



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 1997

BETWEEN

C., Appellant

-and-

The Durham District School Board, Respondent

Tribunal Members:

Eva Nichols	Chair
Julie Lindhout	Member
Noel Williams	Member

Appearances:

C.	Parent
Brenda Bowlby	Counsel for the Durham District School Board (DDSB)
Martyn Beckett	Superintendent of Special Education, DDSB
Stephen Kelly	Secretary

The hearing on the matter of jurisdiction was held on June 27, June 28 and July 18, 2006 in Oshawa, Ontario.

## INTRODUCTION

On February 28, 2006, the Appellant appealed to the Ontario Special Education (English) Tribunal (“the Tribunal”) regarding the special education identification and placement for the child, an exceptional pupil. The child is nine years old and during the 2005/06 school year attended an elementary school in Ajax, Ontario, a school within the Durham District School Board (DDSB). At this school the child had been placed in a Primary Associated Class, a self-contained special education class. The child’s current identification is Communication - Autism and Physical - Physical Disability. The Identification, Placement and Review Committee (IPRC) whose decision was appealed was convened on September 23, 2005.

Ms. Brenda Bowlby, counsel for the DDSB, filed a motion on April 12, 2006, asking the Tribunal to dismiss the appeal, as there is no disagreement between the parties regarding the student’s identification or placement. A preliminary hearing was arranged for June 27 and 28, and July 18, 2006, to determine whether the Tribunal had the authority to hear the Appeal.

### Relevant Statutory Provisions

The Tribunal’s authority is set out in subsection 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*, the Tribunal’s *Rules of Procedure* and the general rules of “natural justice” and “procedural fairness”, applicable to administrative tribunals.

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

A number of specific sections of the *Education Act* concerning special education in whole or in part were used in the arguments presented by the parties. These were as follows:

##### Subsection 1: Definitions

“*exceptional pupil*” means a pupil whose behavioural, communicational, intellectual, physical or multiple exceptionalities are such that he or she is considered to need placement in a special education program by a committee;

“*special education program*” means, in respect of an exceptional pupil, an educational program that is based on and modified by the results of continuous assessment and evaluation and that includes a plan containing specific objectives and an outline of educational services that meets the needs of the exceptional pupil;

“*special education services*” means facilities and resources, including support personnel and equipment, necessary for developing and implementing a special education program.

##### Subsection 8 (3): 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 these purposes the Minister shall,

- (a) require school boards to implement procedures for early and ongoing identification of the learning abilities and needs of pupils, and shall prescribe standards in accordance with which such procedures be implemented; and
- (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.

Subsection 33 (1): Resident pupil qualification: elementary English-language public district school boards and elementary public school authorities:

A person who attains the age of six years in any year is, after September 1 in that year, qualified to be a resident pupil in respect of a school section of an English-language public district school board.

Subsection 35 (1) : Resident pupil's right to attend more accessible elementary school

Where a resident pupil who is an elementary school pupil of a school section or separate school zone resides,

- (a) more than 3.2 kilometres by the shortest distance by road from the school that the pupil is required to attend;
- (b) more than 0.8 kilometres by the shortest distance by road from any point from which transportation is provided to the school that the pupil is required to attend; and
- (c) nearer by the shortest distance by road to another school of the same type that is in another section or zone than to the school that the pupil is required to attend, the pupil shall be admitted to the nearer school of the same type, where the appropriate supervisory officer for the nearer school certifies that there is sufficient accommodation for the pupil in that school.

Subsection 57 (3): Right of appeal:

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.

Subsection 57 (4): Hearing by Special Education Tribunal:

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.

- **Regulations**

*Regulation 181/98: Identification and Placement of Exceptional Pupils*, governs the identification and placement of exceptional pupils; Identification, Placement and Review Committee (IPRC) reviews; appeal procedures; and the role of parents/guardians in these proceedings. This Regulation provides a mechanism for parents to appeal the identification and placement decisions of an IPRC to a Special Education Appeal Board (SEAB) and sets out the time lines that must be met for such an appeal.

