



IN THE MATTER OF the Education Act, R.S.O, 1990, E2, as amended, 57(3)
AND
IN THE MATTER OF Ontario Regulation 181/98;
AND IN THE MATTER OF the minor child,

BETWEEN

J. K. AND G. H.

AND

THE HALTON DISTRICT SCHOOL BOARD

Tribunal Members:

Paula Barber	Chair
Peter Cassell	Member
Ann Fudge	Member

Appearances:

Appellant:

J. K.	Parent on behalf of J.
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Respondent:

R. Keel	Counsel for the Halton District School Board
N. Tymochenko	Counsel for the Halton District School Board

The Preliminary Hearing was held by teleconference on January 26, 2004.

Introduction

At the opening of the Hearing, the Chair stated that this Tribunal would be guided by the Education Act R.S.O. 1990 as amended, section 57 and the regulations made thereunder and the Statutory Powers Procedure Act.

The Tribunal scheduled this hearing to determine several issues raised by Mr. R. Keel on behalf of the Halton District School Board.

J., a student in the Halton District School Board, is the child of J.K. and G.H. J. has been identified as gifted. The parents appealed the June 2003, placement decision of the Halton District School Board's Identification, Placement and Review Committee (IPRC). A Special Education Appeal Board was struck to hear the appeal.

The appellant was elected to the Halton District School Board during the November 2003 election.

The parents received the Special Education Appeal Board (SEAB) report on November 27, 2003. When the appellant had not heard from the Board within 30 days, she wrote to Mr. B. Wyman, the secretary to the Special Education Tribunal requesting a hearing before the Special Education Tribunal.

The Tribunal was convened on January 26, 2004 to hear the preliminary issues in this matter raised by Mr. Keel on behalf of the Halton District School Board.

Legal Framework

Statutes

Statutory Powers Procedure Act, R.S.O. 1990, c.S.22

Education Act, R.S.O. 1990, c.E. 2, as amended.

Municipal Conflict of Interest Act, (R.S.O. 1990, c. M.50)

Education Act, R. S. O. 1990, c.E.2, as amended.

Subsection 1 (1) Definitions

1.1 Defines "exceptional pupil", "special education program" and "special education services".

'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 or paragraph 5 of subsection 11 (1), of the board.

(a) of which a pupil is a resident pupil

(b) (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 evaluations and that includes a plan containing specific objectives and an outline of educational services that meets the needs of the exceptional pupil.

'special education program' means facilities and resources, including support personnel and equipment necessary for developing and implementing a special education program.

Subsection 8 (3) Powers of the Minister of Education

"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:

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 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 use such prescriptions as established under this clause."

Section 57 (3)

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.

Section 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.*

Section 57 (5) Decision Final

The decision of the Special Education Tribunal is final and binding on the parties to the decision.

Regulations

Regulation 181/98: Identification and Placement of Exceptional Pupils

This Regulation governs the identification and placement of exceptional pupils, IPRC reviews, appeal procedures, and the role of parent(s)/guardian(s) in these processes.

Subsection 17 (1) When making a placement decision on a referral under section 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 30(1) Within 30 days of receiving the special education appeal board's written statement, the board shall consider the special education appeal board's recommendations and shall decide what actions to take with respect to the pupil and shall give notice in writing of the decision to each of the persons described in subsection 29 (1),

Regulation 304, (R.R.O. 1990) School Year Calendar, Amendments, O.Reg. 822/82;). Reg. 91/98. This regulation governs the school year calendar and contains the definitions of the following days, 1. (1): Instructional day, professional activity day, school day, and under 2. (4) lists school holidays.

Case Law

Re: D. et al. and Muskoka Board of Education et al. (1985), 49 O.R. (2d) 546; 15D.L.R. (Y,) 741: 6 D.A.L.389

R. and York Board of Education, (January 24, 1986) (unreported)

Y. v. X.X. District School Board, (February 18, 2002) (unreported)

R. v. Carleton Roman Catholic Separate School Board, (December 16, 1998) (unreported)

A. v. Halton District School Board, (March 28, (2002)] (unreported)

L-A. v. Halton District School Board (October 30, 2000) (unreported)

B. v. Upper Canada District School Board, (September 24, 2001) (unreported)

Hearst (Town) v. District School Board Ontario North East, (September 11, 2000) O.J. No. 3419, Court File No. D.v. 451-00

