



# ONTARIO SPECIAL EDUCATION (ENGLISH) TRIBUNAL

File #2009-03 [d]

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IN THE MATTER OF the *Education Act, R.S.O. 1990, c. E.2*, as amended, ss. 57(3),  
IN THE MATTER OF *Ontario Regulation 181/98*,  
AND IN THE MATTER OF the minor child born in 1994

BETWEEN

Mr. and Mrs. C. S., Appellants

-and-

The Halton Catholic District School Board, Respondent

Tribunal Members:

Eva Nichols	Chair
Ross Caradonna	Member
Julie Lindhout	Member

Participants:

Mr. C. S.	Parent
Mrs. C. S.	Parent
R. S.	Student
Nadya Tymochenko	Counsel for the Halton Catholic District School Board
Suzanne Rossini	Supervisory Officer, Special Education Services, Halton Catholic District School Board
Louise Sibbald	Secretary

A teleconference hearing was held on July 6, 2011 from 11 a.m. to 12:30 p.m.

## INTRODUCTION

[1] On July 6, 2011, the Ontario Special Education (English) Tribunal (the Tribunal) convened a teleconference hearing to determine whether to close the file or remain seized of the appeal of the appellants v. the Halton Catholic District School Board (HCDSB).

## BACKGROUND

[2] On November 30, 2009, the appellants appealed to the Tribunal regarding the special education identification and placement of their child.

[3] The Tribunal heard the merits of the case at a hearing between March 8 and March 12, 2010.

[4] On June 9, 2010, in accordance with ss 57(4) of the *Education Act*, the Tribunal issued its decision, (SET 2009-03[a]), granting the appeal and making the following orders:

(a) The Tribunal orders that the HCDSB comply with its own decision of October 6, 2009 to accept the recommendations of the Special Education Appeal Board (SEAB) and identify the student as an exceptional student, designate the student's exceptionalities as Communication – Learning Disability (Dyslexia) and Intellectual – Giftedness and ensure that this identification is consistently recorded on all documentation for the student.

(b) The Tribunal orders that the student's special education placement be Regular Class with Withdrawal Assistance. In this placement the HCDSB is to provide appropriate programming and accommodations to meet both of the student's identified exceptionalities, Communication – Learning Disability (Dyslexia) and Intellectual – Giftedness.

(c) The Tribunal orders that an Identification Placement Review Committee (IPRC) be convened before the start of the 2010-2011 school year to determine the specific components of the student's special education program to meet the dual exceptionality needs in Grade 11, based on the Tribunal's orders and recommendations listed below.

(d) The Tribunal orders that the HCDSB correctly record the student's exemption from the French language compulsory credit for secondary school graduation in the student's Individual Education Plan (IEP) and Ontario Student Record.

(e) The Tribunal orders that the HCDSB comply with its own agreement to update the student's psycho-educational assessment data to meet the stated requirements of Ontario universities for the admission and accommodation of students with learning disabilities.

[5] The Tribunal remained seized of this matter until the end of the student's first semester in Grade 11 in January 2011, to resolve any disputes that might arise relating to the implementation of these orders.

[6] On November 18, 2010, the Tribunal issued a supplementary decision, (SET 2009-03[b]), with respect to issues raised by the appellants concerning the implementation of the Tribunal's orders. The matter was addressed through written submissions received from the parties. It was not necessary for the Tribunal to issue any further orders at that time.

[7] The appellants raised further concerns about the HCDSB's implementation of the Tribunal's orders regarding the student's placement and the provision of appropriate programming and accommodation in that placement to meet the student's identified exceptionalities. On March 1, 2011, the Tribunal convened to hear the parties on this matter.

[8] On April 15, 2011, the Tribunal issued a decision, ([SET 2009-03[c]). In the supplementary decision, the Tribunal found that the appellants' concerns regarding the HCDSB's compliance with the Tribunal's orders of June 9, 2010 had merit. The Tribunal issued the following two orders as a result:

(a) The Tribunal orders that the HCDSB maintain the student's placement determination of Regular Class with Withdrawal Assistance and continue to provide the student with all appropriate programming and accommodations to meet both of the student's identified exceptionalities, Communication – Learning Disability (Dyslexia) and Intellectual – Giftedness.

