



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 1995

BETWEEN

W., Appellant

-and-

The Limestone District School Board, Respondent

Tribunal Members:

Eva Nichols	Chair
Derryn Gill	Member
Jim McCaughey	Member

Appearances:

W.	Parent
Richard Belzile	Counsel for the Parent
Diane Kelly	Counsel for the Limestone District School Board (LDSB)
Pat Warren-Chaplin	Superintendent for Curriculum, LDSB
Stacey Zabukovec	Itinerant Teacher of the Deaf, LDSB
Laurel Cruise-Alkenbrack	Teacher of the Deaf, LDSB
Heather Hawthorn	ASL Interpreter
Bill Wyman	Secretary

The hearing on the matter of jurisdiction was held on November 24, 2005, in Kingston, Ontario.

Introduction

On August 16, 2005, the Appellant appealed to the Ontario Special Education (English) Tribunal regarding the special education placement and special education services and supports available to the child who is an exceptional pupil. The child is almost ten years old and is attending a regular Grade 4 class in Kingston, Ontario.

A preliminary hearing was arranged for November 24, 2005, to determine whether the Tribunal had the authority to proceed and hear the Appeal. This was arranged in response to the preliminary motion put forward by the Board on October 28, 2005, questioning whether the Tribunal has jurisdiction to hear the merits of the case.

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 both the *Statutory Powers Procedure Act* and the general rules of "natural justice" and "procedural fairness", as applicable to administrative tribunals.

The Appellant is profoundly deaf and communicates using American Sign Language (ASL) as his first language. To provide him with the requisite accommodation, a sign language interpreter assisted in the communication process. Both the Appellant and his counsel used ASL to address the Tribunal and to respond to the questions of the other party. The sign language interpretation was videotaped throughout the proceeding, and the videotapes were given to the Appellant at the end of the hearing. Counsel switched to an oral presentation when he gave the Appellant's closing statement.

Although the focus of the proceedings was on the Tribunal's jurisdiction, the Tribunal also heard evidence that relates to the merits of the case. This decision, however, only addresses the jurisdiction issue and does not deal with any of the evidence that relates to the merits of the case.

Legal Framework

- ***Statutory Powers Procedure Act, R.S.O. 1990, c. S.22***
- ***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, established under subparagraph iii of paragraph 5 of subsection 11 (1), of the board,

(a) of which the pupil is a resident pupil,

- (b) that admits or enrolls the pupil other than pursuant to an agreement with another board for the provision of education, or
- (c) to which the cost of education in respect of the pupil is payable by the Minister;

“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 11 (1): Regulations

Subject to the approval of the Lieutenant Governor in Council, the Minister may make regulations in respect of schools or classes established under this Act,

5. special education programs

- governing the provision, establishment, organization and administration of,
- i. special education programs,
 - ii. special education services, and
 - iii. committees to identify exceptional pupils and to make and review placements of exceptional pupils.

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.

- **Regulation 181/98: Identification and Placement of Exceptional Pupils**

This regulation, established under the Education Act, 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 and sets out the timelines that must be met for such an appeal. The following sections of the regulation were cited by the parties in presenting their cases to the Tribunal.

Subsection 6 (6):

In developing the individual education plan, the principal shall:

- (a) consult with the parent and, where the pupil is 16 years of age or older, the pupil; and
- (b) take into consideration any recommendations made by the committee or the Special Education Tribunal, as the case may be, regarding special education programs or special education services.

Subsection 16 (1), (2), and (6):

The committee may discuss any proposal for special education services or special education programs and shall do so at the request of a parent or a pupil who is 16 years of age or older.

The committee may make recommendations regarding special education programs and special education services.

A recommendation under this subsection is not a decision for the purposes of subsection 26 (1).

Subsection 17 (1):

When making a placement decision on a referral under subsection 14, the committee shall, before considering the option of placement in a special education class, consider whether placement in a regular class, with appropriate special education services,

- (a) would meet the pupil's needs; and
- (b) is consistent with parental preferences.

