



## ONTARIO SPECIAL EDUCATION (ENGLISH) TRIBUNAL

File #2009-03 [c]

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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  
Ross Caradonna  
Julie Lindhout

Chair  
Member  
Member

Appearances:

Mr. and Mrs. C. S.

Parents

Nadya Tymochenko  
Suzanne Rossini

Counsel for the Halton Catholic District School Board (HCDSB)  
Supervisory Officer, Special Education Services, HCDSB

A supplementary hearing was held on March 1, 2011 in Oakville, Ontario.

## INTRODUCTION

[1] On November 30, 2009, Mr. and Mrs. C. S. appealed to the Ontario Special Education (English) Tribunal regarding the special education identification and placement of their child and the implementation of that placement by the HCDSB.

[2] Between March 8 and March 12, 2010, the Tribunal convened a hearing on the merits of the case.

[3] On June 9, 2010, the Ontario Special Education (English) Tribunal rendered its decisions and orders as follows:

[4] (a) In accordance with subsection 57 (4) of the *Education Act*, the Tribunal granted the appeal.

(b) The Tribunal remained seized of this matter until the end of the student's first semester in Grade 11 in January 2011, to decide any disputes that might arise in respect of the implementation of its orders.

[5] The Tribunal issued the following five orders:

(a) The Tribunal orders that the Halton Catholic District School Board comply with its own decision of October 6, 2009 to accept the recommendations of the SEAB and identify the student as an exceptional student, designate the exceptionality as Communication – Learning Disability (Dyslexia) and Intellectual – Giftedness and ensure that this identification is consistently recorded on all documentation.

(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 identified exceptionalities, Communication – Learning Disability (Dyslexia) and Intellectual – Giftedness.

(c) The Tribunal orders that an IPRC be convened before the start of the 2010/11 school year to determine the specific components of the special education program to meet the student's 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 IEP and Ontario Student Record.

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

[6] On October 26, 2010, the Tribunal received a submission from the appellants expressing their concern that the orders of the Tribunal were not being implemented by the HCDSB. The HCDSB's response submission was received on November 9, 2010.

[7] On November 18, 2010, the Tribunal issued a supplementary decision, based on submissions received from the parties. In the supplementary decision, the Tribunal upheld its decision and orders of June 9, 2010 and did not issue any additional orders.

[8] On December 15, 2010, the appellants wrote to the Tribunal, stating that the HCDSB was still not implementing the Tribunal's decision and orders contained in the June 9, 2010, decision and confirmed in the November 18, 2010, supplementary decision.

[9] On January 10, 2011, Ms. Tymochenko, the school board's representative, responded to the Tribunal, setting out how the HCDSB responded to the Tribunal's decision. This letter clarified that the HCDSB had not been able to provide the range and depth of gifted programming recommended by the Tribunal, due, in part, to circumstances beyond its control and in part to the refusal of Mr. and Mrs. S. to agree to their child's participation in a math course offered through the Independent Learning Centre (ILC).

[10] In this letter, the school board offered to facilitate the student's transfer to the Halton District School Board (HDSB), starting in either February 1, 2011 or in September 2011, to take advantage of the gifted programming that that board provides to students in Grades 11 and 12.

[11] The submission confirmed that the HCDSB would provide the student with transportation to and from the HDSB gifted program. The school board also confirmed its commitment to provide an updated psycho-educational assessment for the purposes of attendance at University.

[12] The HCDSB's submission also stated that if the student remained enrolled in the HCDSB for the balance of the student's education, the HCDSB would continue to offer some enrichment opportunities in the Grade 12 math courses, however, clustering and acceleration cannot be provided.

[13] On January 23, 2011, the appellants responded to the HCDSB's submission to the Tribunal. They confirmed their earlier concerns about the board's implementation of the Tribunal's orders and recommendations. Further they expressed their concern about the proposal that their child attend a gifted math program under the auspices of the HDSB.

[14] On March 1, 2011, the hearing panel convened to hear the appellants' concerns about the HCDSB's implementation of the Tribunal's order regarding placement and the provision of appropriate programming and accommodations in that placement to meet the student's identified exceptionalities.

[15] As agreed at the end of the hearing, on March 8, 2011, the respondent submitted a Brief of Law and a supplementary submission. On March 16, 2011, the appellants submitted their response to the respondent's submission and Brief of Law.

## **POSITIONS OF THE PARTIES**

### **Appellants**

[16] The appellants stated that after the parties had received the Tribunal's Supplementary Decision of November 18, 2010, the HCDSB did not remedy the situation noted in that decision, namely that the HCDSB was not in full compliance with the Tribunal's decision and orders, contained in the decision of June 9, 2010. They quoted from the Supplementary Decision the Tribunal's statement that, while the HCDSB has complied with four of its five orders, the HCDSB was not providing programming and accommodations to meet the student's needs as a gifted student, whose placement is Regular Class with Resource Withdrawal.

[17] The appellants also expressed their concerns about the programs and supports that the HCDSB is providing to meet their child's needs as a student with Learning Disability – Dyslexia, as one of the identified exceptionalities. They stated that, in their opinion, the withdrawal programming, scheduled for twenty minutes each day during the school day is inadequate and inappropriate. Further, that the technology training and supports which should be an integral part of their child's programming and accommodations in the implementation of the withdrawal placement and which were recommended by the school board's expert witness in March 2010, have not been provided during the first semester of the Grade 11 year.