(b) The Tribunal orders the HCDSB to provide the student with an appropriate gifted special education program and special education services to meet the student's identified gifted needs. In the event that the HCDSB determines that it cannot provide such a program to meet the student's needs for September 2011, at the start of the student's Grade 12 year, the HCDSB shall enter into an agreement with another school board to purchase access to a gifted Grade 12 Functions and a gifted Grade 12 Calculus program to meet the student's identified needs during the student's Grade 12 year. This is in accordance with subsection 170(1)(7) of the *Act*.

[9] In the circumstances, the Tribunal determined that it would remain seized of this matter with respect to the orders contained in the supplementary decision (SET 2009-03[c]), dated April 15, 2011, until June 30, 2011, by which time all requisite arrangements for the student's Grade 12 year should be completed.

[10] On June 13, 2011, the Tribunal wrote to both parties giving notice that the file would be closed without further notice on June 30, 2011, if neither party submits reasons to the Tribunal why this step should not be taken.

[11] On June 15, 2011, the HCDSB responded and asked that the Tribunal retain jurisdiction beyond June 30, 2011, in order to assist the parties with the implementation of the student's placement in September 2011. In that written submission, the HCDSB described the proposed program to demonstrate their compliance with the Tribunal's order regarding the provision or purchase of gifted programming for the student.

[12] On June 23, 2011, the appellants wrote to the Tribunal, setting out their list of concerns about the HCDSB's compliance with the Tribunal's decisions and orders.

[13] On June 28, 2011, the HCDSB responded and refuted the appellants' allegations regarding their non-compliance with the Tribunal's decision and orders.

## **THE PARTIES' REASONS FOR ASKING THE TRIBUNAL TO REMAIN SEIZED:**

### **Appellants**

[14] The appellants want the Tribunal to remain seized and to take whatever actions it has at its disposal to ensure that the student's needs are met and the Tribunal's orders are fully implemented.

### **Respondent**

[15] The HCDSB wants the Tribunal to retain jurisdiction in order to assist the parties with the implementation of the student's placement and program for September 2011.

[16] Further, the HCDSB wants the Tribunal to remain seized to enable the HCDSB to comply with the Tribunal's order regarding the provision of a psycho-educational assessment for the student.

## **THE ISSUE TO BE DECIDED:**

[17] The Tribunal considered the parties' compliance with the orders contained in the original decision (2009-03[a]), dated June 9, 2010, and the supplementary decision (2009-03[c]), dated April 15, 2011. It is on that basis that the Tribunal can determine whether to close this file or to agree with the parties' request and remain seized for a further period.

## **SUMMARY OF THE RELEVANT INFORMATION SUBMITTED BY THE PARTIES:**

### **Appellants**

#### **Regarding technical support and training**

[18] The appellants stated that, in spite of the Tribunal's observations in the November 15, 2011 supplementary decision and the orders within it about the provision of technical support and training, the student has not received the necessary support and training from the HCDSB.

[19] The student clarified the circumstances based on which the student did not participate in technical support and training during the past semester. These were due primarily to miscommunication between the student and the Special Education Resource Teacher (SERT) at the student's school.

#### **Regarding withdrawal support**

[20] The appellants stated that, contrary to the Tribunal's orders, the HCDSB did not withdraw the student once since the March 1, 2011, supplementary hearing to provide appropriate special education programming to meet the student's identified exceptionality needs.

[21] The student stated that, other than writing tests in the resource room, the student did not feel the need for withdrawal assistance during this semester. The student stated that it was more beneficial and efficient to remain in the classes for “teaching”, rather than going to the resource room for help, which “may not necessarily have been relevant to what the student was working on in class”.

[22] The appellants stated that the proposed withdrawal time in the draft timetable for the student’s Grade 12 year does not allow for adequate support. They are particularly concerned about the availability of withdrawal support during the first semester, when withdrawal is timetabled for the one hour lunch period, during which the student is to have lunch, travel to the public high school for the afternoon classes and utilize the resource room.

[23] In response to a question from Ms. Rossini, the student stated that if the withdrawal help is to be useful, it should be provided in a dedicated period and not during regular class time. The student confirmed that [the student] would like to have access to withdrawal support, if needed, in Semester 1, but thought that it would be more productive in Semester 2, when the student is taking Grade 12 English and has a last period spare every day.

#### **Regarding the student’s participation in the gifted program at the specified secondary school with the Halton District School Board (HDSB)**

[24] The appellants expressed a concern about the Grade 12 Chemistry course developed and delivered by a public school board, compared to the same course provided by a Catholic school board.

