional by virtue of s.12(1) of the *Education Act*, section 12(3) of this *Act* then requires the respondents to provide "special education programs and services in circumstances where exceptional pupils can participate with pupils who are not exceptional pupils within regular classroom settings" ("necessary accommodations"). The testimony of various witnesses was that, at the relevant times, when a student is identified as being an exceptional student, some form of SEP was used, typically either an IRP or an IEP. Based on the testimony of those commonly charged with providing educational services, an SEP should be more accurately viewed as an outline of the work in progress towards the goal of necessary accommodations that should be provided. The SEP form, in and of itself, is not, conclusive evidence that the respondents provided the necessary accommodations, of more significance, is that the actual resources and services the respondents provided accommodated the student's needs.

225. As indicated earlier, an analysis of a complaint of discrimination under the *Human Rights Act* is a comparative process. Mr. VanBuskirk submitted that N's academic performance was below what would be expected of N compared to his classmates.

226. With regard to the use of standardized testing, the educational professionals who testified at this hearing were essentially unanimous in their opinion that this form of testing is useful as a guide; but, otherwise, it provides insufficient information upon which to reliably evaluate a student's achievement. A common criticism was that standardized testing is only an indication of a performance on that particular test on that particular day. This would indicate that a student's results could be skewed by a number of factors, ranging from having a bad day, or a good day, on the day of that test, etc. For example, the CAT Test, which N took in grade four, is no longer

administered here as, for among other reasons, it is not based on the curriculum.

227. With regard to the use of grade equivalencies, these were also considered to be unreliable, with strong cautions against their use. Such cautions included those contained in Landmark East School Standardized Testing, June 2000, Ex. R-9, which reads in part:

Although the scores are useful for comparing a student's performance with a standardized population, it is often not correct to draw conclusions based on grade equivalent measures.

228. The expert testimony of Ms. Levine was to the effect that the method by which to accurately determine a discrepancy between a student's ability and performance is with the use of AADA testing, which was not conducted in this matter.

229. According to the expert opinions regarding N's achievement, in the circumstances of this matter, the most reliable indicators are his teachers' evaluations based primarily on their day-to-day observations. On reviewing the observations of N's classroom performance, including those contained in his progress reports as well as the testimony of N's grades 5 and 6 teachers and his method and resource teachers and Principal from those years, this review reveals a student who was co-operative in class, had to work hard to achieve and did so, thereby achieving reasonable success in the respondent's program. To compare N's performance with that of his classmates, the only evidence on which to base such a comparison was the testimony of N's teachers who compared him to the other students in N's class and found him to be about the middle of the class. This generally corresponds to Ms. Dea's evaluation of N. In her report, Ex. C-6, she indicated that he was a student of average intelligence, "...closer to the lower end of average". Therefore, it has not been proven that N's academic performance was below what should be expected of N relative to his classmates.

230. Section 13 of the *Education Act* provides:

13(1) In support of the learning success of his or her child and the learning environment at the school, a parent is expected to

- (b) communicate reasonably with school personnel employed at the school his or her child attends as required in the best interests of the child,

The facts, as found above, illustrate that, throughout N's time in the respondent's program, the complainant withheld information from the respondents which would have been beneficial to the respondents to further improve the services provided to N, including her failure to communicate to school personnel the difficulties N was experiencing at home until the situation became exacerbated in the winter of 1999. There was expert testimony that a student's academic achievement can be influenced by his home life and such information can be beneficial to school personnel in providing necessary accommodations, etc. The facts illustrate various examples where the complainant did not communicate reasonably with the respondents, in the best interests of N.

231. On reviewing the totality of the evidence, many disparities in the evidence of the complainant are noted, including information which she was reported to have related at different times to various personnel caring for N. Therefore, the evidence of the complainant, including some purported entries in the Agenda, Ex. C-32, is found to be unreliable such that, where it is inconsistent with that of the respondents', the evidence of the respondents' is accepted. Moreover, as has been noted, the information the complainant provided to various professionals at times was incorrect and/or misleading and, therefore, opinions expressed by such professionals based on this information is also unreliable. This would include Dr. Stoddard's and Dr. Evans' opinions with respect to N's attendance at Landmark, although it should be noted, they were guarded in such opinions, in any event.

232. There was expert testimony to the effect that N's global needs, personal as well as academic, would best be served by him remaining in his home, given that the family unit was together and functioning, and N receiving the necessary accommodations in the classroom setting. In fact, Dr. Evans, who was N's psychiatrist while at Landmark, qualified his support for N's continued attendance at Landmark on the basis that N had already been successful there. It is not surprising that, in such an excellent program, with its high concentration of resources for each student, that most students achieve success.

233. The evidence confirmed the following:

1) The respondents identified N as an exceptional pupil and provided accommodations to allow him to participate with pupils who were not exceptional pupils within regular classroom setting. N received resource help as early as grade 1 and was also closely monitored by his kindergarten teacher. The evidence is uncontroverted that N received resource help in grade 2. The complainant's oral testimony confirmed that N was receiving extra help for which he was taken out of class in grade 3 and other evidence indicated N received resources in grade 4. Mrs. Geneau's testimony was that N received more resources than any other student in her grade 5 class. The resources provided to N in grade 6 were partly outlined in the IRP, Ex. R-1, Tab 11, p.l 8. The evidence of Mrs. Geneau, Ms. Cormier, Ms. LaCocq, Ms Branscombe and Mr. Menchions is accepted that part of N's Resource file has been lost and that additional resources were provided to N than those documented on the SEP's, with some of these detailed in the facts set out herein.