[18] The appellants stated that the HCDSB misled the Tribunal regarding their (the board's) intentions of implementing the Tribunal's decision and orders. Further, they alleged that the HCDSB's stated commitment to implement the Tribunal's orders and decisions is an indication of bad faith.

[19] The appellants stated that their child has a legislated right to a publicly funded Catholic education and stated that they were not prepared to accept the HCDSB's offer of a transfer to the public system in order to receive a credible gifted program.

### **Respondent**

[20] The respondent denied the appellants' allegations regarding the HCDSB's non-compliance with the Tribunal's orders, as they relate to the student's learning disabilities. According to the school board, the withdrawal programming for assisting the student with writing is working well, as is demonstrated by the excellent marks obtained by the student, even in the language-based subjects.

[21] The respondent concurred that some aspects of technology training and supports have not taken place, as the appellants had hoped and expected, but clarified that, at least in part, this was the student's choice.

[22] The respondent stated that the HCDSB explored various options but realized that it could not fulfill "two of three expectations of the Tribunal with respect to gifted programming". They attempted clustering, by placing the four gifted students at the student's grade level in the same math class. The other students were not interested in acceleration, compacting or telescoping the curriculum or in enrichment, other than participating in the math contests. Therefore, the respondent stated that "it could not provide an accelerated program within a cluster or withdrawal setting with other students".

[23] The respondent stated that while the recommended components of a gifted math program cannot be provided by the HCDSB, if the student remains enrolled in the HCDSB, there will be access to enrichment in terms of continuing to participate in the math contests, if so desired. The respondent further stated that the board does not think that the student requires an accelerated math program in order to be successful. But, if the appellants feel that there must be access to a gifted math program in Grade 12, the HCDSB is prepared to purchase a full time Grade 12 placement from the HDSB and provide transportation to the school selected for this placement.

[24] The respondent stated that the *Education Act* and *Regulation 181/98* do not allow for a student to attend two schools at the same time or receive special education programs and services from two school boards.

[25] The respondent “emphatically denied” that the HCDSB at any time acted in bad faith with respect to the provision of the student’s educational programs and services.

### **WRITTEN SUBMISSIONS OF THE PARTIES**

[26] At the end of the hearing the Tribunal directed that the parties could make their closing statements in writing. The respondent submitted its written submissions on March 8, 2011. The appellants served their reply written submissions on March 16, 2011.

[27] The board submitted that the student could not receive special education programs in two different schools in two different school boards because this was not permitted under the *Education Act*. Specifically, the respondent noted the use of the singular tense throughout the *Education Act* (ss. 32, 36 and 42) and *Regulation 181/98* (ss. 7, 22 and 23), with respect to special education programming and school attendance and argued that this meant that the *Act* did not contemplate special education students attending two different schools in two different school boards. The respondents also noted the *Act’s* silence with respect to methods of coordination for identification and placement and the provision of special education programs and services between boards indicated that the *Act* did not contemplate programs being offered at two different schools in two different school boards.

[28] The respondent did not cite any specific provision within the *Act* explicitly prohibiting the provision of special education programming at two different schools in two different school boards. The respondent noted that the Ministry of Education document entitled “*Instructions for the Use of Computerized Enrollment Registers for Elementary and Secondary Schools 2010-2011*” did appear to contemplate enrolment in two different schools in two different boards, but submitted that such a document could not supersede the *Education Act*.

[29] The respondent also submitted that the Tribunal did not have the jurisdiction to order it to enter into an agreement with the HDSB for the student to attend gifted math classes at one of their secondary schools in the Grade 12 year, because to do so would be to make an order about the specific special education program the student was to receive. They further noted the Tribunal could not make such an order because the HDSB was not a party to the appeal.

[30] The appellants’ written submissions summarized their earlier submissions at the hearing and responded to the issues raised by the respondent with respect to the delivery of special education programming to a student at two different schools in two different school boards. They also addressed the Tribunal’s jurisdiction to order the respondent to enter into

an agreement with the HDSB to provide gifted math courses to their child at one of their secondary schools and the rest of the courses at the current secondary school.

[31] The appellants noted that there was nothing in the *Education Act*, which made it illegal to provide the program proposed by the appellants. Further, they stated that *Regulation 181/98* contemplated that one school board could purchase appropriate special education programming from another school board where it was necessary and appropriate to do so. The appellants also noted that *“Instructions for the Use of Computerized Enrollment Registers for Elementary and Secondary Schools 2010-2011”* contemplated the enrollment of a student at two different schools in two different school boards.

[32] The appellants also noted that the HCDSB and the HDSB appear to offer many joint programs and courses.

### **REMEDIES SOUGHT BY THE APPELLANTS**

[33] The appellants want their child to remain a student of the HCDSB and be able to graduate from the current secondary school at the end of Grade 12.

[34] The appellants want the Tribunal to order the HCDSB to purchase Grade 12 self-contained gifted-level math programming from the HDSB. These programs would be Grade 12 Functions in semester one of the Grade 12 year and Grade 12 Calculus in the second semester.

[35] The appellants rejected the HCDSB’s offer to transfer their child to a high school in the HDSB for the Grade 12 year to participate in a gifted math program. It is the appellants’ position that their child is entitled to receive a Catholic education, and they want special education to be delivered at the current high school.