*Regulation 298: Operation of Schools - General*, sets out among other things the maximum class size for exceptionality-specific self-contained classes.

- **Special Education Tribunal Cases Cited**

*C. v. Simcoe County Board of Education*, 2003

*D. v. Muskoka Board of Education*, 1984

*R. v. Durham District School Board*, 2004

## ISSUE

The issue is whether the Tribunal has jurisdiction to hear the appeal of the child's identification and placement.

### Respondent's Position

Ms. Bowlby, counsel for the Durham District School Board (DDSB) presented the Board's position on jurisdiction. In support of her motion that the appeal be dismissed, Ms. Bowlby presented the following facts:

The child is identified as an exceptional student, with a dual exceptionality of Communication - Autism and Physical - Physical Disability. At no time had there been a suggestion that the Appellant wanted a different exceptionality identification for the child.

Ms. Bowlby stated that the appeal of identification is moot because there is no disagreement between the parties on the child's identification.

At the beginning of the 2005/06 school year, the child was placed in a Primary Associated Class which is a full-time special education class at an elementary school, with parental approval. This placement was confirmed by the IPRC held on September 23, 2005. The Appellant wants to see the child in a similar placement but closer to home, such as the Associated Class at an elementary school in Pickering.

Ms. Bowlby stated that the appeal of placement was moot, since the Appellant does not disagree with the child's special education placement, only with the location of that placement.

Regarding the other issues that The Appellant raised, Ms. Bowlby stated that these are not within the Tribunal's jurisdiction and should, therefore, not be considered by the Tribunal at this time.

Ms. Bowlby requested that the Tribunal dismiss the appeal.

## **Appellant's Position**

The Appellant represented herself at the hearing. Although this was a hearing on jurisdiction, much of the Appellant's evidence focused on the merits of the case.

Although not stated explicitly, her underlying argument regarding the Tribunal's jurisdiction was based on the fact that she had appealed the IPRC decision of September 23, 2005, to the Special Education Appeal Board (SEAB) held on January 19, 2006, and was still dissatisfied with the Board's decision regarding the child's identification and placement. She also stated that the Tribunal should assume jurisdiction for hearing the appeal for the child on the basis of a "human rights consideration", in that the child is a student with a disability.

In the Notice of Appeal, the Appellant stated that she was appealing the fact that the DDSB had revoked its identification of the child as an exceptional student. She stated that she based this conclusion on the fact that the September 23, 2005, IPRC was a Review of Placement only. She interpreted this to mean that the identification made by the previous IPRC on March 30, 2004, no longer applied, and that the child was no longer identified as an exceptional pupil.

During the hearing, the Appellant stated that she agreed with the March 30, 2004 identification of the child as an exceptional pupil with the dual exceptionality of Communication - Autism and Physical - Physical Disabilities.

In the Notice of Appeal, the Appellant did not explicitly state that she disagreed with the decision of the September 23, 2005 IPRC to place the child in the Primary Associated Class at the elementary school. However, during the hearing she stated that she wanted the child's placement to be in the Associated Class in another elementary school, which is closer to her home in Pickering.

The Appellant requested compensation for the child and reimbursement of costs and lost wages for the father. She stated that she looked to the Tribunal to order the DDSB to meet the child's needs.

## **SUMMARY OF EVIDENCE**

### **Respondent's Evidence**

The DDSB presented two witnesses: Mr. Martyn Beckett, superintendent of special education for the DDSB and the principal of an elementary school and chair of the IPRC.

The principal stated that in November 2003, an IPRC was convened for the child at her school, although at that time the child was not yet enrolled at the school or any other school within the DDSB. The November 2003 IPRC identified the child as an exceptional student with a dual identification of Communication - Autism and Physical - Physical Disability.

This IPRC decision was cancelled and the parents were notified on January 9, 2004 that the IPRC had been deemed null and void. When the child was enrolled at the school in January 2004, the child was not considered to be an exceptional student.

