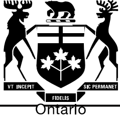

ONTARIO SPECIAL EDUCATION (ENGLISH) TRIBUNAL File #1

IN THE MATTER OF the *Education Act,* R.S.O. 1980, c.129;
IN THE MATTER OF Ontario Regulation 554/81, Regulation made under the *Education Act*;
AND IN THE MATTER OF the minor child born in 1974.

BETWEEN

J. D. AND M. D.

Applicants

\- and -

THE MUSKOKA BOARD OF EDUCATION

Respondent

Tribunal Members:

Tom H. Houghton	Chairman
Ronald E. Jones	Member
Ruth Banks	Member

For the Applicants:

David Baker

For the Respondent:

Bruce H. Stewart, Q. C.

The hearing was held in Orillia on February 1 and 8, 1984.

The applicants, on behalf of their child, have applied to the Ontario Special Education (English) Tribunal (the “Tribunal”) for leave to appeal to a regional tribunal under subsection 36(1) of the *Education Act*.

This is a continuation of the hearing which began in Orillia on January 10, 1984 at which time the question of the Tribunal’s authority to hear the case was considered. At the Orillia hearing Ronald E. Jones of Toronto was a member of the Tribunal, but at the resumption of the hearing in Toronto on February 1 and 8, 1984, John Johnson of Brantford, with the consent of both parties, replaced Dr. Jones.

At the time the application was made the parents requested under subsection 36(3) of the Act that, in lieu of granting leave to a regional tribunal, the Tribunal hear and dispose of the appeal. The Muskoka Board of Education (the “Board”) for its part consented to this arrangement.

It is agreed by both parties that this application concerns the placement of a pupil who has been identified as an exceptional pupil by the Board’s Special Education Identification, Placement and Review committee (the “I.P.R.C.”) under clause 2(3) (d) of Ontario Regulation 554/81:
Special Education Identification Placement and Review Committees and Appeals.

2.— (3) Where a committee is engaged in identifying a pupil as an exceptional pupil or in determining the recommended placement of such a pupil, the committee shall obtain and consider an educational assessment of ‘the pupil and,

....

(d) the committee shall cause to be sent to a parent of the pupil and to the principal who has made the referral, as soon as possible after the making of its determination, a written statement of,

(i) the identification it has made of the needs of the pupil,

(ii) where, in the opinion of the committee the pupil is an exceptional pupil, the recommendation made in respect of the placement of the pupil, and

....

On behalf of the parents Mr. Baker contends that when the family returned to Muskoka from British Columbia during the late summer of 1982, the child was enrolled in a class for trainable retarded pupils at Victoria Street School, a school which, according to Mr. Baker, was and continues to be known as a school for trainable retarded pupils. He contends that this placement did not meet the student’s needs because the student was not considered to be retarded, and furthermore that the placement denied the student both the opportunity to learn expressive communication and the opportunity to associate with non-handicapped peers.

Mr. Baker states that in March 1983, at the request of the parents, the I.P.R.C. recommended that the student be placed in a class for rnultihandicapped pupils at the "Primary Junior Level" in Victoria Street School. The parents realized, states Mr. Baker, that this proposed placement for their child was to be in the same class as the one in which the child was enrolled, with merely a name change. Mr. Baker refers to section 72 of the Act, and claims that the Board erred in placing the student in a class for trainable retarded pupils when in fact the student was identified, not as a trainable retarded pupil but as a multihandicapped pupil.

> 72. - (1) Subject to subsections (2) and (4) and to the regulations, every board shall provide adequate accommodation for the trainable retarded pupils,
>
> (a) who are exceptional pupils of the board; and
>
> (b) in respect of whom a placement in a school or class for trainable retarded pupils has been made by a committee established under paragraph 5 of subsection 10(1),
>
> and shall establish and maintain a school or class for such trainable retarded pupils in which special education programs and services shall be provided in accordance with the regulations... .