[25] The appellants asked why they need to sign an agreement with the HDSB. They stated that the agreement should be between the two school boards, the HDSB and the HCDSB, and should not require any third party involvement, such as a waiver letter from them. They were concerned about limiting “their child’s legal rights and wondered about the need to hire a lawyer”. They stated that they understood that all issues regarding the student’s educational program would continue to be the sole responsibility of the HCDSB. They know that they, as parents, and the student will not have any rights to appeal, complain or initiate an action against the HDSB with respect to the student’s special education program and the student’s status as an exceptional student.

#### **Regarding the psycho-educational assessment**

[26] The appellants are concerned about the assessment ordered by the Tribunal in the June 9, 2010 (SET 2009-03[a]) decision. They stated that because they did not know the name of the assessor, the assessment tools to be used and the purpose of the assessment, they could not give their informed consent. The appellants stated that they “did not trust the school board”. Further, until they knew which university the student was attending, they would not know what that university would require in the way of assessment information.

#### **Respondent**

[27] Counsel for the HCDSB confirmed that the HCDSB has complied with all orders issued by the Tribunal with the exception of the psycho-educational assessment ordered in the June 9, 2010 (SET 2009-03[a]) decision.

### **Regarding technical supports**

[28] Updated computer software for both Inspiration and Dragon Naturally Speaking has already been purchased for the student. The HCDSB is prepared to provide withdrawal time for technology training to be delivered to the student by their special education and IT personnel, provided that the student agrees to commit to participate in the training. The HCDSB will be pleased to set out more specifically what and where the training will happen, but is not prepared to commit to purchasing the training from an outside provider, as requested by the appellants.

### **Regarding withdrawal supports**

[29] Counsel for the HCDSB stated that the Tribunal did not order a specific number of withdrawal minutes per week. The student had access to withdrawal time between March 1, 2011 and June 20, 2011, but chose not to use it. Nor did the student participate in the other withdrawal opportunities that were offered, such as math contest preparation. Neither the student nor the parents requested additional withdrawal assistance during the past few months.

[30] The HCDSB confirmed that withdrawal assistance would continue to be available to the student in both Semester 1 and 2 of the Grade 12 year at the student's request. There will be an opportunity to provide assistance for longer periods of time in Semester 2, when the student has a spare period at the end of the day and when the student is taking Grade 12 English.

### **Regarding the student's participation in the program at the public secondary school**

[31] On June 15, 2011, the HCDSB provided details of the timetable options available to the student for the Grade 12 year, based on the courses chosen by the student and the parents. These options include the opportunity to take Math and Chemistry courses at a secondary school of the HDSB. If the student chooses to take Math courses at the public secondary school, the student will be with a cluster of gifted students with whom the student would be provided opportunities for enrichment.

[32] The HDSB will provide access to the student to these courses on a "without prejudice and without precedent basis. All issues and all rights regarding the student's educational program will continue to be the sole responsibility of the HCDSB. The appellants will not have any right of appeal, or access to any action, complaint or application against the HDSB with respect to the student's special educational programming or lack thereof." The student will not be identified as an exceptional pupil of the HDSB. Both school boards will consider the student's attendance at the public secondary school an extension of the educational programming provided by the HCDSB.

[33] The appellants are expected to acknowledge this in writing prior to the student's beginning attendance at the public secondary school. Counsel for the HCDSB stated that she would draft a sample letter for the appellants' consideration.

## **AGREEMENTS REACHED BETWEEN THE PARTIES DURING THE HEARING ON THE REMEDIES SOUGHT BY THE APPELLANTS:**

[34] The parties agreed that Option 1 of the three available timetable options is in the student's best interest. The student confirmed that Option 1 is [the student's] choice for September 2011.

[35] The appellants agreed to waive their objection to the student receiving the Grade 12 Chemistry course from the public board, rather than from the Catholic board.

[36] The parties agreed that daily transportation would be provided by the HCDSB between the two named secondary schools with the two school boards to enable the student to attend classes at both locations, in accordance with the timetable set out in Option 1.

[37] The parties agreed that the student would have access to withdrawal support for the Learning Disability (Dyslexia) exceptionality needs in the resource room at the Catholic secondary school, in accordance with the timetable set out in Option 1. During the first semester when the student's subjects at the Catholic secondary school will be Biology and Religion, the student will have access to the resource room during the one hour lunch period, prior to traveling to the public secondary school. During the second semester when the subjects at the Catholic secondary school will be Physics and English, the student will be able to access the resource room during the last period of the day, after returning from the public secondary school. This will enable the student to have longer periods with the SERT. The actual length and frequency of the withdrawal sessions will be at the student's discretion. The student confirmed that this arrangement would be helpful. The student confirmed the belief that [the student] would particularly benefit from being able to have longer withdrawal periods during the "spare" in the second semester.