E. v. Halton District School Board, (September 19, 2003)(unreported)

O. v. Wentworth County Board Of Education, (July 17, 1987) (unreported)

B. v. North York Board of Education, (January 26, 1984)

The Respondent's Position

Mr. Keel, on behalf of the Halton District School Board, submitted that there were three issues that the Board was raising during the Preliminary Hearing. He stated that the first issue is the position of the Board that the appeal rights have not yet been exhausted. He elaborated that the fact that the Appellant is a trustee of the Halton District School Board "goes to the heart of the matter". The decision by the Board was made because she is a trustee. The decision made by the Board was to have the decision [Special Education Appeal Board decision report] looked at again and to bring that report [SEAB] back to the Board. At this time, the date of the Preliminary Hearing, the decision that was made by the Board was neither to accept nor reject the Special Education Appeal Board's (SEAB) decision, but to have the matter reconsidered and brought back to the Board on February 18th. The director of the Board had met with the parents and tried to find a resolution. It was the intent of the Board to have the matter remain outstanding in an attempt to have the matter resolved.

Mr. Keel made reference to section 30 of Regulation 181, regarding the time allowed for the Board to consider the SEAB's written report and to issue its decision to the parents. Mr. Keel summarized this first issue by stating that it is the position of the Board that the rights [of the parents] have not been exhausted because the Board has deliberately left the matter outstanding in an attempt to have the matter resolved.

The second issue raised by Mr. Keel on behalf of the Board is the fact that the parent, the Appellant, is a trustee of the Halton District School Board. Mr. Keel referenced the *Hearst* decision in which Judge Hennessey ruled that a trustee of

a board cannot be in litigation with the board on which he/she serves. According to Mr. Keel, there was considerable concern among the trustees that this would be the position if this matter went forward to a Special Education Tribunal. The trustees did not think that it would be appropriate for this matter to proceed to a tribunal given that the Appellant is a trustee.

Mr. Keel argued that the *Hearst* decision reflects the common-law principle of conflict of interest. He mentioned the Municipal Conflict of Interest Act, which is very specific about a pecuniary conflict of interest.

The appellant declared a conflict of interest when the matter of her appeal on behalf of her child came before the trustees “in camera” and removed herself from the deliberations. Mr. Keel stated that this action indicated her recognition of the conflict of interest requirements.

Mr. Keel explained that the *Hearst* decision reflects the common-law conflict of interest which is reflected in civil case law, namely that a person cannot be in a conflict of interest with his/her employer or in this case, with a Board of Education when that person is sitting as a trustee. He further argued that in the *Hearst* decision the issue was whether a trustee could support an application against a board and in that case, the court said that the trustee could not do that because that is considered a conflict of interest.

He further cited a situation in a school closing issue when a trustee withdrew from the application. Mr. Keel stated that in this situation, the appellant is not just supporting the appeal, she is the Appellant in the appeal.

From a practical perspective, Mr. Keel noted that the appellant campaigned on the issue of special education in the Halton District School Board, and her campaign literature was critical of the way in which the Board delivers special education and was critical of an administrator in the Board. This administrator would be a witness for the Board in the hearing. This situation raised questions about confidentiality, and counsel’s ability to get instructions to deal with trustees on a confidential basis and to maintain solicitor-client privilege when there is a party to the litigation present at the Board meeting.

To extend the concern beyond the Board level, Mr. Keel raised the point of calling a principal as a witness and then the potential implications for promotion of that principal, given that the trustee sits on the Board. Mr. Keel argued, that the persons giving evidence need to know that they can give evidence without ramifications to their employment or their profession. He gave a parallel argument for a teacher as a witness, and stated that it would be challenging for a person to give evidence contrary to the Appellant’s position, knowing that the Appellant was a trustee in the system.

The Board's position is that the conflict of interest principles exist and apply and the *Hearst* decision simply reflects something that has always existed. In summary, Mr. Keel argued that it would be difficult to give briefings to the Board, difficult to maintain confidentiality, and further that the client-solicitor privilege would be breached.

According to Mr. Keel, in this situation the Appellant has two choices. If she wants to litigate against the Board, she can resign. If she doesn't want to resign, she should not litigate against the Board.