2) All of the respondents' witnesses were in general agreement that the documentation regarding the accommodations provided to N was improperly maintained. The evidence, which this Board accepts, was, however, that all the necessary accommodations which school personnel considered N required based on their professional judgment, with the limited information given to them by the complainant, was provided to N;

3) The evidence is clear that the respondents were willing to work with N and his parents to find additional, effective accommodations to further advance N's academic achievement;

4) There were no reasonable requests for additional necessary accommodations made for N which were denied by the respondents. In fact, the only request which

the respondents denied was the complainant's request to provide N one-on-one teaching, such as the complainant felt would be provided by the respondents funding N's attendance at Landmark in Wolfville, Nova Scotia. This request was denied by the respondents because it was considered to be unnecessary given the circumstances. The requirements of section 12(3) of the *Education Act* are to provide special education programs and services in circumstances where exceptional pupils can participate with pupils who are not exceptional within regular classroom settings where practicable. The respondents believed that it was practicable to do so and that they were therefore precluded from providing such funding.

VII. CONCLUSION

234. Based on the evidence presented at this hearing this Board finds that N has ADHD which is a mental disability pursuant to section 2 of the *Human Rights Act*.

235. When all of the evidence is considered, however, this Board finds that the complainant did not establish:

A) that the respondents denied N a service available to the public, because of a mental disability, contrary to subsection 5(1)(a) of the *Human Rights Act*; or

B) that the respondents discriminated against N with respect to any service available to the public, because of a mental disability, contrary to subsection 5(1)(b) of the *Human Rights Act*.

236. All parties maintained that the evidence presented including that of N's entire career in the public education system was relevant to this matter and, on that basis, this Board received such evidence. After all parties closed their cases, during submissions, counsel for the respondents referred to section 17.1 of the *Act*, which provides:

17.1(1) Subject to subsection (2), every complaint shall be filed within one year after the alleged violation of the Act.

17.1(2) The Commission may, where in the opinion of the Commission circumstances so warrant, extend the time for the filing of the complaint.

and suggested that this inquiry is confined to a violation of the *Act* occurring within one year of the filing of the complaint, as there was no evidence that the Commission extended the time for the filing of the complaint pursuant to subsection 17.1(2) and that evidence pertaining to N before that time was relevant as background only. Mr. VanBuskirk argued that section 17.1 was not applicable to this matter. Given the findings of this Board, it is not necessary to determine the applicability of this section to this matter.

237. Therefore, based on the requirements of subsection 20(6.1) of the *Act*, this Board dismisses the complaint.

DATED at Moncton, New Brunswick this 13 day of August, 2004

Judith F. Macpherson, Q.C.
Vice-Chair

I concur.

Gerald Cluney
Board Member

Dissent

Gregory Murphy
Board Member

SCHEDULE "A"

Exhibits admitted on behalf of the complainant:

- C-1 Complaint Form New Brunswick Human Rights Commission dated January 24th, 2000 and 2 pg. attachment;
- C-2 Team Meeting Information Sheet dated April 26th, 1994;
- C-3 Notes of meeting with the complainant dated June 2, 1994;
- C-4 Canadian Achievement Tests - Second Edition, test date: 02-05-97;
- C-5a WRAT-R1-Wide Range Achievement Test-Level 1-dated September 25, 1997;
- C-5a.1 WRAT-R1 -Wide Range Achievement Test-Level 1-dated June 1, 1998;
- C-6 Psychoeducational Assessment Report-Date of Assessment-February 11, 1998;
- C-7 black hard cover, note book
- C-8 Color coding labels
- C-9 Landmark East School Brochure package;
- C-10 Landmark East School Newsletter-Winter 2001;
- C-11 Landmark East School information sheet;
- C-12 Lewisville Middle School Registration form;
- C-13 Correspondence from the complainant to Hon. Claudette Bradshaw, MP, dated December 13, 3999;
- C-14 Correspondence from Minister of Education E. Robichaud to Mr. and Mrs. G.C. dated Decembers, 1999;
- C-15 Special Education plan dated November 29, 2000;
- C-16 Medical Expenses list dated July 26, 2001;
- C-17 Landmark East School Weekly Summation Reports for 1999-2000;
- C-18 Landmark East School Weekly Summation Reports for 2000-2001;
- C-19 Landmark East School correspondence dated February 3, 2000;
- C-20 Landmark East School Final Report for N, 1999-2000, June 2000;
- C-21 Landmark East School Report Card for N, 1999-2000;
- C-22 Landmark East School Student Report for N 2000-2001;
- C-23 Curriculum Vitae by Arthur L. Lamrock;
- C-24 Psychiatric report by Dr. Evans dated October 24, 2001;
- C-25 Arthur Lamrock correspondence dated October 2, 2001;
- C-26 Arthur Lamrock Psychoeducational Reassessment dated November, 2001;
- C-27 Correspondence to Dr. Evans from Dr. Stoddard dated November, 12, 1999;
- C-28.1 Dr. Yule correspondence to Dr. M. Bakht dated May 1, 1998; C-28.2 Dr. Yule correspondence to Dr. Fultz dated February 10, 1997;
- C-28.3 Dr. Yule correspondence to Dr. Stoddard dated August 22, 1995; -4pgs
- C-28.4 Dr. Yule Clinical note dated August 21, 1998; -2 pgs
- C-28.5 Dr. Yule correspondence to Dr. Antle dated January 26, 1989;
- C-28.6 Dr. Yule correspondence to Dr. Antle dated August 18, 1988; -2pgs
- C-28.7 Dr. Yule correspondence to Dr. P. Phelan dated April 16, 1988; 2-pgs
- C-28.8 Dr. Fultz correspondence to Dr. Yule dated April 30, 1997;
- C-28.9 Psychoeducational Assessment Report date of assessment: February 11, 1998;
- C-29 NBTA News dated October 3, 2001;
- C-30 New Brunswick Education Summary Statistics September 30, 1996;
- C-31 Ministry of Special Ed. Dept.;
- C-32 Original Agenda;
- C-33 Document - School District 2- *How your child is doing in grade 2;*
- C-34 Document - School District 2- *How your child is doing in grade 3;*

- C-35 Document - School District 2- *How your child is doing in grade 1*;
- C-36 Summer Institutes 1999 July 5 - August 27;
- C-37 New Brunswick Guidelines for New Brunswick Alternative Education Programs and Services June 2001;
- C-38 Document - School District 2- *How your child is doing in grade 4*;
- C-39 Article CanadaEast - April 5, 2002, Math marks don't add up;
- C-40 Article CanadaEast - April 8, 2002, N.B. students' marks reveal a real crisis;
- C-41 Run-on Sentences;
- C-42 The Sentence;
- C-43 Run-on Sentences.

