



ONTARIO SPECIAL EDUCATION (ENGLISH) TRIBUNAL File#5

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IN THE MATTER OF the *Education Act*, R.S.O. 1980, c.129;  
IN THE MATTER OF Ontario Regulation 554/81, Regulation made under the *Education Act*;  
AND IN THE MATTER OF the minor child born in 977;

BETWEEN

M-J. S.

Appellant

-and-

THE BOARD OF EDUCATION FOR THE CITY OF TORONTO

Respondent

Tribunal Members:

Grant R. MacDonald	Chairman
Dr. Marvin Goodman	Member
Prof. Ken Weber	Member

For the Appellant:

Harvey Savage

For the Respondent:

John P. Bell  
Joan M. Gilmour

The hearing was held in Toronto on May 29, May 31, June 10, June 20, and June 27, 1985.

## **APPELLANT'S REQUEST**

The appellant on behalf of her child was granted leave to appeal to a Central Region (English) Special Education Tribunal by the Ontario Special Education (English) Tribunal in its decision of March 15, 1985 under subsection 36(1) of the *Education Act*, R.S.O. 1980, c.129 (hereinafter called "the Act").

The appellant asks that the Central Region (English) Special Education Tribunal (hereinafter called "the Tribunal") make two orders:

1. That the child be defined by the Tribunal as "an exceptional pupil" in respect of having learning disabilities pursuant to the definition provided by the Special Education Information Handbook 1984, by the Ministry of Education (Appellant's statement, Part 3, p. 9).
2. And that following the finding as requested in 1 above, the Tribunal recommend an appropriate placement for the child.

## **RESPONDENT'S REPLY**

The respondent asks that the decision of the Identification, Placement and Review Committee (hereinafter called "the I.P.R.C.") of December 6, 1983, be confirmed as correct, and in the child's best interest, and that the decision of the Special Education Appeal Board (hereinafter called "the Appeal Board") made April 3, 1984, be confirmed as correct, and in the child's best interest.

The respondent requests that the Tribunal dismiss this appeal without costs.

Further, the Respondent submits that under subsection 36(6) of the Act, the Tribunal does possess authority to issue guidelines in the form of obiter dictum, which it intends shall have persuasive effect. In particular, the respondent argues that inasmuch as the child's need for a stable, normal, learning environment is clearly evident, the Tribunal in addition make recommendations which discourage the appellant from transferring the child to yet another school. It is also suggested that the Tribunal request that the Board of Education for the City of Toronto (hereinafter called "the School Board") continue to monitor the child's performance closely.

## **APPELLANT'S PRESENTATION**

Counsel on behalf of the appellant states that the Appeal is against the determination of the I.P.R.C. of December 6, 1983, that "This student is not 'exceptional'". (Appellant's brief: tab 1 and Respondent's brief Exhibit 20.10).

Further, the appeal is against the decision of the School Board's acceptance of the recommendation of the Appeal Board of April 3, 1984, upholding the determination of the I.P.R.C. (Appellant's brief: tab 20 and Respondent's brief Exhibit 20.12).

The appellant claims, that both the I.P.R.C. and Appeal Board erred in giving no weight at all, or insufficient weight, to the cumulative evidence which indicated a learning disability in the child; further, “that both bodies gave insufficient consideration, if any, to the possible underlying medical causes with respect to the child’s learning disability” (Appellant’s statement, part 2, No. 8, p. 4).

Citing medical documentation of Dr. Douglas McGreal at the Hospital for Sick Children, (Exhibit 9: tab 14) the appellant presents a diagnosis of temporal lobe epilepsy. The appellant further, in testimony and evidence from a neurologist Dr. Marvin B. Weber, suggests the child is suffering from epilepsy and has “. . . all the features of hyperactivity with short attention span, failure to profit from experience, hyperactivity and soft neurological signs including dyslexia and some motor clumsiness” (Exhibit 10: letter to Dr. R. Sternburg, January 3, 1985) . Dr. Weber also testifies that the child could be suffering from minimal brain dysfunction syndrome which could possibly be “circumvented by special education techniques particularly a low teacher-pupil ratio, and the use of concrete teaching materials.” (Exhibit 10: letter to Dr. R. Sternburg, January 3, 1985). Dr. Weber in his letter also recommends a drug therapy program for the child.

Calling upon written evidence and testimony from Dr. Griffith A. V. Morgan, the appellant contends that the child has “a number of scattered and patchy difficulties in mental processing, none of which on their own appears to be marked, but which are likely to effect the child’s learning competence when taken together”. (Exhibit 2, p. 8). Dr. Morgan testifies to a discrepancy between the child’s potential and tested performance. Dr. Morgan states in his report: “There is research evidence indicating that medication intended to control epileptic seizure activity can significantly depress intellectual functioning. This may be the case here.” (Exhibit 2: p. 8).

Dr. Morgan claims that he observed deficits during his testing procedure with the child, which point to a potentially serious problem in reading for the child, unless the child receives appropriate help at this point in time.