The third issue is jurisdiction in that it is Mr. Keel's understanding that the Appellant is wishing to have an amendment to the Board's Special Education Plan requiring the Board to provide congregated classes at the secondary level. In this case, he argued, we are dealing with an individual student, raising significant issues to how that decision could or would be implemented if it were made.

With respect to Section 57 of the Education Act, "identification and placement", Mr. Keel raised some new insights into the matter of jurisdiction because, according to Mr. Keel, the timing is difficult and unfortunate in this case. The Board has recently established a task force to look at the issue of gifted children. The Gifted Task Force will be making a preliminary report in March 2004, and recommendations could be implemented immediately. For example, a pilot class could be implemented in September 2004. The final recommendations of the Task Force are to be submitted by March 2005. In Mr. Keel's opinion, that task force is where this issue should be dealt with. This would be a task force of all stakeholders, the Board, trustees, staff, parents, Special Education Advisory Committee (SEAC), and associations. This Task Force would look at the best way of providing services for gifted children, a provincial issue. Recommended changes by the Task Force would require an amendment to the Special Education Plan. According to Mr. Keel, the difficulty here is the fact that in this matter, we are dealing with one individual, the Appellant. The Board's Special Education Plan has been approved by the Board, the gifted association and by the Ministry.

In his submission, Mr. Keel cautioned the Tribunal to be wary of its jurisdiction given the nature of the circumstances. Furthermore, because the Board is already looking at the overall issue [the education of gifted students], it would not be appropriate for one individual to skew the development of this plan or these programs.

With respect to timing, should the Tribunal go ahead, the Tribunal would need to know what the community is saying in terms of congregated classes, not just a lone appellant.

Appellant's Position

The Appellant's position on issue one, that the Board is in the midst of making a decision while asking the Special Education Appeal Board to reconsider its recommendation, quoted Regulation 181/08, 30 (1)

Within 30 days of receiving the special education appeal board's written statement, the board shall consider the special education appeal board's recommendations and shall decide what actions to take with respect to the pupil and shall give notice in writing of the decision to each of the persons described in subsection 29 (1),

The Appellant stated that she and her husband received the SEAB report on November 27th and the 30th day [following receipt of the report] was December 27th. The Appellant wrote to Mr. Wyman, the secretary to the Tribunal, stating that she had heard nothing from the Board and that the Board had made no attempt to approach her to discuss the report with her. It is the Appellant's opinion that the Board did not meet the timelines in the Regulation 181 with respect to a Special Education Appeal. According to the Appellant, she does not believe that she had to wait beyond the 30 days to initiate an appeal to the Tribunal. She believes that she has the right to file for an appeal on the 31st day after receiving the Special Education Appeal Board report. If the Board chose to ignore the 30-day timeline, that is their option, but she acted upon her right to file for a tribunal hearing and she did that in writing.

According to the Appellant, after the Board received notification of the Tribunal hearing date, the matter was brought to the Board. The Appellant decided that it was irrelevant to tell the Tribunal what she understands happened with the Board.

With respect to issue number two, the Appellant began by telling the Tribunal that she and her husband filed the request for an appeal of her child's IPRC decisions in June 2003, within the legally required number of days. She and her husband believe that the Board should have a range of placement options available for gifted children. Their family has three gifted children with another child entering secondary school in September, and this child also needs a range of options available. The Appellant stated that what she does for a living or where she volunteers has no bearing on her child's right to have what the child needs and her right to pursue that right.

She believes that applying for an appeal and then a tribunal should not be held against her child and that serving on the Board should not harm her child's right to a fair hearing.

With respect to issue number three, the matter of jurisdiction, the Appellant noted that David Baker, counsel for the Appellant in *E. v the Halton District School Board*, on behalf of A. E. presented the issue of jurisdiction which was accepted by the Tribunal in that tribunal decision.

The Appellant stated “the fact that the placement does not exist in the Special Education Plan is irrelevant when the Education Act calls for a range of placements to be available for exceptionalities”.

She asked that the Tribunal review Mr. David Baker’s statements regarding jurisdiction in the *E. v HDSB* matter.

After speaking to her prepared notes, the Appellant continued by speaking to the issues raised by Mr. Keel. With respect to issue number one, she began by informing the Tribunal that from June 2001, the Halton District School Board has adopted “policy governance” model and further explained that under policy governance, no trustee is involved in hiring principals, teachers or superintendents. In her opinion, even if trustees were involved in hiring procedures, on a matter of integrity, she stated that she was a person capable of hearing a differing viewpoint from how own and then behaving in a responsible, respectful manner. If she felt that she was not capable of doing that, she would not participate in those decisions, should for some reason the trustees became involved in hiring decisions. However, at this point there is no [hiring] team consisting of trustees within the HDSB.