Exhibits admitted on the behalf of the respondents:

R-1:

- Tab 1 Résumés of professional qualifications (with supporting documents) of:
 - a) Cynthia LeCocq –Teacher
 - b) Ken Menchions - Teacher
 - c) Todd Smith - Teacher
 - d) Brenda Geneau - Teacher
 - e) Elizabeth Page Cormier - Teacher
 - f) Heather Snyder - Teacher
 - g) Kathy Steeves - Teacher
 - h) Sandra Steeves -Teacher Assistant
 - i) Barb Amos - Teacher Assistant
 - j) Karen Branscombe - Principal
- Tab 2 Special Education Plan November29, 2000 & Individual Resource Plan for N dated November 24, 1998;
- Tab 3 Chronology of formal assessments, with results - Katherine Levine;
- Tab 5 Program overview - District 2 Summer Enhancement Program.
- Tab 6 Extract, School Report for Landmark East School- 4 pages;
- Tab 7 Attendance Report - Grade 6.
- Tab 8 Summary of Resource Intervention - Grade 6.
- Tab 9 Department of Education Teacher Assistants Guidelines of Standards and Evaluation, May 1994-Tab 19.
- Tab 10 New Brunswick Teacher Assistant Support Protocol, July 1999 - Tab 22.
- Tab 11 Extracts from student file:
 - 1) Cumulative card;
 - 2) Health Record;
 - 3) Record of Addresses;
 - 4) Family Data
 - 5) Elementary Progress Report Grade 1;
 - 6) District 2 - C. Belliveau Feb. 4, 1993 (sic) 1994;
 - 7) District 2 - C. Belliveau April 22, 1994;
 - 8) Elementary Progress Report Grade 2;
 - 9) Elementary Progress Report Grade 3;
 - 10) Elementary Progress Report Grade 4;
 - 11) Elementary Progress Report Grade 5;
 - 12) Elementary Progress Report Grade 6;
 - 13) Correspondence from K. Branscombe (Lewisville Middle School) to Jim

- Stevenson dated February 2, 2000;
- 14) Student Services Report dated May 9, 1994;
 - 15) Individual Resource Plan dated December 9, 1997;
 - 16) Page 2 Individual Resource Plan dated December 9, 1997;
 - 17) Elementary Progress Report Grade 5;
 - 18) Individual Resource Plan dated November 24, 1998;
 - 19) Page 2 Individual Resource plan dated November 24, 1998;
 - 20) Elementary Progress Report Grade 6;
 - 21) Request for Student Services dated February 22, 1999;
 - 22} Correspondence from Karen Rickard to Parents/Guardians dated March 11, 1999;
 - 23) 4 years 1 month to 5 years 0 months Language Development-Parent Questionnaire date April 29, 1992;
 - 24) Page 2 4 years 1 month to 5 years 0 months Language Development-Parent Questionnaire date April 29, 1992;
 - 25) Parent Comment Form;
 - 26) Lesson plans September 17, 6C;
 - 27) Individual Resource Plan dated Sept/94;
 - 28) Page 2 Individual Resource Plan dated Sept./94;
 - 29) Cumulative Photo Record;
 - 30) Correspondence to Mrs. Cormier from the complainant dated January 17, 1999;
- Tab 12 Spread sheet - Special needs funding, 1993-1994 to 2001-2002;
- Tab 13 Correspondence from Jim Stevenson dated March 1, 2000 - response to complaint;
- Tab 14 Additional comments re complaint;
- Tab 15 Discussion Paper-Nova Scotia Department of Education Review of the Delivery of Services for Students with Severe Learning Disabilities, March, 1994;
- Tab 16 Nova Scotia Department of Education Guidelines Regarding Tuition Agreements for Students with Special Needs, August 20, 1997;
- Tab 17 Nova Scotia Department of Education and Culture School Board and Ministerial Appeal Guide;
- Tab 18 New Brunswick Resource for the Identification and Teaching of Students with Specific Learning Disability;
- Tab 19 New Brunswick Department of Education Teacher Assistants Guidelines for Standards and Evaluation, May 1994;
- Tab 20 New Brunswick Department of Education *Best Practices for Inclusion*, July, 1994;
- Tab 21 New Brunswick Department of Education Resource for Assisting Struggling Learners, dated September, 2000;
- Tab 22 New Brunswick Department of Education Teacher Assistant Support Protocol, July 1999;
- Tab 23 Pamphlet, *Teacher Assistant Support Protocol*, September 1999;
- Tab 24
- Tab 25
- Tab 26 Pamphlet, *Learning Disabilities in New Brunswick*, undated;
- Tab 27 Paper, *Learning Disabilities within an Inclusionary Model*, June 1998;
- Tab 29 Document, *Learning Disabilities Educational Programs and Services in New Brunswick*, September 2001;
- Tab 30 *Excellence in Education, Issues Paper 1*;
- Tab 34 Excellence in Education Review of Programs, July 1993 - June 1994;
- Tab 35 Guidelines for Excellence in Education and Youth Futures Initiatives, June 1999;
- Tab 36 Correspondence from Hon. Bernard Richard, Minister of Education to Ms. Millie LeBlanc, President, Learning Disabilities Association of New Brunswick, dated