[36] Regarding the programming and services provided to meet their child’s Learning Disability – Dyslexia needs, the appellants want their child to have access to regularly timetabled withdrawal programming, that does not interfere with other classes, i.e., programming that is provided at the start or end of the school day. In addition, they want this programming to be more than twenty minutes per session.

[37] The appellants want the respondent to provide appropriate training and supports for their child during withdrawal periods to acquire and enhance the child’s skills in the use of technology, including Dragon Naturally Speaking, Inspiration and Word Q.

[38] The appellants want the Tribunal to take “whatever actions it has at its disposal”, in accordance with subsection 57 (5) of the *Education Act*, which states that the Tribunal’s decisions are final and binding, to ensure that their child’s needs are met and that the Tribunal’s orders are appropriately implemented.

### **THE RESPONDENT’S RESPONSE TO THESE REMEDIES**

[39] The respondent stated that if the appellants want the student to remain at the current secondary school, then they have to accept that the Grade 12 math programming will not be accelerated or provided in a cluster in a compacted way.

[40] If the appellants want their child to have access to gifted-level math programming in Grade 12, then the HCDSB is prepared to purchase a full time placement at a secondary school of the HDSB, where such programming is available. The HCDSB would provide transportation to that school. The purchase of only one credit course in each semester is not possible legally and would be a “logistical nightmare”. Further, the respondent stated that the HDSB is not a party to this appeal and has not agreed to provide gifted programming in only math courses.

[41] The respondent will provide training in Dragon Naturally Speaking, if the student remains in the HCDSB and is interested in pursuing this.

[42] The HCDSB cannot provide withdrawal programming outside of the regular school day, because legally that is not possible.

### **RELEVANT STATUTORY PROVISIONS**

[43] The Tribunal’s authority is set out in section 57 of the *Education Act, R.S.O. 1990, c. E.2*, and the regulations made there under. The Tribunal’s procedures are governed by the *Statutory Powers Procedure Act, R.S.O. 1990, c. S.22*, the Tribunal’s *Rules of Procedure*, and the rules of natural justice and procedural fairness applicable to administrative tribunals.

#### ***Education Act, R.S.O. 1990, c. E.2:***

[44] Subsection 57 (3) of the *Education Act* sets out the parents’ right of appeal to the Tribunal:

Where a parent or guardian of a pupil has exhausted all rights of appeal under the regulations in respect of the identification or placement of the pupil as an exceptional pupil and is dissatisfied with the decision in respect of the identification or placement, the parent or guardian may appeal to a Special Education Tribunal for a hearing in respect of the identification or placement.

[45] Subsection 57 (4) of the *Education Act* sets out the Tribunal’s decision-making authority:

The Special Education Tribunal shall hear the appeal and may

- (a) dismiss the appeal; or
- (b) grant the appeal and make such order as it considers necessary with respect to the identification or placement.

[46] Subsection 8 (3) of the *Education Act* sets out the requirements for identification programs and special education programs and services:

The Minister shall ensure that all exceptional children in Ontario have available to them, in accordance with this *Act* and the regulations, appropriate special education programs and special education services without payment of fees by parents or guardians resident in Ontario, and shall provide for the parents or guardians to appeal the appropriateness of the special education placement and for those purposes the Minister shall,

(b) in respect of special education programs and services, define exceptionalities of pupils and prescribe classes, groups or categories of exceptional pupils, and require boards to employ such definitions or use such prescriptions as established under this clause.

- [47] Subsection 170 (1) of the *Education Act* sets out the duties of boards:  
Every board shall,  
7. Special education programs and services – provide or enter into an agreement with another board to provide in accordance with the regulations special education programs and special education services for its exceptional pupils.
- [48] Subsection 21 (6) sets out the entitlements of Roman Catholic Separate School supporters:  
Nothing in this section requires the child of a Roman Catholic separate school supporter to attend a public school or a Protestant separate school, or requires the child of a public school supporter to attend a Roman Catholic separate school.
- [49] Subsection 42 (3) sets out the process for a secondary student of a Roman Catholic board to receive instruction from a public board:  
A person who is qualified to be a resident pupil of an English-language Roman Catholic board and to receive instruction in a secondary school grade is entitled to receive instruction provided in a secondary school operated by an English-language public board if the area of jurisdiction of the Roman Catholic board is in whole or in part the same as the area of jurisdiction of the public board.
- [50] Subsection 32 (1) and 36 (5) set out the resident pupil qualifications:  
A person has the right, without the payment of a fee, to attend a school in a school section, separate school zone or secondary school district, as the case may be, in which the person is qualified to be a resident pupil.
- A person who is qualified to be a resident pupil in respect of a secondary school district or a separate school zone is a resident pupil if the person enrolls in a secondary school operated by the board of the secondary school district or separate school zone, as the case may be, or in a secondary school operated by another board,
- (a) to which the board of the secondary school district or separate school zone pays fees on the person's behalf; or
  - (b) with which the board of the secondary school district or separate school zone has an agreement relating to the provision of education to the person.
- [51] The respondent cited section 7 from *Regulation 181/98* to support the contention that the *Regulation* only allows for one school board to provide special education programs and services at any one time to a given student.
- [52] The appellants cited *Regulation 298* to support their contention that the HCDSB should be able to provide withdrawal programming for their child outside of the regularly timetabled period of the school day.