As well, Dr. Morgan in his report and testimony points to a number of related problems for the child including:

- difficulty with consonant clusters (p. 6)
- vowel confusion, and b/d reversals (p. 6)
- word reversals (p. )
- confusion about fundamentals of base and place value in arithmetic (p. 7)
- inefficient learning strategy (p. 8)
- weakness in listening, auditory processing (p. 8)
- impulsivity and distractibility (p. 8)

- problems in visual and auditory analysis of words (p. 8)
- confusion in sequence and order of symbols (p. 8)
- understanding what reading code is all about (p. 8).

Dr. Morgan strongly recommends that the child “receive adequate and intensive remedial teaching in reading and arithmetic, in a small group, provided by appropriate resource teaching”. (Exhibit 2, p. 9)

A letter by Dr. Maria J. Arstikaitis, an ophthalmologist, states that the child has severe dyslexia.

A report of Maria De Francesco, M.Sc.Cl., audiologist, recommends appropriate classroom placement to compensate for the child’s listening difficulties.

The appellant presents examples of the child’s written work indicating letter reversals.

In support of the appellant’s case, a brief of documents, some cited above, many dealing with medical matters, as well as correspondence and reports, are submitted.

The Tribunal notes some reports as hearsay evidence in so far as they are unsubstantiated by expert testimony, specifically the report of Dr. Gerald C. Young of September 28, 1983, a neurological and psychological assessment (Exhibit 3) to which considerable reference is made.

## **RESPONDENT’ S PRESENTATION**

Counsel for the respondent contends that the onus is upon the appellant to demonstrate on evidence that the I.P.R.C. erred in determining, on the basis of the evidence before it, as at December 6, 1983, that the child is not “an exceptional pupil”, as that term is defined by the Minister of Education.

In cross-examination of the appellant’s chief witness, Dr. Griffith A. V. Morgan, the respondent contends that Dr. Morgan “found no evidence on any single test which could support the finding of learning disability” (Respondent’s statement: p. 8). Further, the respondent notes that Dr. Morgan failed to relate his findings to the definition of learning disability established by the Minister of Education.

The respondent argues that the evidence of Dr. Morgan should be “wholly disregarded by this Tribunal” because:

1. Dr. Morgan did not review or consider the child’s academic performance as of January 1985;
2. did not discuss with any of the child’s teachers or principals any aspect of the child’s behaviour or academic performance;
3. tested the child only once, in January 1985, administering 17 tests between 9:30 a.m. and 4:30 p.m.;

4. administered tests to the child during the latter part of the morning and afternoon sessions after observed signs of fatigue were present;
5. administered tests to the child inappropriate for the child's age and grade level (Exhibits 4 and 5);
6. erred in scoring the results obtained on certain of the tests (example WISC-R coding test, Exhibit 5);
7. reported that the child had scored poorly on the Clinical Evaluation of Language Skills Test when, in fact, Dr. Morgan admitted the child's performance on that test was above average with respect to the number of errors (none) and the time within which the test was completed (Exhibit 5: pp. 12, 20);
8. administered and interpreted a number of tests which lack any or appropriate norm references;
9. attributed number and word reversals to the child which in fact did not exist in the work produced by the child that day;
10. concluded that the child was quite confused about the fundamentals of base and place value, thereby being in need of a remedial program in arithmetic, on the basis of his erroneous belief that the child had already received instruction from the child's teachers in addition and subtraction, which would require re-grouping or carrying;
11. concluded that the child "made many confusions of vowels" on the Carver test, using examples which were clearly wrong or did not appear at all on the test.

The respondent indicates that Dr. Morgan expresses some surprise that the appellant has attempted to elevate his conclusions and recommendations to be the definitive statement of the child's abilities and achievements, as well as the basis for the appropriate educational placement. In fact, counsel for the respondent contends Dr. Morgan has always intended that his testing, and his opinions based on that testing, be merely one factor to be considered in assessing the child.

In cross examination of Dr. Marvin B. Weber, the respondent submits that Dr. Weber's evidence be limited both in weight and application. Such contention is based upon Dr. Weber's admission that he did not directly observe any of the characteristics identified by him as indicative of minimal brain dysfunction syndrome; nor did he observe any elements of hyperactivity, short attention span, failure to profit from experience, or motor clumsiness. Further, he did not diagnose the child as suffering from any elements of dyslexia.

The respondent draws attention to the fact that the appellant did not testify in respect of her own case. Citing Connaught Laboratories Ltd. v. Her Majesty the Queen, the respondent applies the principle of adverse inference in which a court or tribunal may make an adverse inference from the fact that the appellant failed to testify.

The respondent presents evidence from Mrs. Maureen Keating, the child's grade 1 teacher; Mrs. Margaret Thatcher, grade 2 teacher during the first two terms of the year at Market Lane Public School, Mr. Donald Urquhart, the principal of Rose Avenue Public School where the child is currently enrolled, and Dr. Lynn Wells, Senior Psychologist of the School Board.

