



ONTARIO SPECIAL EDUCATION (ENGLISH) TRIBUNAL File #9

(heard by the Northeastern Region (English) Special Education Tribunal)

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 1979;

BETWEEN

P and F

Appellants

-and-

THE NIPPISING BOARD OF EDUCATION

Respondent

Tribunal Members:

Louissette Duchesneau-McLachlan
Glenn Clark
Joan Hayden

Chairman
Member
Member

The hearing was held in North Bay on June 13, 26 and 27, 1986, and on July 10 and 11, 1986.

The appellants requested in writing that their child born 1979, be referred to a Special Education Identification, Placement and Review Committee (hereinafter called IPRC) in accordance with Section 2 of Ontario Regulation 554/81 under the *Education Act*. The IPRC was held September 25, 1984. The decision of the IPRC was reduced to writing January 7, 1985. The IPRC decision was that the child was an exceptional student who may be classified as trainable retarded. The placement was a full day program in an integrated primary trainable retarded class (hereinafter referred to as ITMR). The parents formally appealed the IPRC decision January 31, 1985, and the appeal was heard June 11, 1985 by a Special Education Appeal Board which upheld the decision of the IPRC by decision June 14, 1985.

On June 26, 1985, the parents sought leave to appeal pursuant to Section 36 of the *Education Act*. The leave to appeal was heard November 27, 1985, and the decision to permit leave to appeal was rendered December 11, 1985. This conferred jurisdiction on the Northeastern Region (English) Special Education Tribunal to hear and dispose of the appeal.

The Appellants' Request

Mrs. O, representing the Appellants, seeks the following remedies:

1. Identification of the child as educably retarded.
2. Placement of the child by way of mainstreaming the child into an age appropriate class, that is to say Grade One currently, in an appropriate neighbourhood school with a Teacher's Aide or Special Resource Teacher to assist the child in academic performance, and this placement is for fifty percent of the day. Placement for the remaining fifty percent of the day would be with a Speech Therapist and Occupational Therapist.
3. In the alternative, placement of the child in a basic learning skills program available at a neighbourhood school, together with a Teacher's Aide or Special Resource Teacher for full day placement.

On behalf of the parents, Mrs. O states that either of the placements suggested by the parents would provide the child with the necessary socializing (total integration—mainstreaming) and address the child's needs and assist the child in the areas of language and basic learning skills.

In effect, the appellants are requesting this Tribunal to find that the IPRC erred in identifying the child as trainable retarded and therefore erred in recommending a placement in the ITMR classroom, stating that such placement does not properly reflect the child's educational needs and exceptionality. Mrs. O also claims that the Special Education Appeal Board failed to address the issue and/or confirm the accuracy of the identification of the child. She further states that at no time did the Board of Education advise the parents of the different programs available within the Board other than the ITMR class.

The Respondent's Reply

Mr. Bell, appearing for the respondent, insists that the IPRC identification and placement, as it is

confirmed by the Appeal Board, was totally appropriate. He indicated that the delay between the IPRC hearing and its written decision resulted from the Nipissing Board of Education's formulation of a program to meet the child's needs in consultation with the parents. He further states that the only reason given to the respondent for the parents' objection to the placement of the child was that the child's sibling would also be placed in the same class, and they felt that the child might tend to dominate the sibling. He states that the only issue is program placement and that the child was properly identified as exceptional and properly identified as mentally retarded. He further states that this program is particularly appropriate because it was tailor-made. On behalf of the respondents, Mr. Bell requested that the Tribunal dismiss the appeal.

The Appellants' Presentation

Mrs. O stated that essentially, Bill 82 was not well known to the average parent. She further stated that its application was that all publicly funded boards were to have proper programs. She referred to Section 10 and 36 of the *Education Act*, as well as Ontario Regulation 554/81, and stated that by September 1, 1985, the Nipissing Board of Education was to meet the needs of all its children. She stated that the appellants may have used labels similar to the Board's but certainly did not understand the labels that they were using until some time later in the procedure. When the child was three, as a result of a recommendation by the Nipissing Developmental Centre, the parents had the child tested at the Children's Hospital for Eastern Ontario in Ottawa. The child was three at the time, and that was in 1983. The child was again assessed from both a health and psychological point of view in 1984 and 1985. The psychological assessment addressing some educational needs was prepared by Dr. Kathleen E. Nitsch. Only the 1984 assessment was provided to the IPRC. Mrs. O stated that under the *Education Act*, placement means a placement in a Special Education Program, which includes a plan containing specific objectives. She states that the term "appropriate" as used by the respondent's counsel is not contained in Section 1, subsection (1), paragraph 63 of the *Education Act*. She further states that this Tribunal has power to order placement under Section 36, subsection (6), clause (b) of the *Education Act*. She states that the IPRC did not identify the exceptionality of the child and that in order to identify the needs of the child, it must do so. She states that the IPRC did not provide a plan containing specific objectives for the child, nor did it consider the labels included in Section 8, subsection (2) of the *Education Act*. She states that there is no evidence that during the IPRC process the definition of trainable retardation was addressed.