#### **OTHER CASES, TRIBUNAL DECISIONS AND DOCUMENTS CITED**

- [53] *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 (SCC);  
*R. v. Carleton Roman Catholic Separate School Board*, Ontario Special Education (English) Tribunal, 1989;  
*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39 (SCC);  
*Sparks v. Ontario*, 2010 ONSC 4234;

[54] *Instructions for the Use of Computerized Enrolment Registers for Elementary and Secondary Schools 2010-11, Ministry of Education:*

**Pupils Enrolled in More Than One School**

If a pupil (other than a pupil taking e-learning courses) is enrolled in schools operated by two different boards, each school shall report the pupil's enrolment in the OnSIS reporting system. The FTE reported by each school must be based on the number of minutes of classroom instructions that the pupil receives at that school. In some instances, the combined FTEs of the pupil may exceed 1.00.

**WITNESSES**

[55] The appellants' witnesses were:

Mrs. C. S.	parent
R. S.	student

[56] The respondent's witnesses were:

Ms. J. D.	Special Education Resource Teacher (SERT), Secondary School, HCDSB
Ms. Suzanne Rossini	Supervisory Officer, Special Education Services, HCDSB

**SUMMARY OF EVIDENCE**

**Regarding meeting the student's gifted needs within the placement**

[57] Mrs. S. stated that the appellants had initially anticipated that the HCDSB would fully implement the Tribunal's orders and recommendations in providing their child with a credible gifted program. She testified that there were no changes made to the IEP or programming after the parties had received the Tribunal's November 2010, supplementary decision.

[58] Ms. Rossini testified that the HCDSB does not have a formal congregated gifted program or a formal clustering of gifted students at the secondary level. Since 2008, they have developed some congregated classes for gifted students from the Grade 5 to Grade 8 level. With more of a "culture" around programming for gifted students, they are looking at a couple of programs at secondary for this fall in grade 9.

[59] Ms. Rossini described her research into what other boards were doing to provide programs for gifted students. She said that none of the boards were using acceleration as a strategy, and that only the larger boards had dedicated programs. Her research at other boards also indicated that there is more interest among grade 9 and 10 students in participating in a withdrawal approach to gifted programming than among grade 11 and 12 students who are more interested in getting good marks. In programming for grade 11 and 12 students, there is a shift away from Withdrawal Assistance to Resource Support, with a SERT coming into the classroom to assist them with advocacy skills and other areas.

[60] In response to a question about the school board providing a placement with withdrawal assistance as a gifted placement within the HCDSB, Ms. Rossini stated that the board has always had withdrawal assistance for gifted students. She stated that it was largely students with complex learning needs who were accessing that particular placement.

[61] Ms. Rossini testified that the HCDSB arranged to cluster all four students identified as gifted in the same math class. All four students were offered the Independent Learning Centre (ILC) course option, but none accepted the option.

[62] Ms. Rossini was not able to describe how parents were involved in trying to get the cluster together and in considering the decision to offer the ILC course. She referred the question to the SERT who said that, as far as she knew, the students talked to their own parents about it.

[63] The student stated that the clustering involved three other gifted students being in the math class. They were in the same class, but did not sit together nor were they directed to do any work with each other. The four students were withdrawn once to work on Waterloo math contest questions with the SERT. The student commented that other high achieving math students who are in Grade 11 were not part of the class.

[64] The SERT also said that there was some “pull-out work” where Grade 11 students were clustered together to do work for the math contests, and the student did some work for the math contests with the itinerant math teacher. She stated that there was some preparatory work, which was offered to all of the gifted students for Grades 9, 10 and 11. The grade 9 and 10 students participated, but most of the grade 11 and 12 students did not, as they had previous math contest experience.

[65] The student described seeing the itinerant math teacher only once during the first semester in one of the withdrawal periods.

[66] The SERT stated that in the future, (if the student remains at in the current secondary school) she would like to introduce some integrated math/science projects, possibly on a withdrawal basis, with the assistance of the classroom teachers to enrich the student’s studies.

[67] Mrs. S. stated that it was her expectation that a teacher would be devoting some specific time to providing gifted instruction for those clustered students, so they would be working on a gifted program and collaborating with each other. Mrs. S. stated that doing questions on your own was meaningless busy work. She cited Dr. Edmunds’s evidence from the previous hearing about the pitfalls of busy work being called enrichment for gifted students. She testified that the best enrichment is the engagement of the teacher in broader concepts with the students.

[68] The student stated that the classroom math teacher pointed out some more complex questions at the back of each chapter and indicated that the student could do them if desired. But there was no instruction or review related to those questions.

[69] Ms. Rossini gave evidence that she considered the math program that the student was experiencing in Grade 11 to be enrichment and “part of a gifted math program,” and that the math to be offered in Grade 12 would probably look the same.

[70] Ms Rossini clarified that she believed that providing enrichment opportunities such as participating in math contests, activities such as visiting McMaster University, and providing the option of taking the ILC component while also taking Grade 11 functions, would have been adequate to meet the student’s needs for gifted programming, and that it would have complied with the Tribunal’s order.

[71] Ms. Rossini testified that she saw the value of enrichment experiences and of clustering and providing opportunities for students to work together, but that any form of acceleration was difficult at the Grade 11 and 12 levels.

