



IN THE MATTER OF the Education Act, R.S.O. 1990.c.E.2, as amended, 57(3),
IN THE MATTER OF Ontario Regulation 181/98,
AND IN THE MATTER OF the minor child, born 1991

BETWEEN

Ms. I, Appellant

-and-

The Toronto District School Board, Respondent

Tribunal Members:

Marilyn Thain	Chair
Donna Gracey	Member
Deborah Moskal	Member

Appearances

I	Parent
MJ	Advocate

Grant Bowers	Counsel for the Toronto District School Board
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Bill Wyman	Secretary
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A Preliminary Hearing on the matter of jurisdiction was held by teleconference on October 20, 2004 from 10:00 a.m. – 1:00 p.m.

Introduction

This Tribunal was held on October 20, 2004 to determine the preliminary matter on jurisdiction.

At the opening of the hearing the Chair indicated that 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 both the Statutory Powers Procedure Act and by the general rules of 'natural justice' and 'procedural fairness' applicable to administrative tribunals.

Written submissions were received in advance of the hearing from the advocate on behalf of the parent (appellant). No submissions were received in advance from the Toronto District School Board (TDSB). Mr. Bowers, Counsel for the TDSB submitted two letters during his argument on behalf of the Toronto District School Board. The advocate provided a written response to the letters; no reply was received from Mr. Bowers, Counsel for TDSB.

Legal Framework

- Education Act

Subsection 8(3) 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....

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.

- Regulation

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

Section 27 (2) Selection under clauses (1) (a) and (b) [parent and board members to the appeal board] shall be made within 15 days of receipt of the

notice of appeal by the secretary of the board.

Section 27 (3) The selection of a chair under clause (1) (c) shall be made within 15 days of the last selection under clauses (1) (a) and (b).

Section 28 (2) The meeting shall be arranged to take place at a convenient place, and at a time that is no more than 30 days after the day on which the chair is selected and shall be conducted in an informal manner.

Positions of the Parties

Ms. MJ, advocate for Ms. I stated in her opening that the rights to appeal are exhausted because they were in fact denied.

Counsel for the Toronto District School Board (TDSB) raised a preliminary question about the Tribunal's jurisdiction to hear the parent's appeal. Counsel stated that the parent had not exhausted all rights of appeal and that the TDSB had not denied the appeal to the Special Education Appeal Board.

Arguments

Parent's Arguments

The advocate representing the appellant requested that the Tribunal hear the appeal in respect to her child.

The appellant stated that the Toronto District School Board (TDSB) denied her the right to appeal the Identification Placement and Review Committee's (I.P.R.C.) decision for her child. The appellant, in a letter dated May 11, 2004, and signed by both the appellant and the advocate, notified the supervising principal, that she was appealing the I.P.R.C. decision on the placement of her child, and "requested a reply in ten days, in accordance with the regulations." (Reg. 181 provides for 15 day notice) The appellant received a letter of response dated May 28, 2004 from Mr. Grant Bowers, Counsel for the TDSB, in which she was informed that her letter contained no indication of disagreement with placement, and that she had sent her request to the wrong person. Mr. Bowers stated that the notice of appeal must be filed with the secretary of the board, Mr. David Reid, the Director of Education not with the supervising principal. On this basis, Mr. Bowers said that the TDSB "was not in a position to nominate a member of the Special Education Review Board, pursuant to section 27 of the Regulation".

The advocate maintained that the letter of appeal was sent to the supervising principal on the direction of the head of the Identification Placement and Review Committee (I.P.R.C.). She maintains as well, that the appellant received no assistance from the school, and was not given a copy of the "Parents Guide to Special Education."

The advocate states that the appellant's rights to appeal were denied. She stated that the board has a fiduciary duty to inform parents as to their rights.

The advocate acknowledged that the appellant had received a letter from Mr. E, dated June 21, 2004, which indicated that the Board was willing to proceed with the appeal. However, the Board did not follow the timelines outlined in the Regulation in making this offer. The advocate stated that the response of the Toronto District School Board was frivolous and that they refused to take the request for an appeal seriously. She believes that the only recourse for the appellant is through the Special Education Tribunal.

The Toronto District School Board's Arguments

Mr. Bowers' position on behalf of the Toronto District School Board is "the TDSB has not denied an appeal, either constructively or actually, and that it remains ready to convene an appeal board as soon as the appellant notifies the TDSB as to the name of their nominee."

Mr. Bowers outlined a sequence of correspondence, which led to this hearing on jurisdiction of the Tribunal to hear the appeal, starting with the letter sent by the advocate to Ms. Marilyn Lowe, Supervising Principal, on May 11, 2004, the actual day of the IPRC. He said this letter was not addressed to the correct office. Mr. Bowers said the position of the TDSB is that there was no request for an appeal because none of the conditions precedent to convening a Special Education Appeal Board (SEAB) had been met. He stated the letter contained information indicating "the parent was unhappy with the fact that we weren't assigning a special needs assistant to assist her child in the regular classroom."

On May 28, 2004 Mr. Bowers sent a letter to the appellant, which he submits does not state the board will never have an appeal. He said it's in effect, a request for clarification.

Mr. Bowers read into the record a letter dated June 21, 2004, which Mr. E sent to the appellant. Mr. Bowers stated this letter acknowledged the request for an appeal, and that Ms. I's letter dated June 29, 2004 acknowledged the letter of June 21st, and asks that the appeal process proceed during the summer.

Mr. Bowers points out that the appellant requested the Tribunal two days after the June 21, 2004 letter was sent by Mr. E, explaining and starting the process for the Special Education Appeal Board.