The teachers' testimony is that the child is not an exceptional pupil and does not require special education placement. They observe many strengths within the child's performance in the classroom, particularly in phonics, arithmetic, vocabulary, and in the child's ability to speak clearly. Testimony indicates that the frequency of the child's reversal of letters and numbers is decreasing. The teachers are not concerned about the number of reversals, particularly for a left-handed student. The teachers' testimony in many cases contradicts evidence of Dr. Griffith Morgan, particularly in regard to the child's ability in phonics, ability to discriminate sounds, and ability in mathematics and reading. Attention is drawn to the fact that the demands of some of the items in Dr. Morgan's testing were incompatible with the child's current grade placement at January, 1985, e.g., place and base references in mathematics, printing letters in small spaced areas rather than in primary printers.

Both the principal of Rose Avenue School, Mr. Donald Urquhart, and the senior psychologist of the School Board, Dr. Lynn Wells, are of the strong opinion that the child is not exceptional and is not in need of a special education placement. Dr. Wells emphasizes that what the child needs is a stable placement in a normal classroom environment for an extended period of time.

The respondent draws a sharp contrast between the evidence presented by the appellant about the child, and that presented by teachers and experts in the School Board, contending that the evidence of the school personnel is based upon actual observation. These witnesses conclude that the child is not exceptional.

## **BASIS OF TRIBUNAL FINDING**

1. Counsel for the respondent, at the outset of the hearing contends that the Tribunal is an appeal from the IPRC decision, and that therefore the Tribunal should regard only the evidence of the I.P.R.C. in making its decision.

The Tribunal believes that the purpose of the legislation under which it is constituted has been written with the best interests of the child in mind. Therefore this Tribunal in the spirit of the Act and within the parameters of the *Statutory Powers Procedure Act*, intends to act accordingly, by admitting and giving appropriate weight to whatever evidence is available to decide in the best interests of the child.

2. Evidence is presented to indicate a diagnosis of epilepsy, for which the child is receiving medication. However, neither the evidence nor the arguments presented, demonstrate a causal relationship between epilepsy and learning disability, or the use of medication and lowered intellectual functioning in the child's case.

3. The Tribunal sees no clear evidence of dyslexia, hyperactivity, or minimal brain dysfunction syndrome in the child that would contribute to or constitute a learning disability which would require special education programs or techniques, as defined in Paragraph 21 of Subsection 1(1) of the Act.

Further, the Tribunal believes that the appellant's evidence and testimony fails to support the contention that the child is exceptional, and that on the other hand, the daily classroom observations reported by the child's teachers indicate academic and social progress within normal standards.

4. The respondent expresses concern about the frequent changing of schools for the child. The Tribunal concurs with the contention that frequent movement of the child is not helpful. Further, the Tribunal notes that no evidence is presented as to why the changes of schools were made, and therefore is not satisfied that the child is being given a satisfactory opportunity to develop within an education program.
5. The Tribunal takes note of the respondent's reference to the principle of adverse inference, but feels that sufficient evidence exists, without acting upon the fact that the Appellant did not testify.
6. The Tribunal has serious concerns regarding the quality of assessment information reported to the appellant about the child by several of the various specialists. Much of this information is confusing, contradictory, and unsubstantiated by established clinical technique, or by clinical observation. This problem is reflected within individual reports and by cross-references among several reports.

The situation is compounded by what seems to be a failure of several reporting specialists to communicate directly with one another, and especially with classroom teachers, about the child's case. Further, it appears from a careful tracking of the reports, that in some cases, several of the specialists were led to conclusions on the basis, exclusively, of background history rather than of clinical observation.

## **TRIBUNAL DECISION**

After hearing all the evidence, taking note of tested evidence and testimony, and with regard to other items submitted by the appellant and respondent, the Tribunal can find no merit to the argument and can find no valid evidence to define the child as an "exceptional" pupil under subsection 1(1) of the Act. Further, the Tribunal cannot find any substantiated evidence which would identify the child as "learning disabled" under section 11(5) of the Ministry of Education's Special Education Information Handbook 1984.

Therefore, under the authority of subsection 36(6) of the Act, the appeal is dismissed.

The Tribunal recommends (by way of obiter dictum) that the child be allowed to continue [the child's] education in a stable, normal, learning environment at Rose Avenue Public School and believes this is most appropriate to the child's needs and in the child's best interest.

Out of concern for the child, the Tribunal recommends that the parent and the School Board officials and teaching personnel meet at the earliest possible moment and seek to reconcile the differences that appear to have developed as a result of conflict in the past. A continuing adversarial approach is not constructive in relation to the child's best interests and welfare. Should reasonable negotiation fail, it is the Tribunal's opinion that an arbiter such as Family and Children's Services be utilized.

The Tribunal notes that the respondent sought no costs and therefore advises that both parties are responsible for their own costs.

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Grant R. MacDonald, Chairman

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Marvin Goodman, Member

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Ken Weber, Member