- July 23, 1998;
- Tab 37 Excellence in Education, Guidelines, 1997-1998, Programs for Learning Disabled Students;
- Tab 38 Excellence in Education, Guidelines, 1997-1998, Programs for Behaviour Disordered Students;
- Tab 39.a Correspondence from Hon. Elvy Robichaud, Minister of Education to Hon. Claudette Bradshaw, MP, dated January 6, 2000;
- Tab 39.b Correspondence from Hon. Elvy Robichaud, Minister of Education to Mr. and Mrs. G.C. dated Decembers, 1999;
- Tab 39.c Correspondence from Hon. Claudette Bradshaw, MP, to Hon. Elvy Robichaud, Minister of Education, dated December 16, 1999;
- Tab 39.d Correspondence from the complainant to Hon. Claudette Bradshaw, MP dated December 13, 1999;
- Tab 39.e Support needed for Learning Disabled and Attention Deficit Child;
- Tab 40.a Correspondence from Hon. Bernard Richard, Minister of Education to the complainant dated February 23, 1999;
- Tab 40.b Correspondence from J. E. Lockyer, Solicitor General to Hon. Bernard Richard, Minister of Education dated Februarys, 1999;
- Tab 40.c Correspondence from J. E. Lockyer, Solicitor General to the complainant dated Februarys, 1999;
- Tab 40.d Correspondence from the complainant to J. E. Lockyer, Solicitor General dated January 29, 1999;
- Tab 41 Correspondence from Dennis Cochrane, Superintendent, to Mrs. P. J. dated February 26, 1998;
- Tab 42.a Correspondence from J. E. Lockyer, Minister of Education to Ms. P. dated June 4, 1997;
- Tab 42.b Correspondence from F. P. to J. E. Lockyer, Minister of Education dated May 26, 1997;
- Tab 43 Correspondence from Bernard Richard to Ms. F. P. dated September 3, 1997;
- Tab 44 Correspondence from Alex Dingwall, Department of Education to Mr. Dennis Cochrane, School District No. 6, dated April 16, 1996,
- Tab 45.a Correspondence from J. E. Lockyer, Minister of Education to Ms. Crossman dated February 22, 1996;
- Tab 45.b Correspondence from Pat Crossman to J. E. Lockyer, Minister of Education dated February 1, 1996;
- Tab 46.a Memorandum from B. James, dated January 15, 1996, to Superintendents, re Residential School Option for Students with Severe Learning Disabilities;
- Tab 46.b Memorandum from Alex Dingwall, dated January 15, 1996, to Premier's Council on the Status of Disabled Persons and the N. B. Learning Disabled Association, re Residential School Option for Students with Severe Learning Disabilities;
- Tab 46.c School Programs for Learning Disabled Students Residential School Option;
- Tab 47 Correspondence dated February 5, 1990, from G. Keith Winter, Ph.D., Government of Newfoundland & Labrador to Arnold Jones, Superintendent, and APSEA;
- Tab 48 Correspondence dated January 4, 1990, from Roger Burke, Government of P.E.K to Arnold Jones, Superintendent, APSEA;
- Tab 49.a Correspondence from Hon. J.E. Lockyer, Minister of Education to Mrs. Greer, dated January 17, 1996;
- Tab 49.b Correspondence from Jan Greer, Learning Disabilities Association of New Brunswick, to Hon. J.E. Lockyer, Minister of Education dated December 18, 1995;
- Tab 50 Comprehensive Plan for Pupils with Learning Disabilities, 1977 -1987;
- Tab 51 Correspondence from Christian Whalen to Carl White dated September 21, 2000

- with attachments;
- Tab 52 Correspondence from the complainant to Carl White dated October 10, 2000;
- Tab 53 Correspondence from Christian Whalen to Carl White dated November 3, 2000;
- Tab 54 Correspondence from Jim Stevenson to Carl White dated March 1, 2000 with Response to Complaint attached;
- Tab 56.a Correspondence from Hon. Elvy Robichaud, Minister of Education to Carl A. White, Jr. dated February 22, 2000;
- Tab 56.b Correspondence from Elvy Robichaud to Cart A. White, Jr. dated February 21, 2000;
- Tab 59 Correspondence from Hon. Vaughn Blaney, Minister of Education to Mrs. D. I. dated June 9, 1994;
- Tab 61 October, 1991 New Brunswick Guidelines for a Special Education Plan;
- Tab 62 Memorandum from Byron James dated April 3, 1997 with attached Budget Information;
- Tab 63 Special Needs Funding -1997-1998 Budget;
- Tab 64 Pamphlet, *A Service Delivery System for Learning Disabled Pupils*;
- Tab 66 User's Guide to the Appeal Process;
- R-2 Correspondence to Dr. Yule from Dr. Bakht dated May 4, 1998;
- R-3 Correspondence to Mr. Boudreau from the complainant dated July 6, 1992;
- R-4 Mental Health Commission of New Brunswick correspondence to Dr. Yule dated April 19, 1993;
- R-5 Correspondence to Dr. Yule from the complainant dated April 15, 1998;
- R-6 Correspondence to Dr. Yule and Dr. Stoddard from the complainant dated April 17, 1998;
- R-7 Correspondence to Dr. Bakht from the complainant & G.C. dated August 8, 1999;
- R-8 Mental Health Services Referral Form dated February 10, 1999, signed by Dr. Bakht;
- R-9 Landmark East School Standardized Testing, June 2000;
- R-10 Individual Education Plan dated Nov. 1993;
- R-11 Individual Education Plan dated 93-94 - 4 pages;
- R-12 Individual Education Plan dated November 1993- 5 pages;
- R-13 Form A-2 pages;
- R-14 Best Practices in School Psychology-III, Edited by Alex Thomas and Jeff Grimes;
- R-15 Mental Health Clinic referral signed by Dr. Yule dated 2/4/92;
- R-16 Resume of Gordon L. Porter, December 2001;
- R-17 Curriculum Vita of Juanita Marie Kelley Mureika;
- R-18 Guidelines for Professional Practice for School Psychologists;
- R-19 School Psychology Paradigm Shift;
- R-20 School Psychologists as Health-Care Providers in the 21st Century: Conceptual Framework, Professional Identity, and Professional Practice;
- R-21 The Ecology of School Psychology: Examining and Changing Our Paradigm for the 21st Century;
- R-22 Curriculum Vitae for Kathryn (Kate) McLellan;
- R-23 White Paper Opportunities for the Handicapped, Honourable J. Lome McGuigan Minister of Education, April, 1974;
- R-24 Schools for a New Century document. Report of The Commission on Excellence in Education;
- R-25 Special Needs, December 17, 2001;
- R-26 Resume Albert L. Cyr, PsyD;
- R-27a Correspondence to Mr. VanBuskirk dated April 12, 2002;
- R-27b Correspondence to Ms. Landry dated April 8, 2002;
- R-27c Fax Transmission from Dr. Albert L. Cyr dated 02-04-03;
- R-27d To Dr. Albert Cyr dated April 2, 2002;
- R-27e Correspondence to Mrs. Cormier et al from the complainant dated February 14, 1999;