With respect to point number two, the establishment of the Gifted Task Force, as an alternate member of SEAC for the past five years, the Appellant has repeatedly asked for a range of options for gifted children to be examined. She continued to elaborate by saying that, “ it was only after I filed for a tribunal that the Gifted Task Force was formed; it was formed in January 2004.”

Regarding the Special Education Plan of the HDSB, she stated that the Ministry of Education has not approved the Special Education Plan of the Board.

Finally, with respect to points made by Mr. Keel, regarding the appeal of one child, the Appellant argued that this is the only way that an appeal can be initiated. Parents appeal on behalf of their own child.

The Appellant referenced decisions in *B. vs UCDSB* and *X. v.Y.Y* in which the Tribunals made orders with respect to placements that were outside the Board’s Special Education Plans. She told the Tribunal that she is the president of the Association of Bright Children (ABC) in Halton and has an understanding of wishes of the parental community with gifted children to have a range of placement options for their children. In her capacity as president of the ABC, she acknowledged that there are a variety of feelings within her organization on the issue of appropriate placements for gifted children.

In reply, Mr. Keel noted that the Board applies the 30-day requirement [in Regulation 181] to mean 30 “school days”. The HDSB concluded that it had 30 “school days” to bring the report to the Board.

With respect to the *Hearst* decision, the Appellant reiterated that the principle is the objective test of conflict of interest. He further stated that the courts are concerned that they must avoid a reasonable apprehension of bias. He further explained that “...as an individual parent in Halton seeing a trustee appeal, in my submission, that parent would have the right to say, ‘that’s not fair...that person [a trustee] has an inside edge’.”

Mr. Keel noted that although this is an individual appeal to the Tribunal the Appellant is also involved with the community and that this matter needs to come through SEAC and back to the Gifted Task Force. The establishment of the Task Force is not because of this individual appeal, but in response to issues raised and concerns from the community. The HDSB is concerned that there could be dual processes underway – the Tribunal hearing the appeal and the Task Force looking at gifted education in HDSB. He stated that timing is significant in this matter and does impact on the issue of jurisdiction.

In subsequent questions of clarification, the Appellant noted that the *Hearst* case deals with money and the division of geographical areas and that this case is not applicable to this matter of an appeal to a Tribunal.

As well the Appellant responded to a question indicating at the time of this Preliminary Hearing that she had not received written notification from the Board regarding their decision with respect to the SEAB report. Mr. Keel noted that the Board was waiting to put this matter on the agenda of the February 18, 2004 Board meeting.

A discussion of the meaning of “day” and “school day” within the Education Act and regulations took place. Regulations 181 and 304 were referenced by Ms. Tymochenko.

At the beginning of the Preliminary Hearing the Tribunal Chair stated that, as a “preliminary matter” to the Preliminary Hearing, she had discussed the Appellant’s request to have some trustees give evidence in confidence only to tribunal members regarding a discussion of this case that occurred at an “in camera” meeting of the Board. The Chair stated that she and the other tribunal members believed that whatever occurred at an “in-camera” meeting of the Board was irrelevant to the issues that were to be addressed at the Preliminary Hearing. The matter of concern to the Tribunal members was whether the Board had responded to the parents with their decision regarding the SEAB report within 30 days. The Appellant acknowledged in her statement that this was now an irrelevant request under the circumstance described by the Chair.

Reasons for the Decision

1. The Tribunal accepts the Appellant's arguments that the Board had not dealt with the issue of the Special Education Appeal Board Report and that the parents had the right to request a Special Education Tribunal. The Tribunal is of the opinion that a decision to send the report back to the SEAB for reconsideration is not a proper way to deal with a SEAB report. The fact that the Board believes that it is holding the matter open in order to resolve the matter, is not in keeping with the responsibilities and timelines required by Regulation 181(30). The Tribunal acknowledges Mr. Keel's arguments on behalf of the Halton District School Board but was not persuaded that the Board had adhered to the timelines for the appeal process as outlined in Ministry Regulations 181.

