



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 1991

BETWEEN

I., Appellant

-and-

The Toronto District School Board, Respondent

Tribunal Members:

Eva Nichols	Chair
Derryn Gill	Member
Julie Lindhout	Member

Appearances:

I.	Parent
MJ.	Advocate
Brenda Bowlby	Counsel for the Toronto District School Board (TDSB)
Karen Forbes	System Superintendent, Special Education, TDSB
Louise Sibbald	Secretary

The hearing on the matter of jurisdiction was held on October 4, 2006 in Scarborough, Ontario.

INTRODUCTION

The Appellant appealed the identification and placement of the child to the Ontario Special Education (English) Tribunal (“the Tribunal”) on June 16, 2006. The Toronto District School Board (TDSB) questioned the Tribunal’s authority to hear the case, on the grounds that the Appellant had not exhausted all rights of appeal related to the decision of the Identification, Placement and Review Committee (IPRC) held on March 1, 2006. The Appellant appealed the IPRC decision to a Special Education Appeal Board (SEAB). Before the SEAB could meet, the Appellant appealed to the Tribunal to assume jurisdiction. The TDSB urged the Tribunal to dismiss the appeal in accordance with ss. 57(3) of the *Education Act*.

The Tribunal met on October 4, 2006, to hear arguments to determine whether the Tribunal had the authority to hear the Appeal.

Relevant Statutory Provisions and Cases Cited

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*, 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

Several specific sections of the *Education Act* concerning special education in whole or in part were used in the arguments presented by the parties.

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 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

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. The sections relevant to this appeal are as follows:

Part VI: Appeals from Committee Decisions

26. (1) A parent of a pupil may, by filing a notice of appeal in accordance with subsection (2) or (3), require a hearing by a special education appeal board in respect of,

- (a) a committee decision under Part IV or V that the pupil is an exceptional pupil;
- (b) a committee decision under Part IV or V that the pupil is not an exceptional pupil; or
- (c) a committee decision under Part IV or V on placement of the pupil.

(2) A notice of appeal in respect of a committee decision under Part IV shall be filed with the secretary of the board,

- (a) if no meeting is held under section 19, within 30 days of receipt of the statement of decision under section 18 by the parent who is seeking to appeal.

27. (1) The special education appeal board shall be composed of,

- (a) one member selected by the board in which the pupil is placed;
- (b) one member selected by a parent of the pupil; and
- (c) a chair, selected jointly by the members selected under clauses (a) and (b) or, where those members cannot agree, by the appropriate regional manager of the Ministry.

(2) Selections under clauses (1) (a) and (b) shall be made within 15 days of receipt of the notice of appeal by the secretary of the board.

(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).

(5) No person who has had any prior involvement with the matter under appeal may be selected under subsection (1).

28. (1) The chair of the special education appeal board shall arrange for a meeting of the members of the special education appeal board to discuss the matter under appeal and shall give notice of the meeting, in accordance with subsection 5 (5), to a parent of the pupil and, where the pupil is 16 years of age or older, the pupil.

(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.

(3) Despite subsection (2), with the written consent of the parents of the pupil and the designated representative of the board, the meeting may be scheduled for a time that is more than 30 days after the day on which the chair is selected.

Cases Cited

The Appellant cited *E. v. Brant County Board of Education*, [1997] 1 S.C.R. 241

ISSUE

The issue is whether the Tribunal has jurisdiction to hear the appeal of the child's identification and placement, as determined by the IPRC held on March 1, 2006.

POSITIONS OF PARTIES

Respondent

Ms. Brenda Bowlby, counsel for the TDSB, presented the board's position on jurisdiction. Ms. Bowlby stated that in March 2006, the child was a student in Grade 8 in the placement designated by the Ontario Special Education (English) Tribunal.

On March 1, 2006, an IPRC was held to determine the child's placement for the upcoming Grade 9 year.

On March 6, 2006, the Appellant appealed the decision of the IPRC.

On March 10, 2006, the system superintendent of special education for the TDSB, Ms. Karen Forbes, sent a letter to the Appellant. This letter:

- invited the Appellant to request another IPRC meeting in an effort to resolve the issues;
- gave the Appellant the name of the person to contact at the TDSB to arrange a second meeting of the IPRC;
- advised the Appellant of the board's nominee to the SEAB and gave a telephone number for the nominee, where the Appellant's nominee to the SEAB could contact her;
- named Ms. Rosalie Rodrigues as the board's contact person for making the arrangements for the SEAB;

- advised the Appellant of the obligation to name a nominee to the SEAB and the timelines for doing so;
- outlined the process for setting up the SEAB,
- informed the Appellant of the right to attend and make a presentation to the SEAB;
- included the TDSB's *Parent's Guide to Special Education and Highlights of Regulation 181/98*.