Appellants Evidence

Chris MacMillan is the Director of the YMCA day nursery in North Bay. She stated that in January of 1984, the child was enrolled in the Nursery School program, and came three half days a week. She further stated that at first the child was with the youngest group which would be age two and one-half to just over three, and that the child was four at the time and it was found the child did not fit into the group so the child was moved in with the group of three and one-half to four years old which was an age appropriate group. She further stated that the child was instructed by a teacher, who as it turns out, is the child's current teacher for the past two years in a JK program at a public School. Mrs. MacMillan indicated that the child appeared comfortable in [the child's] group, interacted quite well but had no verbal skills though the child could communicate with the other children and teachers. She indicated the child knew some signs and seemed to understand what was said or shown to [the child].

Mrs. MacMillan stated that the YMCA nursery had an academic component since it followed a cognitively-oriented curriculum. She identified a letter produced as an exhibit in Exhibit Number 1 (N) as a letter from herself and the teachers at YMCA nursery school to the Board indicating that the child would thrive in an integrated setting. She defined integrated as the child being in a group of many children of different ages and different levels. She indicated that the child would do [the child,s] own plan for what the child would like to do during the morning. This is very important evidence as this same educational component is included in the ITMR class proposed by the Board as a proper placement. Mrs. MacMillan indicated, however, that the child had favourite things to do and the child seemed to stick with those all of the time unless the child was encouraged to do something else and that if the child did do something else, the child would always go back to the things that were the child's favourites to do. She indicated that the child performed [the child's] activities with other children and with lots of supervision. She further indicated that since the child was not particularly verbal, the child had to use a crayon and circle the area [the child] wanted to move to and that then the child would go to that area with the teacher. As to the child's preferences, Mrs. MacMillan indicated that the child preferred to go to a house area or that the child liked to look at [the child] in the mirror and that the child liked to play with the play dough. She did testify that the child would put the play dough in [the child's] mouth a lot, usually when the child thought the teacher was not watching. It was Mrs. MacMillan's opinion that the child knew [the child] should not be doing this but obviously liked to do it. On cross-examination, Mrs. MacMillan indicated that the child had been with the YMCA nursery program for a total of nine months, and that the child attended half days three times a week during that time period. In an answer to Mr. Bell's inquiry as to the said Exhibit 1 (N) and the phrase integrated setting, Mrs. MacMillan stated that she meant an integrated setting where the child of exceptional or special needs was functioning in a group of normal children; in other words a normal JK class.

Since, in effect, the child has been in a normal JK class for the last two years, Mr. Bell asked Mrs. MacMillan on cross-examination if she would be concerned upon hearing that the child was not doing well in that setting. She replied in the affirmative. Mrs. MacMillan also indicated that there were other problems in relation to the child putting objects other than play dough in [the child's] mouth, and she referred to orange peels, paint and glue. She further indicated that when the child began the YMCA nursery program the child seemed to have a good background of colours.

On re-examination by Mrs. O, Mrs. MacMillan indicated that some children also exhibited the same type of difficulties in terms of eating or putting paint, glue or play dough around their mouth and that this was not unusual.

The second witness for the appellants was Mrs. F. She indicated that she was a registered guide and that the child was a Brownie and she herself worked with the child from February to June, 1985. She testified that the child functioned like the other girls, fit into the group and got along with the other girls and that there were no particular problems. In terms of communication skills, Mrs. F testified that the child seemed to get along with other children and that socially the child interacted quite well with them. She indicated that the Brownie meetings were weekly for an hour and one half and that there was an instructional component to the program. She further indicated that even if the child did not know how to write, a lot of the girls who started out in Brownies were six years old going into grade one, and a lot of them still could not write when they began. She further indicated that she felt an integrated setting would be good for the child and that by integrated she meant being placed in with

normal children and being able to participate in the activities that they participate in and to learn at the best rate that they can. She indicated that her present employment was as a teacher's aide with the Nipissing Board of Education helping a physically handicapped student at the secondary level.