Mr. Keel argued that the Board understood that "day" in Ministry regulations referred to "school day" and therefore that the Board had until January 17, 2004 to address the matter.

Although Ministry legislation does not specifically define the meaning of "day", Regulation 304 defines "school day" as follows:

Reg. 304 1. (1) In this regulation,

"school day" means a day that is within a school year and is not a school holiday;

This section of the regulation defines, as well, "instructional day" and "professional activity day". Section 2. (4) lists the school holidays.

Although the Education Act and Regulations relating to Special Education do not specifically define "day", when another description of day is mentioned in the Regulations, a descriptor of the "day" is used. For example, in Reg. 181, 6. (8),

Within 30 school days after placement of a pupil in a program, the principal shall ensure that the plan is completed....

And

7. (7) Within 30 school days of an implementation of a change in placement or, where the placement is confirmed, within 30 school days or receiving the notice under subsection (1), the principal shall ensure that...

And

With reference to the use of "school holiday",

Where the time limited by this Regulation for doing anything expires or falls on a school holiday within the meaning of Regulation 304 of the Revised Regulations

of Ontario, 1990, the time so limited extends to and the thing may be done on the next day following that is not a school holiday.

It is the opinion of the Tribunal that when the Ministry does not specify whether it is a “school day” or a “school holiday” that “day” means a regular day and that the timelines referred to in Regulation 181 must be adhered to using the common understanding of “day”, not “school day”, as Mr. Keel and Ms. Tymchenko argued.

Section 2 of Regulation 181 makes it clear that school holidays as defined under Regulation 304 are only relevant where the time allowed for a step expires on a school holiday, at which point the expiration date becomes the next day following that is not a school holiday. In this case, therefore, when the 30-day period expired on December 27, the final day would move to January 5.

Nevertheless, the above reasoning is “moot”, because at the time of the Hearing, January 26, 2004, whether using the definition of “school day” that Mr. Keel suggested was the one used or not, 30 school days had passed from the receipt date of the SEAB report without a written statement from the Board with the Board’s decision. The Tribunal accepted The Appellant’s statement that she had not yet received a written statement from the Board containing its decision regarding the SEAB’s report.

2. The second issue that Mr. Keel described as at “the heart of this matter”, is the issue of the fact that the Appellant, is now a trustee with the HDSB. Mr. Keel based this argument on the *Hearst* decision by J. Hennessy, of the Ontario Superior Court of Justice, in which the District School Board recommended a redistribution of trustees within the Northern Region. The applicants, the Corporation of the Town of Hearst and The Township of Mattice-Val Cote, whose representation will be reduced, brought application for Judicial Review for that recommendation. A trustee who would likely lose her seat as a result of this distribution would not sign an affidavit in support of the application.

The Tribunal did not accept the arguments of Mr. Keel regarding the authority of the *Hearst* decision for the following reasons.

In the *Hearst* decision, there was litigation involving the Board in a Superior Court of Ontario. This case was before a Superior Court judge and contested in a court of law. In litigation, the applicants can sue the respondent for damages. Mr. Keel used the language of “litigation” and “court” in his submission.

The appeal is before an administrative Tribunal that is not a “court” and does not have a judge hearing the case. The term, “litigation” is not used in describing Tribunal proceedings. The Special Education Tribunal has its authority granted to it by Statute and was established to adjudicate disputes between parents and school boards regarding the rights of exceptional pupils to an appropriate

placement to meet their needs. Under the Education Act a parent of an exceptional child has the right to appeal the identification and placement of the child. By denying the Appellant the right to appeal the placement of her child, whether she is a trustee or not, would be denying her child the right to have an appeal heard regarding those rights. Should there be a decision by a tribunal denying the Appellant the right to pursue this tribunal, in effect, any person who had an exceptional child should not seek election as a trustee, in the event that that parent decided to proceed with a tribunal.

The Special Education Appeal Board is a separate entity from the HDSB. A parent who has appealed an IPRC decision before a SEAB has the statutory right to appeal a Board's decision to a tribunal. A Board trustee has rights as a parent under the Education Act. The Tribunal is of the opinion that the *Hearst* decision is not applicable in a Special Education Tribunal proceeding for the above reasons. Judge Hennessey's decision was in another legal setting with another set of procedures and another mandate, different from an administrative tribunal established to allow parents to appeal on behalf of the rights of their exceptional children.

