



**Between**

**J. D. and R. H., Appellants**

**On behalf of the child**

**And**

**Toronto District School Board, Respondent**

**Tribunal Members:**

<b>Paula Barber</b>	<b>Chair</b>
<b>Donna Gracey</b>	<b>Member</b>
<b>Deborah Moskel</b>	<b>Member</b>

**Appearances:**

<b>R. H.</b>	<b>Parent on behalf of the child</b>
<b>J. D.</b>	<b>Parent on behalf of the child</b>

<b>Byrdena MacNeil</b>	<b>Counsel for the Toronto District School Board</b>
<b>Sarah McCoubrey</b>	
<b>Brian Ellerker</b>	<b>Central Co-ordinating Principal-Special Education Toronto District School Board</b>

**Secretary:** **Bill Wyman**

The Preliminary Hearing on Jurisdiction was held at the Four Points Sheraton Hotel, 1926 Lakeshore Boulevard West, Michigan Room, Toronto, Ontario, on Tuesday, November 20, 2001.

## **Introduction**

At the opening of the hearing the Chair stated that this Tribunal would be guided by the Education Act R.S.O. 1990, c. E. 2, as amended, section 57, the regulations made there under, and the Statutory Power Procedures Act.

The Tribunal scheduled this hearing to determine the matter of jurisdiction.

## **Legal Framework**

A number of regulations made under the Education Act concerning special education in whole or in part have been used in the arguments presented by the parties.

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 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.

Regulation 298: Operation of Schools General contains certain qualifications for special education teachers, a provision for reducing the length of the school day for exceptional pupils, and maximum class size provisions for special education classes.

## **Issue**

Counsel for the Toronto District School Board raised a preliminary question about the Tribunal's jurisdiction to hear the parents' appeal. The Toronto District School Board based its position on two arguments:

1. The parents had not exhausted all rights of appeal
2. The matter dealt with program issues, not placement.

## **Arguments**

### **The Toronto District School Board's Position**

1. Ms. MacNeil's position, on behalf of the Toronto District School Board, is that the Tribunal does not have jurisdiction over the matter because the parents have not exhausted all rights of appeal under the Regulations. She argued that the Tribunal should not proceed to hear the matter because a Special Education Appeal Board had not been established. In her submission, Ms. MacNeil stated that there is no provision in the Act or Regulations that authorizes a parent to appeal a decision of an Identification, Placement and Review Committee (IPRC) directly to the Special Education Tribunal. Ms. MacNeil indicated that mediation had been attempted but was unsuccessful.

In summary, Ms. MacNeil stated that the appeal to the Tribunal was premature, and that the matters could be resolved through a Special Education Appeal Board. Ms. MacNeil stated that although mediation was not successful [in the context of the Tribunal], this does not reflect that mediation would be unsuccessful if the matter went back to an Appeal Board.

2. Ms. MacNeil stated that the parents' appeal is not capable of being heard because it is not an appeal in respect of the identification or placement of the exceptional pupil within the meaning of Subsection 57(3) of the Act. In a letter of June 12, 2001, the parents wrote to Director of Education and Secretary to the Toronto District School Board, Ms. Marguerite Jackson. The parents requested an appeal of the IPRC decision because the placement was not addressing the child's needs.

Ms. MacNeil described the Toronto District School Board's response to the Notice of Appeal in the letter of June 22, 2001 from Mr. Brian Ellerker, the Central Co-ordinating Principal of Special Education. Mr. Ellerker stated that the parents' profile of strengths and needs which they had composed for the child (that they had attached to a letter of May 28, 2001 to Ms. Cathy Fedun, the chairperson of the IPRC) would be included in the Ontario Student Record

(OSR). Mr. Ellerker, in his letter to the parents outlined what IPRC decision matters were appealable under the Regulation. His letter indicated that the identification or non-identification and placement were the only decisions that could be appealed. He ended the letter by stating that if the parents had any questions they could contact him. Ms. MacNeil introduced a sworn affidavit by Mr. Ellerker in which he stated that his remarks to the parents were explanatory and that he had not intended to deny their right to an appeal.