An IPRC was convened on March 4, 2004, where the same identification was confirmed. The child was identified as an exceptional student with a dual identification of Communication - Autism and Physical - Physical Disability. Both parents agreed with the IPRC decision. Since that time, the

Board has maintained the same exceptionality identification for the child, which had been supported by both parents. The principal stressed that the Appellant's concern that, because the September 23, 2005, IPRC decision form does not specify the child's exceptionality, the Board cancelled the child's exceptional designation is unfounded.

The principal stated that the family's home school is in Pickering. However, when the child first entered school, the child was allowed to be enrolled at a different school, because the child's sibling was already attending that school. The child began school in January 2004 in a regular class placement. In this placement, the child was supported by an educational assistant (EA) and the program was modified.

Following the March 2004 IPRC, the child's placement was changed to Regular Class with Resource Assistance. This placement was maintained for the 2004/05 school year at the same elementary school.

In the spring of 2005, The principal decided that the child should return to the home school, because of the conflict that the family had with the staff of the school that the child was attending. This decision was supported by the Board's administration.

The principal also gave evidence regarding several other issues raised by the Appellant in her Notice of Appeal, which had no relevance to the Tribunal's jurisdiction. These included the status of the child's Ontario Student Record (OSR) and its contents when it was forwarded to the current school from the previous school.

Mr. Beckett gave no evidence regarding the child's identification, other than confirming the current identification as an exceptional student with a dual exceptionality of Communication - Autism and Physical - Physical Disability.

Mr. Beckett stated that, during the 2004/05 school year, while the child was at the previous school, no IPRC review was held for the child. At the end of the year, it was decided that the child should return to the home school. In August 2005 a request had been made to the board through Children's Case Co-ordination Services of Durham for the child to be relocated to a small special education class placement. An interim placement decision was made in August 2005 to place the child in an Associated Class at an elementary school in Ajax, starting on September 6, 2005. The September 23, 2005, IPRC confirmed this placement.

Mr. Beckett described that in response to the Appellant's concerns about the location of the class in Ajax and the concerns related to the transportation arrangements for the child, he offered the child an alternative Associated Class placement at another school in Pickering. This offer was made at the SEAB hearing in January 2006. The father declined a mid-year change of location.

A place has been held for the child throughout the 2005/06 school year in the Associated Class at the school in Pickering. Arrangements had been made for the child to visit this class on June 22, 2006, as part of a transition plan to facilitate the child's transfer to that location for September 2006. This visit did not take place, because the Appellant withdrew her permission for the visit.

Mr. Beckett stated that it is the Board's position that the child is appropriately placed in an Associated Class. He said that location of special education classes is decided by the DDSB and cannot be appealed as part of the placement decision. Further, he said that the DDSB has agreed

to implement the transfer of the child to the Associated Class at the Pickering elementary school for September 2006.

Mr. Beckett also gave evidence about the challenges facing the DDSB in dealing with the lack of agreement between the Appellant and the father regarding the child's placement. He also described the availability of and the process for accessing Section 20 placements through the DDSB and various community agencies providing care and treatment programming to exceptional students. He explained that such programming may include Intensive Behavioural Intervention (IBI) treatment for students who need this. He also spoke about the programming that is provided to students in the Associated Class placement and how this placement is related to the maximum class sizes for exceptionality-specific classes described in *Regulation 298*, section 31.

In her summary statement, Ms. Bowlby reiterated that the Durham District School Board wants to work co-operatively with parents in the best interests of students. She also stated that there is no disagreement regarding identification or placement, since location cannot be appealed as a component of placement. This makes the appeal moot.

However, Ms. Bowlby suggested that the Tribunal could adjourn the hearing, pending the implementation of the child's relocation to the Associated Class placement at the elementary school in Pickering in September 2006.

### **Appellant's Evidence**

The Appellant presented her own arguments and served as a witness as well. She also had two other witnesses, Denyse Newton, program manager for Children's Case Co-ordination Services of Durham Region and Cindy Waugh, Special Education Facilitator for the DDSB.