[72] Ms. Rossini testified that she spoke with the resource teacher at one of the secondary schools of the HDSB, which offers gifted programming. The teacher explained that there are a number of ways that the school provides gifted programming. For example, they compact the math curriculum so that it is delivered in four days of the week, and on the fifth day, they provide enrichment activities. Ms. Rossini stated that it was her understanding that under this scheme the students would not be gaining credits for both Grade 11 and Grade 12 Functions within one semester.

[73] The student had hoped initially to take three math courses during the two semesters of the Grade 11 year. These would have been Grade 11 and Grade 12 Functions and Grade 12 Calculus. The student believed that each course would have taken two thirds of a semester. Realizing that this was not going to occur, the student chose to opt for physical education for the second semester, instead of taking Grade 12 functions.

[74] The appellants stated that they were very encouraged by the HCDSB's suggestion, received in January 2011, that their child participate in the HDSB's gifted math courses during the Grade 12 year at a secondary school, which is just over 2 km from the student's current school.

[75] The student testified to making the decision to defer the Grade 12 functions course for the second semester of Grade 11, because of the possibility of taking it at the gifted level at the HDSB next year and it would be preferable to do more than "just the normal" functions course.

[76] Mrs. S. stated that they were shocked and disappointed when they learned from counsel's letter that the HCDSB were proposing that their child transfer and become a student of the HDSB for Grade 12. She testified that the appellants do not accept that this is the only way that their child can access appropriate Grade 12 gifted level math programming. She stated that if it was the will of the administrators to make it work, it could work without being in violation of the *Education Act*. Mrs. S. cited a number of programs that are shared by the two co-terminus boards: the HCDSB and the HDSB.

[77] Mrs. S. stated that for a Catholic School Board to require a Catholic student to forfeit a Catholic education in order to receive appropriate special education programs and services "is scandalous". She further testified that making their child forfeit a Catholic education is a violation of their child's legislated rights.

[78] Mrs. S. stated that since the HCDSB cannot meet their child's needs, the best option is for the student to be enrolled in the HDSB's gifted math course next year. Mrs S. testified that they learned from the superintendent of the HDSB, that his board will offer Grade 12 gifted level Functions in September 2011 and Grade 12 gifted level Calculus in the spring of 2012 at one of their secondary schools.

[79] Both parties entered into evidence a Ministry of Education document that contemplates such an arrangement under the heading of Pupils Enrolled in More than One School. It reads as follows:

*If a pupil (other than a pupil taking e-learning courses) is enrolled in schools operated by two different boards, each school shall report the pupil's enrolment in the OnSIS reporting system. The FTE [full time equivalent] reported by each school must be based on the number of minutes of classroom instructions that the pupil receives at that school. In some instances, the combined FTEs of the pupil may exceed 1.00.*

[80] In spite of that, counsel for the respondent stated in the board's written summation statement that the *Education Act* does not allow for a student to attend two different schools in two different school boards. The HDSB was not a party to this proceeding. Further, she stated that as far as the HCDSB was concerned, it is in the student's best interest to either remain at the current school full time or attend a school within the HDSB full time.

[81] Ms. Rossini testified that it was her understanding that if the student were interested in pursuing the gifted programming at an HDSB school, the student would be attending that school full time. She felt that with the dual exceptionality of Giftedness and Communication - Learning Disability (Dyslexia), "that whatever accommodations needed to happen would have to be seamlessly offered and provided to the student throughout the entire day, that we couldn't just cut off programming and resume it at another school." She did not think the two exceptionalities could be separated. She cited other logistical difficulties, regarding transportation, timing, IEP development, other school activities the student might want to participate in, and the good relationship the student has with the SERT that she would not want to see "diluted," as reasons for not pursuing this option.

[82] Ms. Rossini testified that she saw the report card as evidence of both the student's ability and the appropriateness of the programming that the student is now receiving in school. She suggested that all that needed to be done going forward would be to continue to keep the lines of communication open with the student and the teachers that provide the Resource Support required, and to continue doing the accommodations to help maintain the marks.

[83] The SERT stated, when discussing the student's need for access to a gifted program, that there is a higher demand on the communication component in the senior mathematics curriculum. The student did not do as well on a test with more word problems, as on the Cayley test which is multiple choice. She said that she would work with the University of Waterloo to ensure that there would be access to the same accommodations that the student has at the current school for the next set of math contests. In Grade 12, the communications component of the math courses would be more demanding than in Grade 11.

[84] The SERT testified that she believed that the student should not continue to receive Withdrawal Assistance because time is "a very precious commodity" for the student who does not want to miss class time. The student understands personal needs well, has good self-advocacy skills and would be better served with Resource Assistance in the classroom.

[85] The student testified to the belief in doing one's best. Setting goals, good grades and competition are motivators. The student does the very best and is always looking "for different possibilities to widen the scope of what is next." At the same time, the student also spoke about the many hours of assigned homework and the need for some "down time".

## **Regarding meeting the Student's Learning Disability – Dyslexia needs within the placement**

[86] Mrs S. stated that her child's marks have been consistent in high school and are not an indication of the effectiveness of the special education program, but are an indication of the effectiveness of her child's intelligence and hard work.