The Appellant initially wanted to represent herself on the SEAB. After receiving advice from TDSB personnel and from Ms. Moira Sinclair, education officer with the Ministry of Education, the Appellant chose W., as her nominee to the SEAB.

In accordance with Regulation 181/98, the two nominees chose Mr. John Fauteux as the chair for the SEAB and settled on a date for the SEAB meeting that was within the legislated timelines. That date was not acceptable to the Appellant's representative. Therefore, it was agreed by the three participants to hold the SEAB meeting on September 14, 2006.

On June 16, 2006, the Appellant sent a letter to the secretary of the Ontario Special Education (English) Tribunal stating the wish to appeal the IPRC decision.

On July 11, 2006, Ms. Forbes sent a letter to the Appellant with the information that the TDSB would be contesting the jurisdiction of the Tribunal to hear the appeal.

In an effort to pursue the SEAB process, the TDSB encouraged the nominees to the SEAB to hold open the date for the September 14, 2006, SEAB until September 7, 2006.

Ms. Bowlby stated that the Appellant had not exhausted all rights of appeal and therefore the Special Education (English) Tribunal does not have jurisdiction to hear the appeal.

Appellant

The Appellant's representative (advocate) presented the Appellant's position on jurisdiction. The Advocate stated that the Tribunal should take jurisdiction of the appeal because the Appellant's right of appeal had been exhausted on two counts:

- The Appellant believed that there was no possibility that the child would receive a fair hearing by a SEAB of the TDSB because there was a "poisoned atmosphere" resulting from the previous Tribunal appeal. The Appellant believed that because of the involvement in appeal processes for almost two years, it would be impossible to find SEAB members who did not already have knowledge of and "tainted" opinions about the case. The Appellant believed that it was in the child's best interest to have "a group of people hear the matter who have had nothing to do with this matter in the past".
- The Appellant claimed that, although there may have been discussions among other parties, there had been no notification of the appointment of Mr. Fauteux as chair of the SEAB or of the extension to September 14, 2006 of the date set for the SEAB hearing.

The Advocate claimed that the Appellant did not abandon the appeal process, rather the TDSB abandoned that appeal process by neglecting to keep the Appellant fully informed about the arrangements for the SEAB. The Advocate urged the Tribunal to assume jurisdiction and hear the merits of the appeal.

SUMMARY OF EVIDENCE

Respondent's Arguments

Ms. Bowlby called two witnesses to present the evidence on behalf of the TDSB. These were Ms. Karen Forbes, system superintendent for special education for the TDSB and Ms. Rosalie Rodrigues, administrative liaison to Superintendent Forbes.

Ms Forbes testified that the letter dated March 10, 2006, sent to the Appellant offered to reconvene the IPRC because "sometimes more information becomes available and a compromise may be reached that is agreeable to the parties".

The letter also made preparations for the SEAB by identifying the TDSB's nominee and by naming Ms. Rodrigues as the board's contact person. The letter further outlined the steps the Appellant would need to take and included a copy of the Ministry of Education's *Highlights of Regulation 181/98* and a copy of the TDSB's *Parents' Guide to Special Education* for the Appellant's information.

Ms. Forbes testified that she called the Appellant on April 4, 2006, to explain to that the Appellant could not be her own nominee on the SEAB, because under Regulation 181/98, the SEAB nominee cannot have prior knowledge of the case. Ms. Forbes suggested that the Appellant call Ms. Moira Sinclair at the Ministry of Education to help find a person to nominate to the SEAB.

By April 5, 2006, the Appellant confirmed W., as the nominee. Within fifteen days, the nominees agreed to Mr. Phil Di Francesco as chair. Mr. Di Francesco declined to act as chair for the SEAB. The nominees then agreed on Mr. Fauteux, as chair. As far as Ms. Forbes knew, the Appellant had no objections. Preparations continued for the SEAB to take place on June 22, 2006.