The Appellant stated that she was appealing both the identification and the placement for the child. However, after being specifically asked by the Tribunal, the Appellant stated that she agreed with the identification made at the March 30, 2004, IPRC of the student as Communication - Autism and Physical - Physical Disabilities. This is the identification that remains in effect at this time.

Most of the Appellant's evidence regarding the child then focused on her appeal of placement, based on her stated opinion that the current placement is not meeting the child's needs.

With regard to the child's current placement at the elementary school in Ajax, the Appellant stated that she agreed to it because it was the only small-class placement available. She based this on the information provided to her in writing by Ms. Cindy Waugh, special education facilitator for the DDSB, about the types of special education classes that the DDSB offers to exceptional students in the Pickering/Ajax area.

However, the Appellant stated that the child, rather than improving, has regressed in the Associated Class placement at the current school, because the program provided at that school is not meeting the child's needs.

She cited the absence of one-on-one assistance from an EA who understands the child's needs; who is knowledgeable about autism in general and who can support the program that the child needs, given the child's identified strengths and needs. The child is also denied access to appropriate occupational therapy and speech support. She argued that the child was getting "behaviour programming" rather than the "community, integrative, autism developmental

programming” that the child should be getting. She also expressed numerous concerns about the child being served under the *Safe Schools Act*, rather than the *Education Act*.

She argued that the board was not disclosing all the special education placements available to exceptional students and talked about “autism classes” that were available to other students.

There were numerous other issues raised by the Appellant, which are not within the Tribunal's jurisdiction. The Appellant also requested compensation for the child, reimbursement of lawyer's fees, and reimbursement of lost wages for the father.

During cross-examination by counsel for the DDSB, the Appellant confirmed that she wanted the child placed in the Associated Class at the local elementary school in Pickering.

Denyse Newton, program manager for Children's Case Co-ordination Services of Durham Region, presented evidence about her and her agency's role in the education of the child and the relationship between the family and the DDSB. She said that she became involved with the family at the family's request. She represented the Appellant at meetings with school board personnel in order to improve communication between the board and the parents. She acted as an intermediary to obtain the current small-class placement for the child and participated in the negotiations related to the recovery of the missing documents from the child's OSR.

The Appellant's second witness was Ms. Cindy Waugh, special education facilitator for the DDSB. Ms. Waugh's brief evidence focused on clarifying the information that she provided to the Appellant in writing about the types of special education classes that the DDSB offers to exceptional students in the Pickering/Ajax area, which includes the Associated Class.

In her summary statement, the Appellant reiterated her many concerns about the child's situation as a student with autism within the DDSB. She urged the Tribunal to assume jurisdiction in order to resolve these matters and to ensure that the child receives the education that is needed and to which the child is entitled.

## **REASONS**

The Tribunal's authority is set out in section 57 of the *Education Act*. To assume jurisdiction, the Tribunal must be satisfied that the parents have fully exhausted their rights of appeal of their child's exceptionality identification or special education placement or both and that they are dissatisfied with the identification or placement decision or both.

### **a) Exhausted All Rights of Appeal**

The evidence presented demonstrated that the Appellant had followed the legislated process for appealing the IPRC's identification and placement decision.

The IPRC for the child was held on September 23, 2005. The SEAB met on January 19, 2006. The SEAB upheld the IPRC's placement decision. It also made a number of specific recommendations related to programs and services.

The Appellant appealed to the Ontario Special Education (English) Tribunal after she received the Board's written response to the decision and recommendations of the SEAB on January 31, 2006. The Board upheld the SEAB decision and endorsed the recommendations.

Therefore, the Appellant has exhausted all the appeal rights available to her.

## **b) Dissatisfaction with Identification and/or Placement or Both**

### **(i) The issue of identification**

The Appellant stated that she wants the child to be identified with a dual identification of Communication - Autism and Physical - Physical Disability. The last IPRC where the child's identification was reviewed took place on March 4, 2004. The child's identification was Communication - Autism and Physical - Physical Disability. This identification remains, as it has not been changed by a subsequent IPRC. Since the child's identification stated on the most recent IPRC identification determination of March 4, 2004 and in the decision of the SEAB convened on January 19, 2006, is in accordance with the Appellant's wishes, there is no disagreement regarding the child's identification.