Mr. Bowers stated that the TDSB never refused to convene a Special Education Appeal Board. He said that the representative for the parent did not satisfy any of the requirements under the Regulation for the convening of a SEAB until June 08, 2004. He said within less than two weeks of that date, there was a response to the appellant advising that we would proceed.

Mr. Bowers contends that the appellant has not exhausted all means of appeal and should not be granted a Tribunal hearing until the Special Education Appeal Board has heard the case.

Reasons for the Decision

It is the opinion of the Tribunal that the key issue to determine is the date for the Notice of Appeal. The advocate contends that May 11, 2004 is the date while Mr. Bowers contends that June 8, 2004 is the date to be considered as the Notice of Appeal.

The following letters of correspondence are significant to this matter:

- May 11, 2004 - advocate to the TDSB
- May 28, 2004 - Mr. Bowers to the appellant
- June 21, 2004 - Mr. E to the appellant
- June 29, 2004 - Appellant to Mr. E

Mr. Bowers' letter of May 28, 2004 stated the May 11, 2004 letter from the appellant was not a request for an appeal "because none of the conditions precedent to convening a Special Education Appeal Board had been met." He went on to say "that the letter indicated that the parent was unhappy with the fact that the TDSB was not assigning a special needs assistant to assist her child in the regular classroom and that this is not something which is subject to an appeal to an IPRC."

The letter dated June 21, 2004 from Mr. E, Central Co-ordinating Principal of Special Education Services for the TDSB to the appellant stated "your May 11th letter indicates that you are requesting placement in a regular class for the child with a full time assistant and that you are declining a reconvening of the IPRC for further discussion...."

Mr. E clearly agreed that in the May 11th letter the parent was appealing the placement decision made at the IPRC, even though Mr. Bowers indicated that the letter did not meet this requirement of the Regulation.

The Tribunal finds that the advocate's letter on May 11, 2004 to the Supervising Principal for the Southeast Region of the TDSB clearly stated the grounds for appeal, and should be considered the date for the Notice of Appeal.

In the letter of June 21, 2004 from Mr. E, Mr. E asked the appellant to advise him if she wished to proceed during the summer or wait until the fall. The appellant indicated on June 29, 2004 that she wished the appeal process to proceed during the summer. No further communications were presented to indicate that plans to establish an appeal board were underway. Given the parties' agreement to have the appeal heard in the summer, the timelines that should have been followed under Regulation 181 are as follows:

- May 26, 2004 Selection of members completed.
- June 10, 2004 Selection of chair completed.

July 12, 2004 Special Education Appeal Board meets.

There is also evidence concerning the lack of responsiveness to the appellant's request for an appeal. The selection process for members of the Appeal Board should have been made within fifteen days of receipt of the Notice of Appeal by the secretary of the board. O. Reg.181.98, s. 27(2). The TDSB's first response to the May 11, 2004 notice was on May 28, 2004 which exceeded the timelines as set out in the Regulation. The Tribunal notes that the parent also did not appoint her representative within the required fifteen days. The Tribunal concludes that this did not happen because she had not been informed of the process and only received the Parent's Guide and additional information regarding the process from Mr. E on June 28, 2004.

Finally, the Tribunal notes that even if June 8, 2004 is considered the date for the Notice of Appeal, the Special Education Appeal Board should have met by August 9, 2004, given the parties' agreement to hear the appeal in the summer.

The Toronto District School Board did not follow the timelines established in the Regulation regarding the Appeal Board and therefore the parent has not had the opportunity to be heard. By the time the Tribunal heard the jurisdiction question all the timelines were extinguished.

The Tribunal also considered the reasons the appellant was required to write a second letter dated June 08, 2004 requesting an appeal of the IPRC decision of May 11, 2004.

The advocate stated that the appellant sought information from the chair of the IPRC to help her in launching an appeal, to ensure that the correct process would be followed. The advocate said the parent was not properly informed of the process to be followed and she was given incorrect information regarding whom to send the notice of appeal at the school board.

It is required that parents are properly informed of the process and the responsibilities inherent in the legislation. The Tribunal notes that Regulation 181, s.14(7) states that parents must be provided a Parent's Guide within fifteen days after notifying the parents of the student's referral to an IPRC.

The evidence shows that the Parent Guide was not made available to the parent until it was included with Mr. E's letter of June 21, 2004. Because the parent was not properly informed there has been considerable time lost. It appears that there has not been clear communications to the parent of the timelines or the correct procedures to be followed. The lack of communication has led to unwarranted delays.

Regulation 181, s 26(5) is clear that such errors cannot constitute refusal to send the case to appeal. It would be up to the Special Education Appeal Board to decide whether or not it will hear the case. This Regulation ensures that the parent's appeal is dealt with on the merits, rather than on technical deficiencies in the manner in which the notice of appeal has been drafted. The Tribunal agrees with the advocate that the appellant was not properly informed and this led to an unwarranted need to write a second letter requesting an appeal.

Decision

Given the above reasons the Tribunal unanimously agrees that the appellant be granted leave to request a full hearing so that all elements of the child's placement be heard. The Tribunal has determined that it has the jurisdiction to hear the appeal.

Commentary

The Tribunal wishes to draw to the attention of the parties Reg. 181.98 s.3 (1) and (2) for the requirements regarding mail delivery as this issue was referred to throughout the hearing. The timelines for launching an appeal are clear in the Regulation and therefore the time required for mail delivery of important communications must be considered to ensure that Reg. 181/98 is adhered to.

The Special Education (English) Tribunal

Marilyn Thain, Chair

Donna Gracey, Member

Deborah Moskel, Member

December 06, 2004