Subsection 17 (2):

If, after considering all of the information obtained by it or submitted to it under subsection 15 that it considers relevant, the committee is satisfied that placement in a regular class would meet the pupil's needs and is consistent with parental preferences, the committee shall decide in favour of placement in a regular class.

Subsection 21 (1):

The principal of the school at which a pupil's special education program is being provided,

- (a) may on written notice to the parent of the pupil;
- (b) shall at the written request of the parent of the pupil; and
- (c) shall, at the written request of the designated representative of the board that is providing the special education program to the pupil, refer the pupil to a committee established by the board that is providing the special education program to the pupil, for a review of the identification or placement of the pupil.

Subsection 23 (2):

With the written permission of a parent of the pupil, a committee conducting a review under this Part shall consider the pupil's progress with reference to the pupil's individual education plan.

• ***Special Education Tribunal Cases Cited***

- O. v. Wentworth County Board of Education, 1987*
- D. v. Toronto District School Board, 2001*
- L. v. Le Conseil des Ecoles Catholiques de Langue Françoise du Centre-Est de L'Ontario, 2001*
- C. v. Dufferin-Peel Catholic District School Board, 2003*
- D. v. Windsor-Essex Catholic District School Board, 2003*
- L. v. Le Conseil Scolaire de District Catholique du Centre-Est De L'Ontario, 2004*

• ***Other Legislation Cited***

- E v. Brant County Board of Education, Supreme Court of Canada decision, 1997*

• ***Other Resources***

- The Tribunal's *Rules of Procedure*, 2005

Respondent's Position

Ms. Kelly, counsel for the School Board outlined the Board's position on jurisdictional matters regarding the Appeal. She submitted that the grounds of the Appeal are based on the argument that the Board has failed to provide an American Sign Language (ASL) component in the pupil's educational program. Ms. Kelly submitted that the grounds fall outside the meaning of placement and are therefore beyond the Tribunal's statutory authority.

Given that the Appeal relates to matters outside the jurisdiction of the Tribunal, Ms. Kelly requested that the Appellant's Appeal be dismissed.

Appellants' Position

Counsel for the Appellant outlined the Appellant's position on jurisdictional matters regarding the Appeal. He submitted that subsection 57 (4) of the *Education Act* requires the Tribunal hear the Appeal before it makes the decision to either dismiss or grant the Appeal.

The Respondent stated that according to the Tribunal's own *Rules of Procedure*, section 17.1:

The Tribunal may dismiss an Appeal without a hearing for any of the following reasons:

- (a) the Appeal is frivolous, vexatious or is commenced in bad faith;
- (b) the Appeal relates to matters outside the jurisdiction of the Tribunal;
- (c) if the Appellant has not satisfied subsection 57 (3) of the *Education Act*; or,
- (d) some other aspect of the legislative requirement for bringing the Appeal has not been met.

Since the Appellant, the father of the pupil in question has exhausted all rights of appeal under the legislation; and is still not satisfied with the child's placement, he has met the requirements of subsection 57 (3) of the *Education Act*. The Tribunal must hear the Appeal, an Appeal that has been brought in good faith by the Appellant.

Respondent's Argument

Ms. Kelly focused the arguments on two central themes:

- i. The Board has complied with all of the statutory directives; and
- ii. The Appellant's Appeal relates to matters outside the Tribunal's jurisdiction.

Re the School Board's Compliance

Ms. Kelly provided the following evidence to demonstrate that the Board has complied with the statutory directives of *Regulation 181/98* and subsection 170 (1) 7 of the *Education Act*, and that the pupil's current placement was meeting the identified needs:

- The IPRC decision of June 22, 2004, identified the pupil as an exceptional student, Communication: Deaf and Hard of Hearing with a placement in a Regular Classroom with Withdrawal Assistance.
- The pupil's mother did not appeal the 2004 identification or placement, but the father objected to the placement.