R-27f hand-written notes -Follow the story, etc.;

R-27g drawing of House;

R-27h drawing of Tree;

R-27S drawing of Person;

R-27J drawing of Persons;

R-27k hand-written notes -Brother-8, etc.;

R-27I Note to Dr. Cyr from P. Cormier undated;

R-27m Phone message to Albert Cyr from the complainant dated Feb 10/99;

R-27n Referral Form Support Services to Education, dated Jan 12/99;

R-27o Correspondence to Mrs. Cormier from the complainant dated January 24, 1999;

R-27p Intervention/Follow-Up dated 99-02-02;

R-28 Katherine M. Levine Licensed Psychologist Resume;

R-29 Psychoeducational Assessment, dated June 13, 2002;

R-30 Terrence C. King Resume.

PROVINCE OF NEW BRUNSWICK



Labour and Employment Board

HR-003-01

IN THE MATTER OF THE *HUMAN RIGHTS ACT*, R.S.N.B., 1973, c. H-11

AND IN THE MATTER OF A COMPLAINT

BETWEEN:

B.C.,

Complainant

- and -

Province of New Brunswick, Department of Education and School District
2,

Respondents

BEFORE:

Board of Inquiry
Labour and Employment Board
Judith F. MacPherson, Q.C., Vice-Chair
Gerald Cluney, Board Member
Gregory Murphy, Board Member

APPEARANCES:

On behalf of the Complainant: *Appeared personally*

On behalf of the Human

Rights Commission: *Kelly VanBuskirk*

Charles Ferris

Sarina McKinnon

On behalf of the Respondents: *Clyde C. Spinney, Q. C*

DATES OF HEARING:

December 10th to 14th, 18, 2001; February 21, 22, 2002; March 18th to 22nd, 2002; April 17, 18, 2002; May 6th to 10th, 2002; September 9th to 13th, 2002; October 28, 2002, January 29, 30, 2003.

MINORITY DECISION BY GREGORY MURPHY

Date: August 16, 2004

238. First, let me say, it is regrettable that it has taken longer than normal to make this Decision. Under the circumstances, this Human Rights matter is a very important Decision as it will have an impact on exceptional children who enter our New Brunswick public education system and how the Government, administration and teachers respond to their needs.

239. The Board had to consider 28 days of testimony from 17 witnesses, 201 Exhibits, the relevant Acts and 815 pages of Arguments and Law from the Complainant and the Respondents. In addition, there were some post-hearing submissions by the parties that the Board had to consider.

240. Although this is a minority decision, it is only proper for me to note that Vice-Chair MacPherson, who is the author of the Decision and completed the work while running her law practice, has painstakingly reviewed all of the evidence and material and this is reflected in the well-documented majority Decision.

241. The majority decision of Chairperson Judith MacPherson, Q.C. and Board Member Gerald Cluney has listed the witnesses and Exhibits (Schedule "A") and has detailed the background of the matter that led this complaint to be filed with the New Brunswick Human Rights Commission by B.C. on behalf of her son N. The decision also reflects much of the testimony given by the witnesses.

242. I will set out below an outline of N's school schedule - school, year, grade and homeroom teacher for ease of reference.

School	Year	Grade	Homeroom Teacher
Wynwood	1992-93	Kindergarten	Ms. C. Tower-LeBlanc
A.H. MacLeaod	1993-94	1	Ms Cecile Belliveau
A.H. MacLeaod	1994-95	2	Mrs. Sherrill Carter
“	“ 1995-96	3	Ms. E. Reid
“	“ 1996-97	4	Mrs. M. Trainor
Lewisville Middle	1997-98	5	Mrs. Brenda Geneau
“	“ 1998-99	6	Mrs. Page Cormier
Landmark East	1999-2000	7	
“	“ 2000-2001	Middle School program	

243. N went to kindergarten and completed the year without medication and Ms. C. Tower-LeBlanc, this teacher, agreed at the end of the school year to have N enter the French Immersion Program for Grade 1 which B.C. wanted her son to do. There is no Elementary Progress Report (EPR) for Kindergarten. For Grades 1 to 6, there is an EPR for each year (Exhibit R-1, Tab 11, pages 5 to 12). In these EPR's, there are two codes, one for Achievement and the other for Effort. The codes for Achievement (for student performance) read as follows: 0-Outstanding, VG-Very Good; S-Satisfactory; ED-Experiencing Difficulty (indicates your child may have difficulty progressing to the next grade or that program adjustment is required.)

244. The Effort codes refer to student effort in relation to ability. VG-Very Good; S-Satisfactory, NI Needs Improvement. These codes are filled in for each subject for each of the four terms plus year end. The EPR also has additional information as to teacher comments for each of the four terms.

245. In Grade 1, Ms. Belliveau indicated at year end in Language Arts-ED and NI; Mathematics - S and NI; Social Studies-S; Science-S; Health-S; Art-S; Music-S; Physical Education-S; and Homework-S.

246. In the teacher comments first term ".....hi dictee and reading he is experiencing difficulty with simple syllables. Needs a great deal of guidance and supervision to do his work. He will have to work harder. The fourth term, she says N still finds it very hard. The decision was made that he will change programs in September 94. Note- He was promoted to Grade 2 (English)"

247. In February, 1994 she notes there is some improvement in N's attitude; she talks about lack of attention in the classroom, the need to improve his printing, she points out "the need for guidance and encouragement from us". In April 1994, she indicates her appreciation for the cooperation in helping N with his homework. The need continues for constant supervision, not able to print and copy from the board, along with other difficulties and expressed the concern whether his achievement will be high enough at the end of the year to go in Grade 2 FI.

