



ONTARIO SPECIAL EDUCATION (ENGLISH) TRIBUNAL

File #2010-02 [c]

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. B. R., Appellants

-and-

The Halton District School Board, Respondent

SUPPLEMENTARY DECISION

Tribunal Members:

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| Eva Nichols | Chair |
| Janice Leroux | Member |
| Jim McCaughey | Member |

Participants:

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| Mr. and Mrs. B. R. | Parents |
| Nafisah Chowdhury | Counsel for the Halton District School Board (HDSB) |
| Mr. David Boag | Superintendent of Education for the HDSB |
| Louise Sibbald | Secretary |

The hearing was held by teleconference on June 22, 2011, from 10 a.m. to 11 a.m.

BACKGROUND

[1] On June 25, 2010, the appellants appealed to the Ontario Special Education (English) Tribunal (the Tribunal). The appellants did not agree with the Halton District School Board's (the respondent) decisions regarding their child's special education identification and special education placement.

[2] The Tribunal issued an Interim Decision on December 15, 2010, with reasons to follow, in order to facilitate the student's return to school as soon as possible and no later than January 2011.

[3] A full decision with reasons was issued to the parties on February 15, 2011.

[4] The Tribunal granted the appeal of the student's identification and dismissed the appeal of the student's placement. The Tribunal stated that it will remain seized of this matter until June 30, 2011. The decision included four orders. The decision and the orders are final and binding on both parties, in accordance with subsection 57 (5) of the *Education Act*. This information was confirmed several times to the appellants in writing, in response to their inquiries.

[5] On March 7, 2011, the Halton District School Board's (HDSB) representative wrote to the Tribunal to express a concern that the HDSB had not been able to implement the Tribunal's orders and the student continued to be out of school. The HDSB requested that, in accordance with the Tribunal's procedures for seized cases, the Tribunal schedule a teleconference with the parties to discuss the matter, so that the Tribunal's orders can be implemented as soon as possible. The Tribunal received this letter on March 28, 2011.

[6] A teleconference was held with the parties on April 6, 2011.

[7] Following the teleconference, the parties met to discuss the outstanding issues. The parties verbally informed the Tribunal that they have complied with two of the four tribunal orders. These are the following:

- The HDSB has deemed the student an exceptional student with no specific exceptionality designation, pending the outcome of the ordered assessment.
- The student attends a congregated special education program at a secondary school, which complies with the Tribunal's order of an interim placement.

[8] The Tribunal's other two orders remain outstanding as follows:

- The Tribunal orders the HDSB to arrange a full psycho-educational assessment for the student as soon as possible, in order to identify the student's strengths and needs and to determine the most appropriate ways to meet the student's academic, behavioural and communication needs. As the student is sixteen years of age, the student is presumed to be capable to consent to such an assessment (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. As an assessment is clearly in the student's best interests, the Tribunal

expects the student's parents to encourage the student to consent to an assessment and to facilitate that assessment, including giving substitute consent for the student, should any issue regarding the capacity to make an informed decision about an assessment arise.

- The Tribunal orders the HDSB to arrange an Identification Placement Review Committee (IPRC) meeting as soon as possible after the psycho-educational assessment results are available. At this IPRC, the student's category or categories and specific exceptionality or exceptionalities are to be determined. The IPRC must also determine the most enabling placement for the student to meet the identified strengths and needs. The IPRC Statement of Decision will also identify the appropriate programs, services and accommodations that will be provided to meet those needs.

[9] On May 24, 2011, the appellants wrote to the Tribunal asking if they could request an IPRC to discuss the student's placement for September 2011. On May 25, 2011, the Tribunal responded stating that it is the Tribunal's expectation that an IPRC will be arranged for the student following the psycho-educational assessment and prior to the end of the 2010/2011 school year.

[10] On June 2, 2011, the appellants once again contacted the Tribunal. They stated that they met with a private psychologist, Dr. Howard Bernstein, as arranged by the HDSB, but that Dr. Bernstein refused to assess the student. They further stated that if a psychologist were to carry out an assessment without their consent, they can charge him or her with professional misconduct.

[11] The appellants also stated that the school board has refused to schedule an IPRC for the student.

[12] On June 6, 2011, the Tribunal responded to the appellants and stated that the Tribunal will not enter into any discussion about who will carry out the psycho-educational assessment for the student. Further, the Tribunal confirmed that under Regulation 181/98, if a parent requests an IPRC in writing and it is more than three months since the Tribunal has issued its decision, the board has a legal obligation to arrange an IPRC.

[13] On June 6, 2011, counsel for the HDSB wrote to the appellants to state that the HDSB will not schedule an IPRC for the student, until the psycho-educational assessment is completed.

[14] On June 9, 2011, Mr. Boag, superintendent of the HDSB, wrote to the appellants. He requested written clarification of their statement that Dr. Bernstein refused to assess the student. He offered to work with the appellants to identify another mutually agreeable psychologist or psycho-educational service to carry out the assessment ordered by the Tribunal, before proceeding to an IPRC.

[15] On June 9, 2011, the appellants reiterated their request for an IPRC in a letter written to the Tribunal and copied to the HDSB.

[16] On June 13, 2011, the appellants once again asked for an IPRC and stated that they will not agree to the student undergoing a psycho-educational assessment or allow the student to attend anything other than a regular secondary school program at their local secondary school.