3. On the third issue, that is the jurisdiction of the Tribunal, the Tribunal references a number of earlier tribunal decisions as quoted in *E. v HDSB* in which the Tribunal ruled that it had a right to make an order for a placement that did not exist within the Board's Special Education Plan.

The Tribunal does not accept Mr. Keel's arguments that the Tribunal cannot order the Board to place A. in a placement that does not exist within the School Board Special Education Plan.

The Tribunal agrees with Mr. Baker that the Tribunal, with powers and authority created by statute, the Education Act, supercedes the authority of a regulation [in this case, Regulation 181/98] and a Ministry Policy Document, Standards for Special's Education Plans [2000].

The Tribunal has the authority and responsibility to make orders that are in the best interests of a student and to order "appropriate" placements that will meet the needs of students.

There has been case law created by previous tribunals and court decisions as well that have supported tribunal decisions that ordered Boards to place student in placements that did not exist within the Board's Special Education Plan.

In D., which Mr. Keel quoted, that 1984 tribunal and subsequent court reviews dealt with a situation in which the Board had not yet developed a range of placements. The Special Education legislation was in the process of being implemented and therefore, leniency was granted during the implementation of such significant legislation.

The following Tribunal decisions all ordered Boards to provide placements where none existed at the time of the hearing:

R. v. Carleton Roman Catholic Separate School Board, [1998];

A. v. Halton "District School Board", [2000];

Y v. XX County Board of Education (2002) and

B. v. Upper Canada District School Board (2001)

B. v. North York Board of Education (1984) stated, "in determining what placement involves, the following matters are considered:

- (a) The identification process required under Ontario Regulation 554/81 [now 181/98] will by its process clarify and indicate the pupil requirements or needs;*
- (b) Appropriate placement must by logical extension in some way answer, provide, or meet the pupil requirements or needs. When determining appropriate placement, therefore, one must decide what factors are required to meet the needs of the pupil;*
- (c) In order to arrive at an appropriate definition of placement, for a particular exceptional pupil, the location, philosophy of education, objectives for the pupil, curriculum or program of students, are factors which may be considered (pages 11 and 12)*

R v. York Region Board of Education (1986) held that "to order a placement, which it considers, is not in the best interests of the child regardless of who wants that placement is contrary to good judgment and responsible decision-making".

In O. v. Wentworth Board of Education (1986), the Tribunal ordered a placement that neither the Board nor the parent requested and was not part of the Board's range of placements.

In conclusion, the Tribunal has the legislative authority to order the Board to place a child in an appropriate placement even though that placement does not exist within the Board's plan and as stated in R. and York Region, it would be contrary to good judgment and irresponsible decision making to order a placement which is not in the best interests of the child. Therefore in the best interests of A., the Tribunal determined that it had jurisdiction to hear the appeal and dismissed the motion.

Decision

On the first issue in which the Board is still considering the Special Education Appeal Board's report in order to try to resolve the matter, the time has passed for the Board to issue its decision in writing to the parent and the parent had not yet heard in writing of the decision of the Board with respect to the SEAB report.

On the second issue, the Tribunal is of the opinion, given the above reason that a board trustee has the rights as a parent under the Education Act and that the *Hearst* decision does not apply in this case.

On the third issue, of jurisdiction, the Tribunal believes that it has the right to hear the appeal of a decision on a placement sought that is not in the Board's Special Education Plan. As in *E. v HDSB*, the Tribunal rejects Board counsel's arguments on jurisdiction because the placement sought is not in the Board's Special Education Plan and believes that it has jurisdiction to hear the appeal of the Appellants.

The motion to set aside the appeal to the Tribunal by the Respondent is denied.

Paula Barber

On behalf of the Tribunal

February 12, 2004

Obiter

The Tribunal noted from a statement made during the Preliminary Hearing that the Halton District School Board had adopted a policy governance model. Under that model, individual trustees are not involved in the operation of the school system and are not involved in decisions regarding the day-to-day operations of the system, such as hiring or promoting staff at a level below that of the Director of Education. Trustees, as individuals, have no powers as individuals. It is the Board that makes decisions affecting the school system. Nevertheless, the Tribunal strongly recommends that the Appellant, as she has done in the past, continue to excuse herself from any Board or committee meeting or any meeting with Board counsel that involves her appeal.