248. In Grade 1, N attended 177 days out of 180 school days.

249. As noted in the majority decision Exhibit C-2, a school based team meeting was held at the request of the parents. This was on April 26, 1994. At pages 6, 7 and 8 of the majority decision, an outline is given as to testing that was done on N, the results discussed and plans made for enrollment in the fall for N in Grade 2 English.

250. Exhibit C-3, the minutes of the June 2, 1994 meeting, indicate books were supplied for the summer to N to assist in improving his English and Mathematics. Sharon Warren was to look at a possible resource in the fall for N.

251. Unknown to Mrs. B.C., an Individual Resource Plan (IRP) was developed in September 1994, Exhibit R-1, Tab 11 p. 27 & 28. The IRP was signed by Sherrill Carter, homeroom teacher; S. J. Warren, resource teacher and William Ross, principal. The objective of the IRP was to master initial and final consonant sounds; to master short vowels; to master a basic sight vocabulary; to be able to read a passage at a high grade one level or a low grade two level with fluency and good comprehension as tested on a Woodcock and to be able to spell at a grade two

level.

252. Ms. Warren in June 1995 comments - "N has improved in all areas of reading this year. He has done well to make the transition from French to English. He should be able to keep up with his class work next year without resource help. He must do work at home consistently."

253. Exhibit R-1 Tab 11 p. 8 is N's Elementary Progress Report for Grade 2 and he has received S for all of the same subjects as Grade 1 with the addition of French. Mrs. Carter's comments were that N sometimes doesn't listen and makes many unnecessary mistakes and that his assignments are not always done nicely.

254. In grade 2, N attended school 181 days out of 182 school days.

255. The Grade 3 report (Exhibit R-1, Tab 11 p. 9) again shows for year end S for all subjects except French and Art which shows VG. Mrs. E. Reid's comments concerning N are "easily distracted, needs practice writing sentences, messy in math, still struggling with spelling, his reading is improving, has some problems with understanding written problems in math. She notes N has worked hard this year."

256. In grade 3, N attended 181.5 days out of 182 school days.

257. Grade 4 (Exhibit R-1, Tab 11 p. 10) at year end shows S in Achievement for Language Arts, Mathematics and Social Studies; S for Music, Physical Education and Homework ; S+ for Health and Art and VG for Science and French. For Effort, he had S for Language Arts, Mathematics, Social Studies and Health; VG for Science and French. Mrs. Trainer's comments are "N has poor listening skills, finding language and creative writing difficult; after lunch he finds it difficult to attend to task, difficult time obeying the rules outside. She concludes in the 3rd term that she is especially pleased with N's improvement in his growth as an individual and also significant gains this term."

258. In grade 4, N attended 181.5 days out of 181.5 school days.

259. Grade 5 (Exhibit R-1, Tab 11, p. 11) at year end the coding for Achievement reads as follows: Physical Education VG; French, Art, Music and Homework - S; Language Arts (adapted spelling), Mathematics, Science, Health - ED. On Effort, French S+; Language Arts S; Social Studies S-; Mathematics, Science, Health - NI. Ms Brenda Comeau in the first term wrote "N is a friendly child and a pleasure to have in class. N is experiencing difficulties in most aspects of the grade 5 program. We will continue with the extra help, i.e. Math resource, parent-volunteer reading buddy and extra help after school. Daily reading at home would be beneficial. Second term: N is a pleasant student who continues to experience difficulties with the grade 5 program. Attention is being given to N's problem; but much more effort on his part is needed if an improvement is to be seen this year. (March 20/98) Third term: N has worked hard this year and will need to continue to read, write and practice math facts over the summer. Perhaps he could join the reading program at the Moncton Library. Have a nice summer and good luck in grade 6.

260. In grade 5, N attended 178.5 days out of 182 school days.

261. Grade 6: N's Achievement Codes at year end read: Physical Education VG; French, Music- S; Language Arts, Mathematics, Social Studies, Science, Health, Homework -S; For Effort: French -VG; Health S+; Language Arts, Mathematics, Science -S; Social Studies -S.

262. Mrs. Page Cormier comments in the first term: "N is a well behaved young man. He has to work very hard in all aspects of school work. In order to gain strength, N is on an altered spelling and reading program; has a parent-volunteer reading partner and receives resource help. His work is very difficult to read. I would like him to always take time to do his neatest handwork. Careful attention must be made for copying down all his lessons every night. Good work N on S.S. poster.

263. Second term: N is a co-operative and well behaved student who tries hard in class. I thank you for your concern and involvement in his progress. The lower marks this term are the result of the difficult period after Christmas which resulted in structure time being lost. N is

working hard to catch up. Your support in monitoring all school assignments is appreciated. Science project done was very good. Lower L. A. mark reflects effort on reading journal entries. Keep up your effort N.

264. Third term: I have enjoyed working with N this year. His attendance at summer enhancement camp will help prepare him for success at the next grade level. Have a safe and happy summer.

265. In grade 6, N attended 158 days out of 179 school days.

266. In the testimony of Mrs. B.C., it is clear that N was on medication (Cylert) at an early age (31/2 years) and prior to N starting kindergarten, he was taken off this medication with the doctor's agreement. She noted that the drug had been taken off the market and this was later confirmed by Dr. Yule that it was removed in 1999 as there was a potential for liver problems and this was known in 1997. The entry on June 14, 1995 (end of grade 2 school year) in N's Health Record that N had been put on Ritalin is the first time the school district became aware of N being active and needed medication for it. It should be noted that in the same Health Record R-1, Tab 11, p. 2, there is an entry on April 29, 1992 that N had allergies to apples, apple juice, oranges and orange juice.

267. The first time the school district indicated that N had any problems was in kindergarten when Ms. Tower-Leblanc advised Mrs. B.C. that N had excited behaviour and suggested he may have Tourette's Syndrome. As indicated in the majority decision (MD), Mrs. B.C. had this checked out and N did not have it.