Therefore, in the Tribunal's opinion, the appeal regarding the child's identification is moot.

### **(ii) The issue of placement**

The Appellant stated that she wants the child to be placed in the Associated Class at an elementary school in Pickering.

The Respondent stated that the appeal of the child's special education placement is moot, since the School Board's special education superintendent, Mr. Martyn Beckett, offered this placement to the Appellant at the SEAB hearing in January 2006.

Although the SEAB's decision does not reflect this offer, evidence was presented that the Board had indeed offered to relocate the child to the Associated Class at the school in question, as early as January 2006. This change had been declined by the father, because he felt it would not be in the child's best interests to move mid-school year. Later during the school year, arrangements were made for the child to visit the proposed Associated Class, as a preliminary step towards transitioning to this placement. This was scheduled for June 22, 2006, but the visit did not in fact happen.

During the Tribunal hearing, Mr. Beckett confirmed that a place is still available for the child at the school in question in the Primary/Junior Associated Class, starting in September 2006. Given this offer, there is no disagreement between the Appellant and the Respondent regarding the child's special education placement for the 2006/07 school year.

Counsel for the Respondent stated that the appeal of placement is moot, but went on to suggest that the Tribunal adjourn the hearing, pending the implementation of this placement offer at the beginning of the school year. In view of the confirmation from the Board during the hearing that the placement sought by the Appellant is available at the named school starting September 2006, the Tribunal agreed that the hearing of the merits of the placement appeal should be adjourned, given that the parties jointly intend to implement the specified placement for the child in September 2006.

A conference call was arranged for September 29, 2006. Both parties confirmed that the child's placement in the Primary/Junior Associated Class at the specified school has been implemented, starting on September 5, 2006, the first day of the 2006/07 school year. Mr. Beckett also stated that the DDSB is working on the child's IEP for the current school year in accordance with the procedure and timelines set out in *Regulation 181/98*. Because the placement in the location requested by the Appellant has been implemented, there is no disagreement between the parties regarding the child's special education placement.

Regarding the Appellant's claim for the reimbursement of expenses, the Tribunal has no authority to order costs.

## **INTERIM DECISION**

On August 21, 2006, the Tribunal issued the following interim decision without reasons.

"1. The Tribunal agrees that the appeal of the identification for the child is moot.

2. The Tribunal will adjourn the hearing of the appeal of the September 23, 2005, IPRC decision regarding the special education placement for the child. This will allow the DDSB to implement the child's placement in the Primary/Junior Associated Class at the specified school, the placement requested by the Appellant in this appeal, starting in September 2006.

A conference call will be arranged with both Parties during the week of September 25, 2006 to confirm that this placement has been implemented. If the Board has implemented the child's placement at the school by September 2006, the appeal will be dismissed. If the placement has not been implemented by that date, the Tribunal will proceed to set dates for hearing the appeal.

3. There are no costs ordered.

The Tribunal's full decision on jurisdiction, including reasons, will be issued following the September conference call."

## **FINAL DECISION**

Based on the information communicated to the Tribunal on September 29, 2006, it is clear that there is no disagreement between the parties on the child's identification or placement. Therefore, the appeal is dismissed in accordance with ss. 57(4)(a) of the *Education Act*.

## **COMMENTARY**

The Tribunal acknowledges the steps taken by the parties between the first hearing dates and the September 29 conference call to implement the child's current placement. The Tribunal urges the parties, namely both parents and the Board, in determining their next steps, to focus on the child's best interests and how the child's needs can be met in the most enabling manner possible. Improved communication and collaboration between the family and the Board can only prove beneficial to the child's education.

Eva Nichols, Chair

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Julie Lindhout, Member

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Noel Williams, Member

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Date October 1, 2006