- The IPRC decision of September 22, 2005, stated that the Resource Assistance would be provided in the classroom to accommodate the father's request that the pupil's partial withdrawal cease. The mother did not attend the meeting and she subsequently refused to consent to the proposed change noting that the pupil "requires regular withdrawal as per previous years".
- The testimony of the itinerant teacher of the deaf and hard of hearing, indicated that:
 - The pupil's Individual Education Plan, (IEP), fulfilled the statutory requirements. Namely, it included:
 - ✓ Specific educational expectations for the pupil;
 - ✓ An outline of the special education programs and services the pupil would receive; and
 - ✓ A statement of the methods by which the pupil's progress would be reviewed.
 - The pupil's current placement was meeting the pupil's needs and the pupil was progressing very well.
 - In her opinion, the introduction of an ASL interpreter would not be beneficial to the pupil as the pupil would then not be lip reading the teacher, but instead focusing on the interpreter.
- The testimony of an expert witness, resource teacher - hearing and vision educational services indicated that:
 - The services and programming provided for the pupil were excellent;
 - The introduction of an ASL interpreter would be confusing and difficult for the pupil as it would introduce a second language;
 - The pupil's level of signing was at an elementary level; and
 - Opportunities to increase signing skills are available through courses offered outside the school by The Canadian Hearing Society and Sir James Whitney School.

Re the Tribunal's Jurisdiction

Ms. Kelly submitted that the Appellant does not object to the IPRC's identification of the pupil as Communication: Deaf and Hard of Hearing, and he supports the pupil's inclusion in a regular class. He is asking the Tribunal to order the Board to place the pupil in a Regular Classroom with Resource Assistance to include ASL interpreters to assist the pupil in becoming bilingual.

Ms. Kelly suggested that the issue of Withdrawal Assistance is moot. The IPRC decision of September 22, 2005, attempted to comply with the Appellant's request that the withdrawal cease, but the mother would not give her consent. Counsel submits that this is a matter for the parents to resolve and therefore is beyond the Tribunal's jurisdiction.

Ms. Kelly submitted that the Tribunal "is an entity created by statutes and is governed entirely by the legislation which created it. It has no inherent authority." Subsection 57 (3) of the *Education Act* gives the Tribunal the authority to hear appeals and make decisions in respect to identification and placement.

Ms. Kelly submitted that the provision of additional services falls outside the meaning of placement and therefore is outside the Tribunal's authority and jurisdiction. She cited the following cases to support the argument:

- i. *L. v CECLFCEO, 2001*;
- ii. *C. v DPCDSB, 2003*; and
- iii. *E. v BCBE, Supreme Court of Canada decision, 1997*.

In summary, Ms. Kelly asked the Tribunal to dismiss the Appeal on the grounds that it relates to issues outside the Tribunal's jurisdiction.

Appellant's Argument

The Counsel for the Appellant questioned the Appellant about his and the child's experiences with the Board. The Appellant says that since 2002 he has been attempting to be included in the discussions regarding the pupil's placement. He contends that he has not been involved in the consultation for the development of the pupil's Individual Education Plans and that his request for a sign language interpreter has been ignored. The Appellant feels that he has not been fully informed of the options available to the pupil or of the programming that the pupil is receiving. The Appellant thinks that there is too much emphasis on the oral approach in the pupil's schooling. He feels that the pupil misses concepts because of not hearing them. The Appellant says that the pupil is frustrated and cries because of missing information.

Turning to the Tribunal's jurisdiction, Counsel submitted that under subsection 57 (4) of the *Education Act*, the Tribunal must hear the Appeal if the parent has met the requirements of subsection 57 (3). Only after the Tribunal has heard the whole Appeal, does it have the permissive authority to dismiss the Appeal.

The Tribunal should hear the Appeal because the parent has followed the requirements of the legislation, has exhausted all rights to appeal, and is not satisfied with the child's placement. This Tribunal can follow the precedents of previous Tribunals and define placement to include the programs and services necessary to meet the student's needs. The School Board's definition of support services for hard of hearing and deaf students includes interpreters but does not include educational assistants. Therefore, the pupil's present placement does not meet the standards set in the Board's own policy/guidelines for special education placement and exceptionalities.