On July 30, 2001, the Board received a letter from the parents in which they reiterated their request of June 12, 2001 for an appeal because the placement was not meeting the needs of their child. In a letter dated August 16, 2001, from Mr. Bill Wyman, Secretary to the Tribunal to Mr. Ellerker, Mr. Ellerker was advised that the parents had requested a hearing before the Special Education Tribunal on the matter of placement for their child.

Ms. MacNeil pointed out that throughout the parents' letter of appeal, there were a great number of paragraphs that discussed services and programming and that the appeal rights of parents do not deal with programs and services as much as the parents would wish them to. She argues that to expand the appeal rights would result in the rewriting of the legislation. She went on to say that placement has been narrowly defined by the Legislature and we are left with that legislation. She stated that support personnel is defined as special education services, which is not appealable.

### **Parents' Position**

1. The mother provided a brief history of the child's development and diagnosis of autism. As well, she briefly described the programs and services provided by the Toronto District School Board from the time of entry into the school system until the current placement in a regular grade 6 classroom, which the child attends on a half time basis.

In addition to the letters entered by Ms. MacNeil in her presentation, the mother introduced a June 15, 2001 letter from Ms. Marguerite Jackson, Director of Education and Secretary to the Toronto District School Board. It was in response to the original letter of June 12, 2001, in which the parents expressed their intent to appeal the IPRC decision regarding their child, because the placement was not addressing the child's needs. Ms. Jackson's letter stated that she forwarded the letter with the parents' request for an appeal of the May 28, 2001 IPRC decision to Ms. Gerry Connelly, Executive Officer Student and Community Services of the Board, for attention.

In their letter of June 12, 2001, to the Board, and the letter of July 30, 2001, to Mr. Brian Ellerker the parents stated that they were appealing the placement of their child. The parents also stated that they were open to mediation and were prepared to meet to try to resolve the issue. In another letter of July 30, 2001, to

Mr. Bill Wyman, Secretary to the Special Education Tribunal, the parents indicated that they were open to mediation.

Via teleconference, the father questioned Mr. Lindsay Moir, witness for the parents. Mr. Moir, an education consultant, gave evidence that he was involved in the revisions to Regulation 181/98, which replaced Regulation 305, the Special Education regulation. Mr. Moir described the timelines for responding to a request for an appeal in the regulation. The parents believed that they were denied their right to appeal to an Appeal Board when the Toronto District School Board did not respond within the legislated time to establish an Appeal Board. Mr. Moir referred to the possibility of a reduction of the school day for an exceptional pupil as outlined in Regulation 298 Subsection 3(3). He said that the parents have expressed to him their concern that the placement for their child is a half-day placement and they have repeatedly stated that they want their child in school for a full day.

To date neither Ms. Jackson nor Mr. Ellerker has referred the appeal to the Toronto District School Board. It has been 160 days since the parents filed the appeal [at the time of the hearing], yet other than Mr. Ellerker's reply of June 22, 2001, and Ms. Jackson's letter of referral of June 15, 2001, the parents had not received any communication from the Toronto District School Board. The parents believe that the Board has had ample time to refer the matter to an Appeal Board. With respect to Mr. Ellerker's claim that the letter of June 12, 2001, was unclear and the parents' denial that their letter of appeal was unclear, the father quoted from Regulation 181, Subsection 26(5):

The special education appeal board shall not reject or refuse to deal with an appeal by reason of any actual or alleged deficiency in the statement referred to in subsection (4) or by reason of the failure of the parent, in the opinion of the special education appeal board, to accurately indicate in the notice of appeal the subject of the disagreement.

The parents believe that the letter of appeal of June 12, 2001, which they sent to the Director of Education and Secretary of the Board should have been submitted to the Toronto District School Board, notwithstanding any alleged deficiency in the appeal wording. Although the parents understand that Mr. Ellerker was entitled to pose a question regarding the matter, they believe that he should not have delayed the Board's referral of the matter to an Appeal Board. Therefore, the parents believe that they have exhausted all avenues of appeal and that they should be allowed to present their case to a Special Education Tribunal.