[87] She testified that appropriate programs, services and accommodation are about developing skills that their child will need to achieve maximum potential after high school. She stated that "the child's strengths will see their child through to succeed at the end of the day"

[88] The student stated that the regularly scheduled withdrawal support really didn't help because [the student] was looking for "parallel assignments" to develop skills in essay writing. The student stated that at the beginning of the first semester there was daily attendance in the withdrawal class with the SERT. As the semester progressed, the level of participation decreased. The student stated that by the start of the second semester it dropped down to "maybe going a week without seeing the resource staff".

[89] The student described that the withdrawal periods were supposed to be about 20 minutes in length. The student typically did not leave class until there was a natural break. By the time the student got packed up and out of class, the amount of time with the SERT only amounted to about 15 minutes.

[90] Mrs. S. testified that in her opinion squeezing 20 minutes at the end of one period and/or in front of another is too compressed, too tight and too unpredictable to be effective in meeting their child's needs. She also testified that their child should not have to go to the resource room during the lunch hour.

[91] The student described the primary needs in editing written assignments and stated that "I am terrible with editing. Reading fluency is still slower and spelling is an issue". The student stated that unfortunately spell check didn't pick up the "long and hard to pronounce technical words" and wanted to apply the information learned in the resource room with the SERT and write material to get good grades knowing that it was "my own contribution".

[92] Mrs. S. stated that they were 100 % supportive of their child getting support in the classroom to integrate the compensatory accommodations into the writing process and the classroom work. She testified that their child is not getting adequate support in the utilization and application of assistive technology within the regular educational program.

[93] When discussing the appropriateness of the type and extent of withdrawal programming provided to their child, the appellants also focussed on accommodation and technology needs, some of which were referenced in the March 2010, decision as recommendations.

[94] Mrs. S. stated that the classroom teachers do not have "working familiarity" with the programs to help their child learn new and efficient approaches or even support and guide in the use of the applications nor have they been assisted to acquire such familiarity. The former principal the current secondary school testified at the March 2010, hearing that the HCDSB had an itinerant Information Technology (IT) staff member who could provide in-service to staff and students on Inspiration as well as other technology applications. There was no evidence that this had occurred.

[95] Mrs. S. testified that their child is currently using Kurzweil and Inspiration and has access to Word Q. She stated that the student's capacity with Inspiration is self-taught. Their child has learned to use mapping with Inspiration, but has not maximized the potential of the software.

[96] The student never experienced the "full benefits" of Inspiration but is interested in learning more about this application. The student described the family's contact with the manufacturer of Inspiration when they learned that the newer version of Inspiration allowed for exporting information into Word and for the development of PowerPoint presentations.

[97] Mrs. S. testified that in spite of their earlier reluctance to focus on compensatory strategies rather than remediation, they have realized the potential benefits of assisting their child to acquire the requisite skills to use voice-to-text software such as Dragon Naturally Speaking. She stated that by providing some voice training and some training in integration and manipulation of the system, the long term potential would exceed Inspiration.

[98] The SERT described the efforts made to help the student learn to use Dragon Naturally Speaking in several 15 minute sessions. According to her, there is a steep learning curve and the student had particular difficulty with the verbal reading to train Dragon to [the student's] voice. It was the student's decision not to continue with the Dragon training, because of the student's competency as a typist. However, she agreed that it might help with some types of writing and said that if the student wanted to try again, she would be more than willing to help.

[99] The SERT also described her own efforts to help the student learn some of the more advanced features of the Kurzweil program that would help with research and essay writing, such as "bookmarking" and notetaking. These efforts were not entirely successful, but she still believes further work with Kurzweil would help in the future, especially with the technical writing in the field of study that the student is likely to follow at university.

[100] The SERT stated that the student uses Inspiration to help writing in English and other courses. She explained that the student developed very complex web maps and used the program very well. She stated that that the word processing part of the program to turn the maps into an essay outline is not as user friendly as Microsoft Word, which is used for most of the writing. The Smart Ideas program, which is universally available in the school, is more helpful than Inspiration in this regard. However, the student and the family prefer Inspiration.

[101] The student stated that "I am very embarrassed with the initial use of Dragon Naturally Speaking" and was told that it had difficulty with [the student's] voice. As a result of the frustration with the software, the program was discontinued. The student has been told that Dragon is more productive in the long run than word processing and will create a quicker and more effective way of expressing ideas in writing.

[102] The student testified that there are always things that you don't like to do but you do them. "I think I need someone to shine a light on the benefits of it and revisit it. I would still be interested in learning Dragon".

[103] The SERT spoke about the student's needs related to the Learning Disability (Dyslexia). She testified that the student has a strong sense of what to put in the writing, but has difficulty with grammar, punctuation and vocabulary issues.

[104] The SERT described the difference between the student's activities related to completing the application form for the Shad Valley program and some other writing tasks. She described how she assisted with the completion of an application to be one of the school's representatives for SOMA, a United Nations simulation program. The application involved several essays, and they spent about an hour and a half working together on the essay parts of the application. The student completed and sent in the application independently, and was accepted into the program. She suggested that the student would have been able to do it entirely independently, because the student was motivated and had time to concentrate on the process.

[105] When it came to the Shad Valley application, the student, due to many other demands, chose not to complete the application in time. The SERT stated that the student did not appear to be sure about wanting to do this and had a lot of other demands on time. The student did not come to see her after school for help with the application, although did stay after school from time to time to complete math tests.