In connection with the appropriate placement for the student, Mr. Baker contends that the student's teacher must be fluent in the use of sign language and states that in the parents' opinion the proposed teacher is not sufficiently fluent in this area. He states that the teaching techniques employed in the student's class are essentially those appropriate to a class for trainable retarded pupils, and that the Special Education Appeal Board of the Board (the "Appeal Board") did not give sufficient weight to this matter when it reviewed the recommendation of the I.P.R.C.

Mr. Baker also claims that the student suffered from lack of progress and boredom which resulted in behavioural problems as the 1982-83 school year progressed. He states that although the parents presented evidence to the Appeal Board of what a "total communication" class should include and what support services would be required, the Appeal Board reached the wrong conclusion by agreeing with the I.P.R.C.

In Mr. Baker's Notice of Appeal from the original decision of the I.PR.C., dated May 25, 1983, Mr. Baker states that his clients wish their child to be placed "in a junior precision learning class in Gravenhurst Public School; or alternatively the student's needs could be met in a junior precision learning class in Beachgrove Public School".

On behalf of the Board Mr. Stewart contends that the Board is under no legal obligation to provide a placement for the student as an exceptional pupil on the ground that such placement had not been contemplated by the Board in 1982 when it approved the first multi-year plan for special education. A subsequent amendment to the plan in 1983 similarly did not make reference to placements for pupils with severe multihandicaps. When the student was enrolled in a Muskoka school for the first time in September 1982, the student was placed in a class with three other pupils, all of whom were multi-

handicapped, although they had been identified originally as trainable retarded pupils. Mr. Stewart states that these four pupils, including the student, were later identified by the I.P.R.C. at its meeting in March 1983 as multihandicapped.

In dealing with the matter of the Board's multi-year plan, reference is made to section 3 of Regulation 274, R.R.O. 1980: Special Education Programs and Services.

> 3. (1) Each board shall prepare and approve a plan in accordance with a planning guide provided by the Minister that will disclose the methods by which and the times within which the board shall comply with paragraph 7 of section 149 of the Act in relation to exceptional pupils of the board who are not trainable retarded pupils.
>
> (2) A plan referred to in subsection (1) shall be submitted to the Minister not later than the 1st day of May, 1982 for review by the Minister.
>
> (3) A plan referred to in subsection (1) shall provide for an annual review of the plan and any amendment to the plan that is a result of the review shall be submitted to the Minister for review by the Minister.

Mr. Baker contends that some new evidence which was not available to the I.P.R.C. and the Appeal Board has since become available. It demonstrates, he claims, that the student requires a teacher who is fluent in sign language and who provides a "total communication" program to meet the student's individual needs. He further contends that the Appeal Board was misinformed about the qualifications of the proposed teacher and about the availability within the Muskoka school system of other, better qualified resources.

As far as the introduction of new evidence is concerned, Mr. Stewart contends that such evidence is not really "new" but serves merely to confirm what was already known to the I.P.R.C. and the Appeal Board about the student. The Board agrees, according to Mr. Stewart, that the student requires a total communication class with a teacher who is reasonably fluent in sign language. The only issue to be resolved, he concludes, is the question of the student's appropriate placement.

Mr. Stewart contends that the teacher's competence cannot be in question before the Tribunal because the issue is one of placement. The teacher holds proper teacher's qualifications, and the Board alone has authority to determine the matter of competency. Placement should be defined in terms of the pupil's needs, he states, and not in terms of the competency of the teacher.

Mr. Baker contends that natural justice was denied the parents by both Appeal Board and the Board by refusing them the opportunity to hear and cross examine witnesses. He states that the parents should be granted leave to appeal in order to provide this opportunity for natural justice.

Mr. Stewart claims that the role of the Tribunal is appellate in nature: that is, its role is to rule on the appropriateness of the placement, and not one of judicial review in which it would set aside decisions of lower levels because of procedural deficiencies. The Tribunal should be concerned more with the suitability of the decisions and not the manner in which such decisions were reached.