2. The parents' evidence was that Mr. Ellerker told them in writing in his letter of June 22, 2001, that the subject matter of their appeal was not capable of being appealed. In addition, the IPRC of May 28, 2001, did not identify the child's needs in the statement of decision, which stated, "See IEP" regarding strengths and needs. The parents believe that the description of the child's needs is

fundamental to the child's placement. The parents believe that they have a right to contribute to the statement of needs at the IPRC meeting and that they have the right to discuss special education services within the framework of the IPRC process. Initially, the parents submitted a psychological assessment outlining the child's needs to the Toronto District School Board which the Board then used to submit to the Ministry of Education for an ISA funding claim. The Board acknowledged the child's needs when applying for funding, but the IPRC did not give the opportunity to the parents to discuss the child's needs when the IPRC was determining placement. The parents claim that at the IPRC meeting they were denied the opportunity to discuss their child's needs and the services to meet those needs and that they were being coerced into making an uninformed decision in respect of the IPRC. Consequently, they declined to sign the IPRC form.

In their May 28, 2001, letter of appeal, the parents stated:

The grounds for our appeal is that the proposed placement has not been described sufficiently to ensure that it will meet our child's needs. Since placement is described under the Education Act as being able to meet the child's needs and the Toronto District School Board has not permitted a clear statement of need and sufficient detail of the resulting program at that placement, we are unable to ascertain if the proposed placement will meet the criteria of addressing the child's needs. Therefore we are unable to agree to the proposed placement and are therefore appealing the placement.

### **Reasons for the Decision**

1. We accept the parents' argument that they have exhausted all avenues of appeal of the IPRC decision. Notwithstanding Brian Ellerker's sworn statement that his letter of June 22, 2001 was explanatory and that he did not intend to deny the appeal, the Board made no effort to adhere to the timelines set out in the Regulation except for the letter of June 15, 2001, from the Director of Education and Secretary of the Toronto District School Board, acknowledging the receipt of the parents' notice of appeal. The parents heard nothing further of the preparations for the establishment of an Appeal Board, which according to the Regulation should have begun within fifteen days of the receipt of their letter of appeal.

When Mr. Ellerker phoned the parents after he returned from vacation on August 20, 2001, he did not offer to establish an Appeal Board. The Tribunal agrees that the parents were justified in believing that the Toronto District School Board was not proceeding with their appeal.

In their letters of June 12, 2001, and in both letters of July 30, 2001, the parents indicated that they were open to mediation. Mediation was attempted after September 17, 2001, but was not successful. The Tribunal mentions the

mediation process only to indicate that it is unlikely that another attempt at mediation would be successful given the Board's position that the subject matter of the appeal is not appealable.

In reference to the case law cited by the Board's counsel which supported the Board's arguments regarding jurisdiction, the Tribunal was not convinced that the cases presented were arguments to dismiss the parent's appeal on grounds of jurisdiction. The Tribunal believes, in this case, the education legislation is absolutely clear in setting out the specific timelines, which a school board must follow in establishing an Appeal Board. The Toronto District School Board did not follow these timelines and did not establish an Appeal Board as required by the Regulations and the parents did not have the opportunity to be heard regarding their appeal of their child's placement decision of May 28, 2001.

2. The Tribunal agrees with the parents that the needs of the child and appropriateness of the placement are an integral part of an IPRC decision and that needs and services should be discussed at an IPRC before a placement decision can be made:

Reg. 181, Subsection 16(1) 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...

While the Tribunal acknowledges that an IPRC may only make decisions regarding identification and placement, it also recognizes that the issue of appropriate programs and services are interconnected with the issue of placement and the consideration of appropriate services is a necessary part of an IPRC.

Reg. 181 Subsection 17 (1) further supports our view that consideration of appropriate services is a necessary part of an IPRC:

When making a placement decision... 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...

Therefore the Tribunal feels that the Toronto District School Board has taken a narrow view of the term "placement". Regulation 181, Sections 16 and 17 acknowledges the need to discuss a pupil's needs and the relevant special education services and programs before coming to a decision about placement. A placement is only meaningful if the parent is familiar with the programs and services attached to the placement.

We believe that this matter may appropriately be considered by the Tribunal.

**Decision**

The Tribunal has satisfied itself that it has jurisdiction to hear the appeal.

On behalf of the Tribunal,

Paula Barber, Chair  
December 24, 2001