268. The MD clearly outlines the decision to put N in Grade 1 Total French Immersion and the difficulties he had and that at the end of the Grade 1 school year, Mrs. B.C. requested a school based team meeting which she attended and was involved in the decision to do testing on N by Carolyn Walsh. At the subsequent meeting, they reviewed the results and made the decision to put N in Grade 2 English and look at available resources hi the fall for N.

269. Unknown to Mrs. B.C., an IRP was done in September 1994 and goals were set with follow-up in June. The resource teacher determined N had improved his reading and should be able to keep up with class work next year without resource help.

270. Mrs. B.C.'s testimony about Grade 3 was that there was no IRP and N received no additional assistance in Grade 3. She also said that during the summer, she took N to the Moncton Library twice a week where UNB students would assist with his reading. When you read the EPR for grade 3, every code for each term and at year end is an S or VG, but Ms Reid's comments indicate problems. There is nothing in his file to indicate that he received additional help.

271. The EPR for Grade 4 (Exhibit R-1, Tab 11, p. 10) gives me great difficulty as to what is happening in the classroom. To read the codes given for each subject, the three terms and at year end, a parent would think N was doing very well. He had more VG, S+ and even an O for Achievement in Science. Only in Social Studies in the 3 term did he have an ED for Achievement and an NI for Effort in the same subject. I have outlined earlier Mrs. M. Trainor's comments and it appears to me it is not consistent with the results listed for the subjects.

272. The item that gives me great difficulty is Exhibit C-4 - Canadian Achievement Tests - taken by N on 02-05-97. This test taken in Grade 4 indicates N's Grade Equivalent for Total Reading was 1.9; Spelling 1.5; Total Language 1.8; Study Skills 1.3; Total Math 3.0 for an Average of 2.05. It is clear N was not doing as well as Mrs. Trainor had indicated on the EPR.

273. In direct testimony, Mrs. B.C. said she had not seen the test before and was never told he was at a Grade 2 level. If she had known, she would have been very much concerned. She said there was no resource plan in Grade 4. There was nothing in the Student File (Exhibit R-1, Tab - 11) to indicate any extra help was given.

274. The MD has covered Grade 5 in great detail, including the interest shown by Mrs. Brenda Geneau in reviewing N's file before he came to Lewisville Middle School, and recognizing that N needed help. A WRAT test (Exhibit C-5a) was given on September 25, 1997 and an IRP

(Exhibit R-1, Tab 11, p. 9-15) was completed on December 9, 1997. According to my notes, Mrs. B.C. testified during cross-examination that "this was the best year for help, everything on that page was done." (Exhibit R-1, Tab lip. 16).

275. Mrs. Geneau in her testimony indicates she and Mrs. B.C. talked quite frequently. She knew of her being on stress leave, about the difficulties she and N had over homework at home ending in fighting and crying. She remembered Mrs. B.C. asking for a psychoeducational assessment and saying it would take awhile to have one done and that she didn't agree there was a need for one. As documented in the MD, Mrs. B.C. mentioned a psychoeducational assessment to her counsellor Patrick Donahue and he recommended his associate, Ms. Sharon Dea, whose report has already been documented. In Grade 5, there were 20 students in N's classroom, 1 special needs student requiring a Teacher's Assistant and 9 students were on IRP. She said in redirect that N was not mentioned at a school based team meeting. She said his writing had improved marginally, work needed to be done in capital letters and punctuation. She said the Sharon Dea report was discussed with her but it never was discussed at the school based team meeting.

276. Grade 6 (Exhibit R-1, Tab 11, p. 12) is the school year when school became difficult. N was in a class of 27 students, 20 had special education plans, 2 of those were on EEPs, each requiring a teacher's assistant. One of those children had loud vocal outbursts in class while the other would thump the desk.

277. In Mrs. B.C.'s testimony, she felt Mrs. Page Cormier was not looking at N's file. She felt she had given the school all the tools to help her son and that the school was going to do it their way. She said she met Mrs. Cormier before Christmas and talked about the recommendations in Sharon Dea's report. Mrs. B.C. felt only three recommendations were being followed and that since N was not able to write well yet, she was going to look into other directions. After Christmas, N didn't want to go to school and it wasn't until the third week of January after getting some anxiety medication that he returned.

278. On January 12, 1999, a Referral Form, for Support Service was completed by Mr. P.

Cormier for Psychology for N "has come to school and then goes home crying, cramps in stomach - 3 times in last week - Mother and Mrs. C. wonder about possible causes." Form was signed by Karen Rickard, School Principal and Mrs. B.C.. (Exhibit R-17, (N)) Dr. Albert L. Cyr, Psychologist who was employed with NB Community Services at the time, was assigned. This is the first time that a request for Support Services was made for N.

279. How this came about is documented by Exhibit R-1, Tab 11, p. 13 in the MD.

280. Dr. Cyr in his testimony said he met with N on February 2, 1999 and met with parents, teacher and collected information on the problems. N's file didn't contain very much information except for some drawings by N. He said the drawings convey the person's approach - child tends to accumulate stress inside, risk of explosive behavior. In cross-examination on the question of the number of students with behavioral problems, there were 20 such students out of 27 students in N's classroom. He said it appears the teacher is frustrated with the whole situation. The teacher needs the resources to tend to such a large class. He went on to say inclusion was to put a smaller number of special needs students in a large class with other students not requiring special needs.

281. Dr. Cyr said in March, he was off because of illness and when he came back in April, he was assigned to Mathieu Martin High School because of the recent student suicides. Mrs. Branscombe said another psychologist had been assigned to the school, but he didn't do anything on N's file because a plan was in place and there were no behavioral problems by N.

282. Mrs. Karen Branscombe, Principal at LMS from 1995-2000, said each school was to have a school based team assigned by the school district. It included the speech therapist, school psychologist, methods and resource teacher and principal or vice-principal. At LMS, they meet monthly except in September and October when they met every two weeks. The team could be convened when needed. A referral to the school based team can be done by the homeroom teacher, at the request of a parent, through a teacher or principal. Full assessments are done by the psychologist who is assigned to the school for one-half day a week.