On cross-examination she admitted that by integrated setting she meant permission for the child to be enrolled in a normal JK class. She also expressed that she would have some concern if she discovered that the child had not been doing terribly well in a JK class. Her evidence in fact was that she would not just leave the child there, but that she would want to know why she was not doing as well as expected. She admitted that the child could not perform all of the tasks generally considered to be conditional upon enrolment into the Brownie pack, but she did indicate that the child presently had eleven badges.

The third witness was Mrs. L. She has a Master of Science degree in speech pathology. She indicated that the child has been referred to her by the Nipissing Development Centre in the fall of 1983 through the outreach program for handicapped children. She indicated that she devised a program for the child while the child was at the Nipissing Developmental Centre, and that this was a speech and language program. She indicated that in the summer of 1983, the child was introduced to sign language and that the purpose was to encourage the child to speak and verbalize [the child's] responses, and to use sign as a supplement. She further indicated that the child was working on a structured program of sequencing words together in sentences. She testified that when the child was on a one to one situation, the child was better able to put together more words than in a classroom. She testified specifically that carry over of skill of what a child learns in therapy and what a child uses in the classroom is often the most difficult step for a child. Mrs. L testified that often the child was a stubborn child in the therapy sessions and that she had to motivate the child. In terms of the JK program that the child has been attending for the past two years, Mrs. L indicated that because the child was in a classroom where the teacher had upwards of approximately twenty children, she did not feel that she could give the teacher something that she had to do one to one with the child. Instead, therefore, she provided the teacher with general suggestions and she observed the teacher to follow through on those suggestions. She testified that any direct programming was given to the parent to do at home with the child. Mrs. L further testified that when she observed the child in the classroom, the child did not willingly participate in classroom activities and that the child preferred to do activities on [the child's] own and stay out of the group activities. She indicated that the child's major handicap is the child's lack of verbal skills. Mrs. L further testified that between the 1984 and 1985 assessments done by the Children's Hospital for Eastern Ontario, the child exhibited a six month gain in her speech and language skills. She further indicated that in 1985 when the child was last tested, although the child's chronological age was six years and three months, the child's receptive or understanding language was found to be at the two and one-half to three year range, and the child's expressive skills to be on the two to two and one-half year range. Mrs. L agreed that there should be continuous speech and language therapy available to the child on the basis of a minimum of twice a week for thirty to forty-five minutes per session. She indicated that her services, when she provided them, were through St. Joseph's Hospital and that the funding was through the Ministry of Health. She did indicate that she did not have any contact with the child since January 1986 and that unfortunately the Home Care program in North Bay does not now employ a speech pathologist, but that when it did, arrangements for School Care Services would be through the Home Care program. She testified that she believed that the child needed to be in an environment where the child hears other children who have better

verbal skills than the child does in order to output. She felt that without this, the child would regress in [the child's] speech skills. She testified that she had appeared at the IPRC and that her major recommendations were that the child needed continued speech and language therapy, that the child be placed in a verbal environment and that a person working with the child would be able to interpret sign language.

On cross-examination, Mrs. L admitted that she knew that the child was in a normal JK class with children demonstrating superior verbal skills than the child. She also admitted that the child could be exposed to a verbal environment other than in a classroom setting such as at home and in Brownies. Mrs. L also indicated that the child should have one to one therapy and would benefit from small group instruction.

The next witness on behalf of the appellants was Dr. Kathleen Nitsch. She is staff psychologist at the Children's Hospital for Eastern Ontario. She has provided psychological assessments, psycho-educational assessments, individual counselling and therapy for children and parent training for parents. She indicated that some of her assessments are used as a basis for providing program recommendations to intervention services. She indicated that she had assisted at least eight school boards in terms of identification and placement recommendations for children. Dr. Nitsch also explained the difference between psycho-educational and psychological assessments. Both Dr. Nitsch's 1984 and 1985 assessments were accepted as Exhibits, as well as her file.