[17] On June 13, 2011, the Tribunal received a letter, dated June 8, 2011, from the counsel for the HDSB, stating that since they could not arrange a psycho-educational assessment for the student, a further IPRC would be a waste of time and money. The HDSB requested a teleconference with the Tribunal to discuss the outstanding issues before the time period for the Tribunal remaining seized ends.

[18] This request for a teleconference was reiterated in an email, dated June 16, 2011.

[19] On June 17, 2011, the Tribunal responded to both parties agreeing to set up a teleconference, once again reminding the school board of its obligation under the Regulation to arrange an IPRC.

[20] On June 20, 2011, the Tribunal sent a Notice of Teleconference Hearing to the parties, stating that the purpose of the hearing was to discuss the parties' concerns about the implementation of the Tribunal's orders.

[21] Following receipt of the Notice, on June 20, 2011, the appellants wrote to the Tribunal, stating that they also wished to discuss the recommendations contained in the final decision, dated February 15, 2011.

[22] The teleconference hearing took place on June 22, 2011 at 10 a.m.

SUMMARY OF RELEVANT INFORMATION COMMUNICATED DURING THE TELECONFERENCE:

Appellants:

[23] The appellants stated that currently the student is in school in the self-contained placement ordered by the Tribunal. She said that they are not prepared to agree to the student continuing in that placement starting in September 2011. They want the student to attend the local high school to participate in Grade 9 and 10 applied and open courses and eventually in Grade 11 and 12 college-bound courses.

[24] The appellants stated that the student requires this [regular class] placement to be able to participate in post-secondary education after the age of 21 and to achieve independent living and gainful employment, in accordance with the Tribunal's recommendations.

[25] The appellants stated that they had consulted Community Living and the student is not eligible for any of their programs. She referred to their family doctor's letter, entered into evidence at the hearing in November 2010, which did not explicitly state that the student has developmental disabilities. Therefore, as she understood it, the student cannot go to Community Living after leaving secondary school, because the student has been in a self-contained program, but does not have a diagnosis of developmental disabilities or Down Syndrome.

[26] Regarding the status of consent for a psycho-educational assessment for the student, the appellants said that the student does not understand what such an assessment is and therefore, cannot give consent.

[27] The appellants said that they will not give substitute consent at this time and spoke again about charging any psychologist with malpractice who completed an assessment without their consent. The appellants stated that such an assessment is discriminatory and harmful to their child.

[28] As has been the case in several written communications to the Tribunal, the appellants made frequent references to taking the complaint forward to [the] Human Rights [Tribunal].

Respondents:

[29] Ms. Chowdhury, counsel for the HDSB, stated that the board believes that going ahead with an IPRC when there has been no psycho-educational assessment is a waste of time. She stated that an IPRC at this time could only confirm the Tribunal's decision of identifying the student as an exceptional student, without specifying the exceptionality, and placing the student in a self-contained program, such as the one that the student attends now.

[30] Mr. Boag spoke about the board's willingness to pay for an outside assessment and the costs incurred so far. He is concerned about the parents' refusal to give consent to an assessment, which is in the student's best interest.

Agreement reached:

[31] The parties agreed that an IPRC will be scheduled for the student at the earliest opportunity, either still in June or in early September 2011. The Tribunal confirmed for the appellants that if they do not agree with that IPRC statement of decision, they have not forfeited their right of appeal.

THE TRIBUNAL'S DECISION:

[32] There were two complaints of non-compliance before the Tribunal, one from each of the parties.

[33] The Tribunal is pleased to note that the HDSB has agreed to schedule an IPRC for the student at the earliest mutually agreeable opportunity without awaiting the results of the psycho-educational assessment ordered by the Tribunal. This agreement regarding the IPRC eliminates the appellant's complaint of the HDSB's non-compliance with the Tribunal's orders.

[34] The Tribunal accepts the appellants' statement that they will not give substitute consent on the student's behalf to a psycho-educational assessment at this time. The Tribunal is aware that no psychologist or psycho-educational consultant will administer an assessment under these circumstances, i.e., without consent. Therefore, although there is merit to the HDSB's claim of non-compliance on the part of the appellants, the Tribunal finds it necessary to issue a supplementary order.

[35] The Tribunal will remain seized of this matter until December 31, 2011, to decide any disputes that may arise in respect of the implementation of the order in paragraph [36] of this decision.

ORDER:

[36] The Tribunal orders the HDSB to comply with subsection 15 (1) of Regulation 181/98 to obtain an educational assessment for the student. The HDSB must ensure that the IPRC considers the results of that assessment before making any decision about the student's identification and placement, and before recommending special education programs, services and accommodation to meet the student's strengths and needs. Such an educational assessment, carried out by a teacher, does not require parental consent. The student's IEP for the 2011-12 school year shall be based on the educational assessment and the IPRC statement of decision. In accordance with the legislation, the IEP will be prepared within 30 days of the IPRC date.

COMMENTARY:

[37] The Tribunal is aware that its supplementary order does not fully resolve the HDSB's concerns about its ability to comply with the Tribunal's order regarding a psycho-educational assessment for the student, which is still seen as being in the student's best interest. However, the Tribunal believes that this step will enable the HDSB to meet the student's strengths and needs more effectively than is the case currently, when there is no up to date information available about the student's functional levels and potential.

[38] The Tribunal hopes that the appellants will recognize the benefits of an up to date psycho-educational assessment for the student, which will enable the HDSB to provide the student with the most appropriate programs, services and accommodation and will agree to give their consent.

[39] This supplementary decision has the unanimous support of the hearing panel and is signed by the panel chair on behalf of the panel.

Eva Nichols, Chair

JUNE 30, 2011