Ms. Forbes stated that in early June 2006 she was informed that the Appellant's advocate was not available on June 22, 2006, and that the SEAB members had set a new date of September 14, 2006, for the hearing. Ms. Forbes stated she was not aware until June 22, 2006, that in the meantime the Appellant had sent a request to Mr. Bill Wyman, secretary of the Special Education (English) Tribunal, to go directly to a Tribunal hearing. The TDSB received notice of the appeal to the Tribunal on July 14, 2006, but did not cancel the SEAB until September 7, 2006, in case the Appellant changed her mind and wanted to continue with the SEAB. Ms. Forbes stated that the TDSB made every effort to have the SEAB go forward. It was up to the Appellant's nominee to communicate with the parent, and Ms. Forbes had no reason to believe that this was not happening.

Ms. Forbes stated that she did not tell the board's nominee anything about the case. She also did not recall the Appellant asking her for procedures about the way the SEAB functions or for a list of potential chairs. Ms. Forbes also stated that the TDSB did not suggest mediation as a way of resolving the developing situation.

Ms. Rodrigues then testified that she had been assigned as contact person for the SEAB. She stated that the TDSB had prepared its documentation for the SEAB, but she had received nothing from the parent.

Ms. Rodrigues stated that she received an e-mail from the Appellant's nominee to the SEAB on June 22, 2006, regarding the Appellant's request to proceed to the Tribunal, but had not previously received any communication indicating that the parent would bypass the SEAB. She heard nothing further from the nominee.

On cross-examination, Ms. Rodrigues stated that she had not received any paperwork to confirm that the Appellant had been informed of Mr. Fauteux's appointment as chair, but that she would not normally receive any such written confirmation.

Ms. Rodrigues stated that she did not tell the TDSB's nominee to the SEAB anything about the case and did not recall being asked for a list of potential chairs or for any procedures in addition to the material sent with the letter of March 10, 2006.

In her closing statement, Ms. Bowlby stated that the TDSB appeared to have done everything possible to have the SEAB go forward as prescribed in the Regulation, and that there was no reason to believe that the three members of the SEAB would be biased. She further commented that W. was not the parent's representative, but the parent's nominee to the SEAB; therefore, it would not have been appropriate for her to discuss the Appellant's child's situation with the Appellant.

Appellant's Arguments

The Advocate had only one witness to present evidence: the Appellant.

The Appellant stated that on March 10, 2006, she received a letter from Ms. Forbes in response to her notice of appeal of the March 1, 2006 IPRC decision. The Appellant testified that on April 3, 2006, she left a message for Ms. Rodrigues naming herself as the SEAB nominee. She also spoke to the TDSB's nominee to the SEAB, who informed her that she had "heard about (her) child". The Appellant said that later that evening she received a message from Ms. Forbes informing her that she could not be her own nominee and suggesting that she speak to Ms. Sinclair at the Ministry of Education about the process of selecting a nominee.

The Appellant stated that on April 5, 2006, she contacted Community Living and spoke to Ms. Petra Asfaw who recommended W., as a potential nominee for the SEAB. The Appellant contacted both Ms. Rodrigues and the TDSB's nominee to inform them that W. would be her nominee. The Appellant said that the board's nominee informed her that the next step in the process would be to "come up with a chair".

The Appellant stated that neither she nor her nominee had been involved previously in a SEAB and that they did not fully understand the necessary steps in the process. She claimed that she repeatedly asked Ms. Rodrigues, the board's nominee and Ms. Sinclair for a list of possible chairs and a document outlining the protocol for the SEAB. She said that she received neither. The Appellant said that she did not see how the appeal could be fair if her nominee did not have the necessary information.

The Appellant stated that, rather than a list of names to consider, she was given the names of two possible candidates for chair but no information on which to base her choice. She rejected both candidates after hearing from "a lot of advocates and parents" that the proposed candidates were not "like-minded choices".

The Appellant suggested a potential candidate for SEAB chair who was not acceptable to the board. She then stated that W. told her that Mr. Philip (Di Francesco) had been chosen as the chair and that hearing dates had been set. The Appellant said that both her nominee and “the teacher” had called her to determine whether she and her advocate were available on the proposed dates. The Appellant stated that she received copies of the e-mails between the nominees and that she had been asked to send in the necessary documents.