The Appellant cited *L. v. CSDCCEO, 2004* and *D. v. TDSB, 2001* as precedents for the inclusion of the provision of special education programs and services within the definition of placement when appealing the special education placement of a pupil. The Appellant contends that without the services of an ASL interpreter in the pupil's regular classroom, that classroom is not an appropriate placement.

The Appellant cited *D. v. WECDSB, 2003* as evidence that the school board must provide the information necessary so that the parents can make an informed decision about the placement of their child. If the Appellant is not properly informed of the options available he cannot make informed decisions and cannot agree to the proposed placement.

Regulation 181/98, subsection 17, states that the IPRC committee must consider whether placement in a regular class, with appropriate special education services, would meet the pupil's needs; and be consistent with parental wishes. The Appellant does not agree with the "Regular Classroom with Withdrawal Support" placement and

believes that the appropriate placement is “Regular Classroom with Resource Assistance”, which would include an ASL interpreter.

Regulation 181/98, section 6 (6) gives the Tribunal the authority to make recommendations about programming and services. The programming and services are an integral part of the placement and therefore are within the jurisdiction of the Tribunal.

The Appellant contends that the need for the services of an ASL interpreter in the regular classroom is a placement issue and asks the Tribunal to assume jurisdiction and hear the case.

Reasons for the Decision

The Tribunal’s authority is set out in subsection 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.

The Appellant is and has been satisfied with the identification of the pupil’s exceptionality; however continues to be dissatisfied with the placement.

The evidence presented clearly shows that the Appellant has followed the legislated process for appealing the IPRC’s placement decision to a Special Education Appeal Board (SEAB). He proceeded to appeal to the Special Education Tribunal after he received the Board’s written response to the decision and recommendations of the SEAB.

Therefore, the Appellant has exhausted all the appeal rights available to him and continues to be dissatisfied with placement, thereby satisfying the requirements of subsection 57 (3) of the *Education Act* and the Tribunal’s *Rules of Procedure*.

The Respondent cited section 17 of the Tribunal’s *Rules of Procedure*, urging dismissal of the appeal without a hearing on the grounds that this “Appeal relates to matters that are outside the jurisdiction of the Tribunal”. By that the Board meant that the Tribunal must not focus on the special education program and service components of the “Resource Assistance” provided to students who are placed in a regular classroom as their special education placement.

The Respondent stated that the Tribunal, like the Special Education Appeal Board, may only deal with identification and placement and that it has no inherent authority beyond that narrowly prescribed by subsection 57 of the *Education Act*.

However, the Tribunal unanimously agrees that its mandate is broader than that of the SEAB and is set out in subsection 57 (4) of the Education Act, which states that

The 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.

Based on this section of the *Education Act* and previous Tribunal decisions that confirm that placement in a Regular Class with Resource Support implies the delivery of appropriate special education programs and services, the Tribunal has jurisdiction to hear the Appeal once an Appellant has satisfied the provisions of subsection 57 (3) of the *Education Act*.

Decision

Based on the evidence received, the Tribunal unanimously agrees that it has jurisdiction to hear the appeal of the June 22, 2004, IPRC decision regarding the special education placement and the provision of special education programs and services to the pupil in question.

A Tribunal hearing to consider the merits of the case will be scheduled, if the parties are unable to resolve the issues between them. Both parties will be invited to participate in a conference call for the purpose of setting the dates and making arrangements for the hearing.

Commentary

Since the Tribunal’s decision is focused only on the matter of jurisdiction, there are no accompanying orders issued at this time. The Tribunal urges that the parties, namely the Board and both parents, in determining their next steps, focus on the pupil’s best interests, and how the pupil’s needs can be met in the most enabling manner possible. The Tribunal notes that should this matter proceed to a hearing to consider the merits of the case, it would be beneficial to have available to the Tribunal up-to-date assessment information on the pupil’s academic and intellectual functioning, hearing and language skills and the ability to utilize ASL to augment the pupil’s receptive language skills.

Eva Nichols, Chair _____

Derryn Gill, Member _____

Jim McCaughey, Member _____

Date December 15, 2005