Mr. Stewart further claims that at the time the parents appeared as a delegation before the Board when it proposed to consider the decision of the Appeal Board regarding the student's placement, the parents did not have a statutory right to a hearing. He contends that the appropriate place to determine whether this action of the Board was proper is a court, not the Tribunal.
Subsections 7(8) and (11) of Ontario Regulation 554/81 are as follows:

> 7. - (8) Any person who in the opinion of an Appeal Board may be able to contribute information with respect to the matters before the Appeal Board shall be invited to attend the discussion and the discussion shall be conducted in an informal manner.

....

> (11) The board within thirty days after receiving the report referred to in subsection (10) shall accept or reject such decision and the secretary of the board shall notify in writing a parent of the pupil and the committee of the decision of the board and in such notice shall inform the parent of the provisions of section 36 of the Act.

Mr. Baker contends finally that there exists a "provincial standard imposed by the *Education Act*" with regard to special education programs and services, and rejects the position of the Appeal Board when it argues that "this is the best that is available in Muskoka". He claims that, because other school boards in Ontario provide these services, they should be available in Muskoka. The parents should not be obligated to leave Muskoka in order to find an appropriate special education placement for their child.

Paragraph 7 of section 149 of the Act, in our opinion, requires a school board to provide special education programs and services not later than the first day of September 1985, and we believe that there exists some doubt as to a requirement to provide these programs and services prior to that date, particularly if such programs and services are not included in a board's multi-year plan.

Regulation 274 requires each board to prepare and approve a plan in accordance with a planning guide provided by the Minister. The Minister may require a board to make changes in its plan that the Minister considers necessary to maintain conformity in the planning approach of boards. School boards, however, determine the types of programs and services that best meet the needs of their special education pupils.

A board, in fulfilling its obligation for an individual pupil under paragraph 7 of section 149 of the Act, may wish to consider entering into an agreement with another board for the provision of these programs and services.

Mr. Stewart, in concluding his submission on behalf of the Board, states that "we do not really have much of an issue left between the parties... . The Board feels very strongly that the program being developed in 1982-83...is quite appropriate for the student".

He refers the Tribunal to paragraph 19 of the applicants' Notice of Application for Leave to Appeal, dated January 30, 1984 and comments on each point made by Mr. Baker.

At the outset he concedes that the question of the teacher's fluency in sign language is the most divergent position between the parties. He states that the Board agrees that the teacher should be sufficiently fluent to communicate with the student. He states that there has been no change in the Board's view that a total communication program is appropriate for the student, but questions Mr. Baker's definition of fluency. The only reference made by Mr. Baker in his submission was to another teacher in the Muskoka system who has "intermediate level signing skills and worked two summers at a summer camp for deaf children". Mr. Stewart then states unequivocably that "the level of signing suggested by intermediate level sign is what this Board can provide".

Mr. Stewart contends that the Board, over the course of a year and a half, has developed a total communication program with a teacher who has an intermediate level of signing skills.

On the other points submitted by Mr. Baker regarding the classification of pupils as to level of language development, delayed social skills, and behaviour difficulties, and the classroom characteristics:

teacher/pupil ratio of 1 to 6;

intensive language focus in all activities;

combined sign and speech instruction for all pupils;

highly structured, teacher-directed activities with little free time;

opportunities for interpersonal relationships;

integrated recesses, lunch hours and school assemblies;

all are agreed to by the Board, claims Mr. Stewart, although he states that it would not be possible immediately to integrate the student with non-exceptional pupils during recess periods, etc. He further states that the Board would have no objection to providing such a class in a school other than Victoria Street School, but "we simply cannot do it now". He notes that there are three other pupils in the class who reside in widely different parts of the District of Muskoka, and that the Board's speech pathologist, who would be involved in the program, is located in Bracebridge.