283. Mrs. Branscombe also testified there was a problem with the Grade 4 students from A. H.

MacLeod, generally, and they needed help. The problem was literacy, with writing being the most critical. She went on to say their concerns were discussed with the principal of A. H. MacLeod School about the gap. She said this gap was not only with exceptional students but with all students, especially average and lower gifted children. She said she sent a memo to Superintendent Strugnell making a plea for more resource help.

284. It is clear that Mrs. B.C. in Exhibit R-1, Tab 11, p. 25, on March 24, 1999 during the second term indicated she would be sending N to Landmark East (LE) if things didn't improve. Prior to that date, Exhibit R-1, Tab 6 (4 pages) February 22, 1999, she asked the LMS to release information regarding N to LE and on March 9, 1999 Mrs. P. Cormier, with team teachers B. Geneau and K. Sleeves, provided the information requested.

285. It is clear the School District #2 knew N was having problems as early as kindergarten as well as Grade 1. In Grade 2, the first IRP was developed.

286. Here is a young child who has been co-operative and a good student throughout his schooling in School District #2. It appears he was a different child at home at various times. He has been subject to various medicines, in different amounts, and in the majority of times administered by himself, yet the system of School District #2 did not want to act in a stronger fashion over the seven years because N did not have a behavioural problem. That he was not disturbing the class or teachers or causing a problem that would require the teacher to refer his needs to a school based team meeting which would generate a full psychological assessment to treat his mental needs and assist him in fulfilling the expected school requirements.

287. It beholds this Board member to observe that in seven years in the public school system, N could not write, his printing was not the best and in going into Grade 7, he was almost two years behind according to the various tests. Yet teachers and other education officials say those tests are a snapshot in time. Other elements could distort that picture.

288. When I review Exhibit C-19 Appendix 1 and 11, September 14, 1999 and February 1, 2000, respectively, and what has been accomplished (four months), one must ask "What is

happening?" Especially when the teacher and principal say N was in the middle of the pack and that students with lesser ability would be selected to go to LE, if such schooling was available by the NB Department of Education.

289. It appears Mrs. B.C. was not saying or requesting the right things to get the help needed. Surely, teachers, the professional element of our education system, must have enough knowledge of the education system to act as advocates for the child or at least give guidance to parents that are looking for help.

290. The last straw was to put 20 students with special needs in the same classroom with seven other students. I do not believe that is what inclusion means.

291. I concur with the Board of Inquiry in their majority decision that N has ADHD which is a mental disability pursuant to Section 2 of the *Human Rights Act*.

292. I find that the respondents discriminated against N with respect to a service available to the public because of a mental disability contrary to subsection 5 (1) (b) of the *Human Rights Act*.

For the following reasons:

-Exhibit C-14 December 1995 letter to Mr. & Mrs. G.C. from Elvy Robichaud , then Minister of Education, advising funding has been withdrawn for students attending Landmark East and outlining a resource manual to provide teachers with tools and strategies was not followed.

-Exhibit R-1, Tab 40 February 23, 1999 letter to Mrs. B.C. from then Education Minister Bernard Richard advising to contact Mr. Terry King for Resource Services and not referring the matter to the Director of Education in accordance with section 12 of the *Education Act* and advising of the availability of an appeal process if not satisfied.

-The NB Human Rights Commission erred in processing the complaint until all appeal procedures had been exhausted under the *Education Act*. Note: Exhibit R-1 Tab 66. "A Users Guide for the Appeal Process January 1998".

-Exhibit R-1, Tab 61 - October 1991. Guidelines for a Special Education Plan outlines "All exceptional children defined under Section 1.1 of the NB *Schools Act* require a Special Education Plan and that the Guidelines for an Individual Educational Plan" was not followed when established and/or no plan was created.

-Exhibit R-18. Guideline for Professional Practice for School Psychologists, June 2001 p. 12 puts an onus on classroom and resource teachers to request such services through the school team.

-Exhibit R-1 Tab 18. Resources for the Identification and Teaching of Students with Specific Learning Disability - November 1999 page 11 - Assessment and Observation not when plans followed up and continued. Page 75 Parents Role not utilized in the planning meetings were developed.

293. I award the following:

294. N remained in the NB public education system to complete the Grade 6 curriculum in June 1999 and there was evidence he went to summer school that summer. The complaint was filed on January 24, 2000. The complainant has met the requirements of Section 17.1 of the *NB Human Rights Act*.

295. The complainant and/or her representative meet with the senior administration designate of School District #2, said person to be designated by School Superintendant Karen Branscombe and with the assistance of Mr. Robert Girard, Assistant Director, Educational Program and Services Branch, NB Department of Education, to develop a Special Education Plan that will assist N in completing his public schooling. If unable to agree on a plan, that the matter be referred to the Labour Employment Board Chairman George Filliter to adjudicate.

296. School District #2 to review the delivery of services to exceptional students with the view to have no more than fifty percent of the students in classes of twenty or more to be exceptional students. In the alternative, that if the 50% must be exceeded, that a Teacher's Assistant or Teacher be assigned to the classroom full-time to assist all exceptional students in the classroom.

297. The complainant has sought one on one instruction for N and that is not practical or required. It is my view that with a review of the delivery of services for exceptional students, a better quality service could be delivered.

298. The complainant has also sought compensation for the years that N attended Landmark East for tuition fees of \$20,000 per year, \$1250 per year for the student account and other expenses. The complainant had been informed in various letters from the Minister of Education, namely Bernard Richard and Elvy Robichaud that the Province had stopped funding of Landmark East in 1997 and proceeded to register N at Landmark East.

299. I have found that School District #2 has not met their obligation to exceptional students; therefore I award one half of the tuition fee for each year to a maximum of \$20,000.

300. On the question of the fee for the psychoeducational assessment report of N by Sharon Dea, I award said fee, if the fee was paid by the complainant and not a third party.

301. I make no other award in relief sought.

[end]