In the 1984 report, Dr. Nitsch stated that on the Stanford-Binet, the child could be considered in the moderately retarded range and that on the Leiter International Performance scale, the child could be considered within the mildly retarded range. The Stanford-Binet used has a heavy verbal component, whereas the Leiter International is all non verbal. Dr. Nitsch recommended that the child would benefit from a full day program five days per week if at all possible. Alternatives she suggested would include half-day (four year old) kindergarten each day, supplemented by half-day nursery school program, or as another alternative, a full day nursery school on a five day basis. Dr. Nitsch also recommended that if the child were placed in a four year old kindergarten, that the school consider providing an aide in the classroom. In addition, Dr. Nitsch suggested help in the area of speech and language development. In the 1985 report, Dr. Nitsch states that although she discontinued the Stanford-Binet because of the child's limited expressive language and Dr. Nitsch's inability to understand the child's sign language sufficiently, the child's measured intellectual functioning in the non-verbal area fell at the extreme upper limit of what is statistically defined as the mildly retarded range. She then went on to say that if one accepted the definition of mental retardation according to the American Association on Mental Deficiency 1983, the child would not be appropriately labelled as mentally retarded because of the child's adaptive behaviour skills. Dr. Nitsch then recommended an integrated placement in a five year old kindergarten with the assistance of a teacher's aide for at least half a day of placement. She then indicated that since the child also demonstrated difficulties consistent with language learning disability with an attentional deficit, a special education program designed to meet these needs, including the provision of a total communication approach, would be desirable in addition to the academic programming in order to provide the child with a full day program. Dr. Nitsch also agreed with the existing evidence that the child was a Down Syndrome child, but she indicated that the existence of Down Syndrome bore no relation to the issues of mental retardation.

Following Dr. Nitsch, both parents gave evidence. Their evidence will not be gone into as fully as the other witnesses, since it is to some extent repetitious of other witnesses and of documents filed by the parents as Exhibits. The parents do testify, however, that since their child has been placed in the JK class the child has regressed and the child now appears bored. They further testified that their child does not exhibit the same type of behavioural problem at home as the child does at school. In addition, their evidence was quite clear with respect to their feelings towards West Bay Field School, a segregated TMR school operated by the Nipissing Board of Education, in that they do not feel it is an appropriate placement for their child. They also expressed resistance to the placement suggested by the school board of the ITMR class at E. W. Norman School as they finally understood it was a satellite class to West Bay Field School, and that the teacher for the ITMR class had previously taught at West Bay Field.

The next witness on behalf of the appellants was Mrs. B. She indicated that during the 1983/84 period she was Director of the North Bay family YMCA Daycare Nursery School. Her evidence did not add much to what had already been heard from prior witnesses.

The next witness was Mrs. D. Mrs. D had been employed by the Nipissing Developmental Centre, and she testified that the child was her student for just a little over a year. She described the child as a very energetic child; a leader in the group; a person with good self-help skills who liked to help everyone continuously. She found the child very eager to work, and one of the brighter students, as well as a very bright and happy child. She believed that in September of 1984 the child should be able to enter a pre-kindergarten class on [the child's] own, that is to say a regular class. On cross-examination she indicated that the purpose of the letter she had sent to the Board and accepted as an Exhibit was to assist the appellants in obtaining an agreement from the Nipissing Board to absorb the transportation costs to and from the nursery program at the Y, as well as the attendance fees for the program.

The Respondent's Presentation

On behalf of the respondent, Mr. Bell submitted that the issue before us was the question of the appropriate program for the child. He further stated that once the Board of Education expressed its opinion, unchallenged on evidence, that the program that is available is in its opinion appropriate for the needs of the child, this particular Tribunal lacks the authority by the legislation to order otherwise. He did indicate that he was not suggesting that this tribunal lacked authority to make determinations regarding placements, but that once placement had been determined, and a program available that was appropriate, then the tribunal ought not to interfere with that program. He further stated that the educational system in this province involving special education and exceptionalities particularly had to survive and function on labels. He suggested that it did not matter whether the Tribunal concluded that the child was TMR or EMR, but that it did matter whether the program that has been made available is appropriate. Through Mr. Robert Sampson, Superintendent of Schools with the Nipissing Board, Mr. Bell led evidence of the creation and development of a program based on the expressed and specific needs of the appellants' children, and in particular the child's. Mr. Bell led evidence from the child's current teacher as to the child's performance, activities and progress in JK. This description was markedly different in some aspects, from the description given by the appellants' witnesses, but in

some other aspects, repeated and supported evidence elicited from those witnesses on cross-examination. With respect to the program offered, Mr. Bell elicited from the ITMR teacher and the current JK teacher Carol, all aspects of the ITMR class including interaction with other children in the school. It was very interesting to hear that the ITMR class is a full day program on a five day week, albeit the day does end at three o'clock to assist those children with their particular travel - arrangements. It was also interesting to hear how the children in fact could interact with the other children in the JK class for time periods within the school day and for field trips and recess and special activities and with children from the rest of the school on an established buddy system. In fact, the teacher did give evidence of the child's participation in her class on a regular and frequent basis. Mr. Bell also provided evidence through Dr. Wells of different conclusions which could be drawn from the raw data in Dr. Nitsch's file as to the child's level of mental retardation. She further expressed views as to her preferred method of testing children, and her opinion on the tests used by Dr. Nitsch, as well as her opinion on the administration of the tests by Dr. Nitsch, and her views on the appropriateness of using the American definition for mental retardation. On cross-examination of the appellants' witnesses, as well as through his own witnesses, Mr. Bell led evidence to the effect that there were forty-two similarities between the stated needs of both the child and the sibling by the parents, and in fact that there was only one additional item in the statement prepared for the child by the parents, which raised a problem that they did not see was a need and a problem for the sibling. As already indicated, the sibling has been placed with the consent of the parents in the ITMR class.