Mr. Stewart states finally, that the differences between the two parties are minimal, and that an appeal is not necessary to resolve these differences. The Board can substantially meet the parents' proposal for a total communication class for the multihandicapped, and Mr. Stewart states that the Board is willing to discuss the points on which they still differ.

In the opinion of the Tribunal this statement of Mr. Stewart constitutes a proposal by the Board of a special education program and special education services for the student. Under section 3 of Regulation 274, the Board is required to make such proposals in the multi-year plan for its exceptional pupils. That plan is required to be implemented by the Board under subsection 8(1) of that Regulation and the Tribunal has no doubt that the Board could be compelled by mandamus issued out of the

Supreme Court of Ontario to provide that which is called for in its plan.

> 8. – (1) A plan prepared and approved by a board in accordance with section 3 in respect of its exceptional pupils who are not trainable retarded pupils and in accordance with section 6 in respect of trainable retarded pupils, shall be implemented by the board in accordance with the terms of each of the plans, as the case may be, as to the dates by which and the extent to which special education programs and special education services shall be established or provided for its exceptional pupils who are not trainable retarded pupils and its trainable retarded pupils.

While the Tribunal does not have the authority to compel the Board to so amend its multi-year plan, it does not perceive that this is a problem because the Board is now publicly committed to do so subject only to a review of the amendment by the Minister under subsection 3(2) of Regulation 274, and to the enrolment of the student in a school operated by the Muskoka Board.

The review by the Minister would appear to be governed by the opening words of subsection 8(2) of the *Education Act*:

> (2) 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...

The Tribunal notes that subsection 3(1) of Regulation 274 refers to a plan "by which....the Board shall comply with paragraph 7 of section 149 of the Act... ."

> 149. Every board shall,
>
> 7. before the 1st day of September, 1985, provide or enter into an agreement with another board to provide in accordance with the regulations special education programs and special education services for its exceptional pupils... .

That paragraph clearly requires a board to provide special education programs and special education services for "its exceptional pupils". This would seem to impose upon the applicants the necessity for the student to be enrolled and in attendance if the Board is to be expected by them to comply with the requirements of the Act and the regulations. The Board did not by its counsel on February 8, 1984 specifically make this a condition of its proposal but the Tribunal believes that such was implicit in the proposal. The legislation does not seem to require a board to plan for pupils who are not enrolled in its schools.

In the opinion of the Tribunal the foregoing is related to special education programs and services. The question before the Tribunal, however, is whether there should be an appeal as to placement.

As a ground for seeking leave to appeal, the Tribunal was urged to consider the issue of the suitability of the location at which the program was delivered. It was submitted that one element of a total communications program was the benefit to the pupil to be able to communicate with other pupils by

way of sign language. It was argued that this benefit could not be obtained where the class in which the child was placed was located at a school that was essentially for trainable retarded pupils.
Assuming, but not deciding, that the location at which a placement is provided is part of the placement, an I.P.R.C. could recommend that the placement be at a particular school as opposed to another school. It is noted that in this case the recommended placement supported by Board resolution was at the Victoria Street School. The Tribunal is satisfied that for the balance of the 1983-84 school year the placement at Victoria Street School must be accepted. However, any change in the location of this placement must be considered in due course by an I.P.R.C.

It is the opinion of the Tribunal that I.P.R.C. and Appeal Board proceedings are to be conducted in an informal way. This implies that these sessions are not to be conducted as though they were being held before a court or other judicial body. The Tribunal does not believe that the right to cross examine witnesses is contemplated in the legislation governing the procedures of I.P.R.C.s and Appeal Boards.

The Tribunal, if granting leave, would be inclined to do so on the basis that there seemed to be something unsatisfactory with the placement that is sought to be appealed. The issue is not how the placement was determined initially; the fact is that a placement was made. The issue is the appropriateness of such placement. Therefore, the question of procedural deficiencies, if such existed, at prior levels, is not relevant. We agree that the Tribunal does not have the power to set aside decisions because of procedural actions at lower levels.