[106] Mrs. S. stated that "in a perfect world" her child would have the opportunity to be withdrawn for two 45 minute sessions a week outside of the regular school hours. She stated that a 45 minute block of time would allow her child to implement and work on the writing exercises as opposed to merely receiving handouts on how to write, but don't get implemented.

[107] She testified that there are lots of things that go on in the school outside of classroom hours such as literacy programs. The appellants rejected the offer to receive programming during the lunch hour, since it was not a defined program and offered an "ad hoc" arrangement. She stated that their child was "entitled" to the lunch hour.

[108] Counsel for the respondent stated that it is the school board's position, supported by legislation, that any withdrawal or other support program must take place during the school day.

## **REASONS**

[109] The Tribunal noted in its Supplementary Decision of November 18, 2010, that the HCDSB had adopted four of its five orders contained in the June 9, 2010, decision. The Tribunal determined that the exceptionality identification and special education placement are and continue to be appropriate in light of the identified strengths and needs. There was no evidence presented to the Tribunal at the March 1, 2011 hearing to suggest a valid reason to change the student's placement.

[110] The Tribunal does not accept the respondent's evidence that the current placement is no longer in the student's best interest and that this placement should be changed to Regular Class with Resource Assistance. The Tribunal noted that the HCDSB has made significant efforts to timetable the withdrawal periods on a regular basis, as requested by the parents. Although it is clear that the student has not found the 20 minutes per day timetabled withdrawal particularly helpful and has not utilized it in a consistent manner, both the student and the SERT spoke about the benefits of working with the SERT from time to time to assist with writing assignments. Similarly, if the student is to become proficient in the use of technology applications and accommodations such as Dragon Naturally Speaking, the training and application of this requires a withdrawal arrangement.

[111] The Tribunal accepted Ms. Rossini's statement that the HCDSB has always provided withdrawal programming for gifted students especially when those students have complex

learning needs. The Tribunal determined that, based on this statement and the student's profile with two identified exceptionalities, the student continues to be an appropriate candidate for withdrawal programming.

[112] The Tribunal accepted the evidence provided by the respondent that the HCDSB has no obligation to provide any school programming, including withdrawal programming to exceptional students, outside of the regularly scheduled school day. Therefore, any future arrangements for withdrawal programming including finding appropriate times and determining the length of time for withdrawal will require cooperation and compromise from both the school personnel and the student. Scheduling should be arranged between the SERT and the student. It may occasionally become necessary for the student to give up some of the lunch-time. However, it is the Tribunal's opinion that cancelling access to withdrawal programming is premature and not in the student's best interest.

[113] The Tribunal accepted the evidence of both parties that the anticipated gifted programming had not been put in place. The Tribunal accepted the respondent's evidence that it could not deliver this program for a variety of reasons. However, it is disappointed that this information was not communicated to the appellants and to the Tribunal during the fall of 2010. If it had been made clear that it was not going to be possible to create a gifted program that matched the Tribunal's "expectations", the Tribunal's Supplementary Decision might have been different. Further, course selections for the second semester of Grade 11 might also have been different.

[114] The Tribunal noted that during the March 2010, hearing references were made to the availability of an itinerant math teacher, who would be available to assist the math teacher at the current secondary school to provide a gifted program to the math cluster and to the student. The Tribunal accepted evidence that this teacher withdrew the student from the regular class only once during the first semester, but did not withdraw the other students identified for the gifted cluster.

[115] The Tribunal accepted the appellants' evidence that there were no apparent changes made to the IEP and programming, after the parties received the Tribunal's Supplementary Decision, dated November 18, 2010. The respondent did not counter this evidence.

[116] The Tribunal noted the respondent's testimony that if the student takes Grade 12 Functions and Grade 12 Calculus at his current secondary school, the student will not have access to a differentiated gifted program. The only form of enrichment that the student would reliably have access to is participation in a math contest, if the student so chooses. The Tribunal does not accept that this is an appropriate way for a school board to comply with its duties, as set out in subsection 170 (1) (7) of the *Education Act*, regarding the board's obligation to provide, in accordance with the regulations, special education programs and special education services for its exceptional pupils.

[117] The Tribunal does not accept the respondent's evidence that the only way that the student can access gifted-level math programming during the Grade 12 year is by transferring to become a full time student of the HDSB. There is nothing in the legislation that prevents a school board from making arrangements to purchase a particular special education program for a particular student from another school board, if it determines that it is not able to provide the necessary programs, services and accommodations to meet the student's identified needs. In fact, the Ministry of Education's "*Instructions for the Use of Computerized Enrolment Registers*

for *Elementary and Secondary Schools 2010-11*" specifically provides for more than one school board to deliver education programs in more than one school to the same pupil.

[118] The Tribunal does not accept the respondent's contention that it is not in the student's best interest to have access to gifted programming and in fact does not need such programming. The Tribunal believes that the student, as an identified gifted student, has a right to have such an opportunity made available. The fact that the student is currently receiving good marks in all subjects does not prove that the current programming is totally appropriate to meet all the student's needs and the student might not do better. Similarly, the stated concern that the Grade 12 math curriculum relies on a much greater language-based proficiency than the student has, was not supported with any evidence.