[38] The parties agreed that the student would continue to be able to write tests for which the student requires accommodation of the Learning Disability (Dyslexia) exceptionality in the resource room at the Catholic secondary school, if the student so wishes.

## **REASONS**

[39] The Tribunal considered the parties' submissions and the rationale that they put forward for the Tribunal remaining seized of this appeal. The Tribunal also considered the parties' compliance with the Tribunal's orders contained in the previous decisions.

[40] The Tribunal notes that the HCDSB complied with the two orders contained in the April 15, 2011, supplementary decision (SET 2009-03[c]).

[41] The Tribunal notes the HCDSB's arrangements with its coterminous public school board to purchase Grade 12 gifted level Math and Grade 12 Chemistry programming for the student. This complies with the Tribunal's order in the April 15, 2011, supplementary decision.

[42] The Tribunal notes the appellants' concern about signing the required waiver to facilitate the student's attendance at the public secondary school. The Tribunal urges the parties to expedite this matter of the required waiver letter.

[43] The Tribunal notes the HCDSB's belief that the Tribunal's continued involvement will facilitate the successful implementation of the student's program during the Grade 12 year. This is not within the Tribunal's legislated mandate and the Tribunal cannot undertake such a facilitating or supervisory role.

[44] The Tribunal notes the appellants' concerns about the provision of withdrawal supports and technology training to the student during the second semester of the past 2010-2011 school year. The Tribunal also notes that the parties do not fully agree on the way the withdrawal supports and technology training will be provided to the student during the Grade 12 year. The success of both the provision of withdrawal supports and technology training will primarily depend on the communication between the student and the SERT and the student's own decisions about [the student's] own needs and interests. In the circumstances, the Tribunal does not believe that its ongoing involvement would have any influence on this situation.

[45] The Tribunal notes the HCDSB's concern that it has not been able to comply with the Tribunal's order in its June 9, 2010, decision regarding the provision of a psycho-educational assessment for the student. This is due to the fact that the appellants would not consent to such an assessment.

[46] As the student is almost 17 years old, the Tribunal recognizes that the student is capable to consent to a psycho-educational assessment on [the student's] own behalf (see the *Health Care Consent Act 1996*, S.O. 1996, c. 2 Schedule A, s. 1(c)(iii) and the *Substitute Decisions Act, 1992*, c. 30 s. 2(2) and (3)). These Acts indicate that everyone who has attained 16 years of age is presumed to be capable to make their own treatment decisions, unless the person doing the assessment has reasonable grounds to believe that he or she is incapable of making those decisions. That is not a likely outcome for the student.

[47] A psycho-educational assessment for the purposes of facilitating the student's entry to the university of the student's choice, where the student will have access to the requisite accommodation of the Learning Disability (Dyslexia) exceptionality is clearly in the student's best interest. The Tribunal would expect the student to consent to such an assessment on [the student's] own behalf and the parents to encourage the student to consent to an assessment. The Tribunal does not believe that its ongoing involvement would have any influence on the student's decision regarding this matter.

[48] Finally, the Tribunal notes that since this appeal began in November 2009, much of the communication between the parties has taken place through the Tribunal rather than between themselves. It is time for the parties to focus on communicating directly and to work on building a greater level of trust with one another.

## **DECISION**

[49] The Tribunal does not find that there are any ongoing issues relating to the implementation of its earlier orders, which require it to remain seized. Regrettably, the Tribunal's ongoing involvement cannot resolve the issue of the appellants' lack of trust in or improve their communication with the HCDSB.

[50] Therefore, the Tribunal will close this file effective the date of this supplementary decision.

## **COMMENTARY**

[51] This decision does not relieve the parties of the obligation to collaborate creatively in a continuing effort to ensure that the student has access to the agreed upon placement and programming which are in the student's best interest. This outcome depends on the parties' willingness to communicate, to co-operate and, when appropriate, to compromise. The Tribunal wishes the student well in this last year of secondary education and for the future.

**JULY 27, 2011**

Eva Nichols, Chair

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Ross Caradonna, Member

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Julie Lindhout, Member

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