Basis for Decision

The Tribunal finds that the dispute between the parties rests with the identification made and the placement recommended by the IPRC which were upheld by the Appeal Board. The Board of Education is convinced that the child was properly identified as an exceptional child and specifically as trainable retarded and that it has tailor made an appropriate program for the child. On the other hand the parents argue that the child ought to have been identified as an educable retarded child and that the Board can offer to the child placements other than the ITMR class.

In order to reach its decision, the Tribunal notes the following:

1. Despite Dr. Nitsch's proposition that the child falls somewhere between EMR and an average child in accordance with the American definition, the parties agree that the child is an exceptional student with some degree of mental retardation. Dr. Nitsch's 1984 report confirms this. And in fact if one does not apply the American definition of mental retardation, her 1985 report also confirms this as well as her file, which was tendered as an Exhibit. The 1984 report, however, from Dr. Nitsch, was the one which was placed before the IPRC and the appeal board.

The *Special Education Information Handbook 1986* defines "educable retardation" as follows:

"A learning disorder characterized by:

- (a) an ability to profit educationally within a regular class with the aid of considerable curriculum modification and supportive services;

- (b) an inability to profit educationally within a regular class because of slow intellectual development;
- (c) a potential for academic learning, independent social adjustment, and economic self-support.”

Paragraph 68 of Section 1, subsection (1) of the *Education Act* defines “trainable pupil” as follows:

“means an exceptional pupil whose intellectual functioning is below the level at which he could profit from a special education program for educable retarded pupils.”

On the basis of all the evidence provided, the Tribunal feels that the child is at present appropriately identified as a trainable retarded pupil.

2. We note that placement in the regular JK class has not assisted the child’s development despite the inter-relationship with the speech pathologist up to January of 1986 and her interaction with the ITMR class and a teacher’s aide provided by the Board, although this teacher’s aide was not meant specifically for the child.

3. The Exhibits tendered as authored by the child are very important evidence in relation to the child’s needs.

4. We note that the child is provided with a verbal environment apart from the school situation. We note that the child should be exposed to a verbal environment during part of her school day and that the child requires one to one attention during part of the school day.

5. We note that the child, contrary to the parents’ fears, and the parental support worker’s opinion, has interacted in the ITMR class with her sibling positively.

6. We note that although a grade one class would be most age appropriate for the child, the child’s present stage of development in terms of both verbal and non-verbal skills would set the child apart in a regular grade one class, and we feel that it would not be in the best interest of the child to place the child in such a setting, where the child could easily become very frustrated. The child does not appear to have, from the evidence, the academic skills prerequisite for a grade one class.

7. The Tribunal feels that if the ITMR class had been labelled a primary special education class, and not labelled a satellite class of West Bay Field School and had the parents been made aware of joint activities between this special class and the other kindergarten classes in the school, as well as the buddy system, the parents might have found the placement acceptable.

Decision

1. The Tribunal dismisses the appeal of the appellants.

2. The Tribunal states that the ITMR class at D. W. Norman School is a proper placement for the child for the 1986-87 school year.

3. The Tribunal states that where available through the Home Care Program, a Speech Pathologist and Occupational Therapist ought to be permitted to interact with the ITMR teacher and the child during the school hours.

Recommendations:

1. The Tribunal recommends that a complete psycho-educational assessment of the child be made after the 1986-87 school year, using the most recently standardized tests and presented to an IPRC review to determine whether the child ought to be placed for the 1987-88 school year in a primary modified basic class such as the one at Marshall Park School, where Miss W is currently the teacher.

2. From evidence presented, the Tribunal feels that the services of speech pathologists and occupational therapists are not sufficiently available to adequately serve the needs of area students and strongly recommends that the Nipissing Board pursue the provision of such services with the appropriate ministry.

Dated at North Bay this 18th day of July, 1986.

Louissette Duchesneau-McLachlan

Glenn Clark

Joan Hayden