In the course of the preparation of its decision the Tribunal received the following written communication from Mr. Baker:

February 22, 1984

Dear Mr. Houghton:

Re: [The student} and the Muskoka Board of Education

Since the Tribunal last heard submissions with respect to my client's application for leave to appeal on February 8th, it has come to my attention that certain representations of fact made on behalf of the Board of Education at that time were inaccurate.

In particular I am referring to Mr. Stewart's statements at page 36 of the transcript;

> ...and I can say this to this Tribunal unequivocably, that we believe that the level of signing suggested by intermediate level sign is what this Board can provide.

and again at page 38;

> ...so the Board has developed this sufficient level of fluency in the person assigned to that class, so that it can provide the level of fluency as roughly described in paragraph seventeen, the intermediate level signing skills.

At the time it was my understanding that the Tribunal hoped to have reached a conclusion with respect to the granting of leave by the afternoon of February 9th. I therefore wrote Mr. Stewart confirming my concerns and indicating that should leave be refused, I would be seeking reconsideration to permit the inaccuracies to be corrected.

The decision with respect to leave has taken longer than was originally anticipated, enabling the Tribunal to clarify matters without the necessity of reconsideration.

On behalf of the [the applicants], I am requesting that the Tribunal determine whether the statements referred to above are material to issues being resolved on the leave application. If they are considered material then I would request the Tribunal reconvene in order to hear evidence with respect to these statements. Alternatively, I would request the Tribunal consider what form written representations with respect to these statements should take.

If they are not considered material, then it would serve no purpose to consider the matter further.

I await the Tribunal's decision in this regard.

Yours truly,

(signed)

DAVID BAKER

While the nature and content of the program that is provided to an exceptional pupil pursuant to a placement may be considered in order that the rationale for the placement can be understood, opinions in respect of the course content, the staffing allocated to the program, the adequacy of a teacher's capabilities to communicate in sign language, and the means by which the program could or should be enhanced or improved, tend to obscure those other matters that have to be considered in trying to decide whether a placement that has been recommended is right or wrong. Those opinions do identify the source of parental complaint. It is entirely possible, however, that a placement may be correctly recommended notwithstanding that the special education program provided for the pupil fails in one or more respects to completely satisfy the parents of the pupil.

It is common ground that the student should not be placed in a class for trainable retarded pupils. It is common ground also that the student be placed in a class for the multihandicapped. That is the recommended placement that gives rise to this application. Clearly, if the special education program had been tailored to the requests of the student's parents, there would not have been an application at all. The resolution of the matter lies in matching, as nearly as may be practicable, those requests with the resources provided by the Board. This comes within the jurisdiction of the Board, not the Tribunal.

Consequently, no purpose would be served by re-opening the hearing for the purpose indicated in the letter from Mr. Baker. In any event, and after a close scrutiny of the transcript, it does not seem to the Tribunal that it was in any way misled having regard to the undertaking of the Board represented to the Tribunal by Mr. Stewart.

Decision

In reaching its decision on the application for leave to appeal the placement of the student, the Tribunal has concluded that:

1. The Tribunal does not have the authority to require the Board to amend its multi-year plan to provide for a child who is not enrolled as a pupil in a school operated by the Board.

2. The Tribunal believes that what the parents are seeking goes beyond that which can be reasonably interpreted as placement. The parents, in addition to their wishes respecting the placement of their child, make requests that encompass matters such as teaching strategies and methodology, teacher qualifications, the program of studies, and the philosophy of education--all matters outside the scope of this Tribunal.

3. The Board, through its counsel, has made a public commitment to provide a placement for the student that, in the opinion of the Tribunal, could be appropriate for the student's needs at this time. The Tribunal believes that such provision should be made not later than the beginning of the next school year, and the Tribunal assumes that the student will first be enrolled and in attendance in a school operated by the Board.

   Accordingly, the Tribunal denies the leave to appeal.

____

Tom H. Houghton, Chairman

February 28, 1984