[119] The Tribunal notes that given the time it is within the semester and school year, it is no longer possible to plan for acceleration as a component of the student's math program. However, it is still not too late to implement a credible gifted program for Grade 12, perhaps as described by Ms. Rossini and providing access to meaningful enrichment, as one of its components. The availability of such a program for Grade 12 Functions and Grade 12 Calculus may perhaps even attract the interest of other gifted and high achieving students at the secondary school. At the same time, it may provide an opportunity to participate from time to time in an appropriate withdrawal program with the SERT, such as the one suggested by the SERT for linking the science and math courses.

[120] The Tribunal accepted the evidence of both parties regarding the gaps in the provision of technology supports for the student, including the fact that the student has not acquired the requisite proficiency in the use of Inspiration and has not had adequate opportunity to master Dragon Naturally Speaking. The Tribunal accepted the evidence of both parties that this will be remedied during the balance of the current school year and hopes that the HCDSB's IT staff will be involved, as appropriate, in remedying this situation. This will rely upon an appropriate withdrawal arrangement.

[121] The Tribunal accepted the student's evidence that the regularly timetabled 15 or 20 minute withdrawal arrangement to spend time with the SERT was neither satisfactory nor beneficial. The Tribunal noted that the student chose not to utilize this on a regular basis. On the other hand, the Tribunal noted that the student benefited from the occasional longer sessions with the SERT, where the focus of the support received reflected the student's needs and interests, such as the completion of the SOMA application. Therefore, it is still in the student's best interest to maintain the opportunity for withdrawal support for the Learning Disability – Dyslexia exceptionality.

[122] The Tribunal notes that, in accordance with section 21 of the *Education Act*, the student is entitled to a Catholic education. The Tribunal also notes that, in accordance with subsection 8 (3) of the *Education Act*, the student is entitled to appropriate special education programs and services.

[123] Although the Tribunal's mandate focuses on the identification and placement of exceptional students, the Tribunal may rely on other relevant legislation. Therefore, the Tribunal notes and concurs that under Ontario law, the student and the parents do not have to make a choice between these entitlements. The Tribunal does recognize, however, that the implementation of the legislation may sometimes call for some compromise on the part of parents.

[124] The Tribunal does not accept the appellants' contention that the definition of the school day in *Regulation 298* mandates the provision of educational programming outside the regular school day.

[125] Although the Tribunal accepts the respondents' statement that section 32 of the *Education Act* and *Regulation 181/98* both refer to "a school" and "a principal" in the singular, it does not accept that this explicitly excludes the possibility of more than one school or one school board providing programs and services to a given student. The *Legislation Act, 2006* S. O. 2006, c. 21, Sch.F, sets out the proper means of interpreting legislation in Ontario and therefore applies to the *Education Act*. Section 67 of the *Legislation Act* states that "Words in the singular include the plural and words in the plural include the singular".

[126] The Tribunal notes that the document entered into evidence by both parties, the Ministry of Education's *Instructions for the Use of Computerized Enrolment Registers for Elementary and Secondary Schools 2010-11*, explicitly refers to pupils enrolled in more than one school in more than one school board. Therefore, the Tribunal did not accept the respondent's evidence that the *Education Act* does not allow for the student's participation in educational programming offered by two schools under the jurisdiction of two school boards.

[127] The Tribunal accepts the respondent's evidence that the HCDSB does not currently offer Grade 11 and Grade 12 level gifted math classes to its students. It also accepts the evidence that the HDSB has such classes at several secondary schools.

[128] The Tribunal notes the appellants' statement that they want the Tribunal to order the HCDSB to purchase Grade 12 gifted level math programming for the student from the HDSB, starting in September 2011.

[129] The Tribunal accepts the respondent's statements that since the HDSB has not been a party to this proceeding, since the Tribunal has no evidence of the HDSB's willingness to enter into such an arrangement, and given the Tribunal's legislated mandate, the Tribunal cannot order such a specific location for the student to receive gifted programming.

## **DECISION**

[130] The Tribunal has determined that the appellants' concerns regarding the HCDSB's compliance with the Tribunal's decision and orders of June 9, 2010 and November 18, 2010, have merit. Therefore, the Tribunal has decided to issue additional orders regarding this appeal.

[131] In the student's best interests, the Tribunal will continue to remain seized of this matter until the end of the current school year, June 30, 2011, by which time all requisite arrangements for the student's Grade 12 year should be complete. This decision, i.e., remaining seized, only applies to the specific orders contained in this Supplementary Decision. Therefore, the parties may only approach the Tribunal to decide any disputes that might arise in respect of the implementation of these orders.

## **ORDER**

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

[133] The Tribunal orders the HCDSB to provide 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 these needs for September 2011, at the start of the 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 Grade 12 year. This is in accordance with subsection 170 (1) (7) of the *Education Act*.

**COMMENTARY**

[134] The Tribunal encourages both the parents and school personnel to forge new relationships that open communication and collaboration to ensure that the student's course choices are appropriate and provide smooth transitions from one class to the other. The student is a key voice in this relationship. It is important that for the remaining year of the student's secondary school education the school and the parents work together to eliminate any logistical difficulties and roadblocks which could interfere with the implementation of the Tribunal's orders and with the student's potential for successful graduation and entry to a post-secondary institution of choice.

Eva Nichols, Chair

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Ross Caradonna, Member

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Julie Lindhout, Member

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**DATE**