The Appellant said that on June 2, 2006, she passed on the information that her advocate was not available for the proposed June date for the SEAB hearing. She stated that after that time her nominee may have told her on the phone about the changes of date and the change of chairs. The Appellant claimed that she never really absorbed the last names of the candidates, because she was busy and ill at the time. She was surprised and upset to discover that her nominee had agreed to someone about whom the Appellant had no information.

The Appellant stated that at this point she felt that “things were not going smooth”. She said that she called her advocate and said, “I need to go through a Tribunal for them to hear me out”.

The Appellant said that the process was not fair because:

- She didn't get a list of candidates for the position of chair, curriculum vitae for the candidates who were proposed or the opportunity to approve the final choice.
- She didn't get a document outlining the procedure for the SEAB.
- Her own nominee would not listen to her when she wanted to tell her about her child.
- Her nominee knew nothing about the child and yet the board's nominee said that she was familiar with the child and the case.
- The board's nominee was a former TDSB employee.
- The nominees had conversations that did not include the Appellant.
- She was asked to produce documents for the SEAB but wasn't told who would see the documents.

The Appellant said that she felt that everything was unfair and one-sided in favour of the board and that she had no information for herself or for her nominee about the steps in the process. On June 16, 2006, she asked her advocate to send a letter to Mr. Wyman, secretary of the Special Education (English) Tribunal, copied to her nominee, to state that she wanted to appeal to the Tribunal.

The Appellant stated that she spoke to her nominee about her decision but that they never spoke again after June 22, 2006. She said that no one contacted her about mediation or about the September 14, 2006, SEAB date.

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 the parents are still dissatisfied with the identification or placement decision or both.

The issue is whether the Tribunal has jurisdiction to hear the appeal of this child's special education identification and placement. To determine this, the Tribunal must establish whether the parent's rights of appeal of the March 1, 2006, IPRC decision had been fully exhausted in accordance with the relevant sections of Regulation 181/98.

The Tribunal believes that the TDSB met its legislated obligations in setting up the SEAB in accordance with subsections 26, 27 and 28 of Regulation 181/98:

- Ms. Forbes's letter of March 10, 2006, set out for the Appellant the steps that she needed to take to proceed to the SEAB. The letter included the TDSB *Parent's Guide to Special Education and Highlights of Regulation 181/98*.
- The nominees and the chair were selected within the legislated time lines.
- The date for the hearing was set within the legislated time lines.
- The Appellant and her advocate had agreed to the date for disclosure of documents for the planned June 22, 2006, SEAB date.
- The June 22, 2006, date was postponed at the Appellant's request.
- On June 22, 2006, an e-mail was sent by the SEAB chair to the nominees stating the time and place of the rescheduled SEAB. The SEAB would have met on September 14, 2006, to consider the appeal of the child's identification and placement, if the Appellant had not abandoned the appeal process by applying directly to the Tribunal on June 16, 2006.

The Appellant claimed that she had to abandon her appeal because of the "poisoned atmosphere" at the TDSB, which would have prevented a fair appeal for the child. To the contrary, the Tribunal finds that the evidence established the following regarding the Appellant's appeal to the SEAB:

- Ms. Forbes responded promptly to the Appellant's appeal of the IPRC decision.
- Ms. Forbes provided information on the appeal process.
- Ms. Forbes named a contact person for the SEAB and informed the Appellant.
- Ms. Forbes provided the Appellant with contact information for the TDSB's nominee.
- Ms. Rodrigues provided the Appellant with the contact information for Ms. Sinclair at the Ministry of Education.
- The Appellant was offered more time to choose a nominee, if necessary.
- The June 22, 2006, SEAB meeting was postponed to accommodate the Appellant.
- The Appellant received copies of organizational e-mails.
- The Appellant had input into the selection of the chair.

Therefore, the Tribunal finds that the Appellant had not fully exhausted her rights of appeal when she decided to abandon the SEAB in favour of an appeal to the Tribunal.

DECISION

The following decision without reasons was issued on October 11, 2006.

The Tribunal finds that it does not have jurisdiction to hear the merits of this case. The Appellant has not demonstrated that all rights of appeal have been exhausted. Therefore, the Tribunal dismisses the appeal in accordance with ss. 57(3) of the Education Act.

The Tribunal's full decision on jurisdiction, including reasons, will be issued within the timelines set out in the Tribunal's Rules of Procedure.

Eva Nichols, Chair

Derryn Gill, Member

Julie Lindhout, Member

Date December, 18, 2006