



IN THE MATTER OF the *Education Act*, R.S.O. 1990.c.E.2, as amended, ss. 57(3),  
IN THE MATTER OF Ontario *Regulation* 181/98,  
AND IN THE MATTER OF the minor child, born 1993

BETWEEN

Ms. P, Appellant

-and-

The Ottawa-Carleton District School Board, Respondent

Tribunal Members:

Marilyn Thain	Chair
James McCaughey	Member
Eva Nichols	Member

Appearances

Ms. P	Parent
Ms. S	Advocate
Mr. Roger Mills	Counsel for the Ottawa-Carleton District School Board
Bill Wyman	Secretary

The preliminary hearing on the matter of jurisdiction was held on June 3, 2005, in Ottawa, Ontario.

## **Introduction**

The parent appealed to the Special Education Tribunal regarding the identification and special education placement of her child, an exceptional pupil.

The child is twelve years old and is in Grade 1 in a regular French immersion class. The child has attended school for three days since October 27, 2004, and has not been in attendance at school since February 7, 2005.

The issue before the Tribunal was whether it had the authority to proceed, as the Appellant's Notice of Appeal indicated she had not been before a Special Education Appeal Board (SEAB). A preliminary hearing was arranged to hear the matter of jurisdiction on June 3, 2005.

The Tribunal's authority is set out in section 57 of the *Education Act* R.S.O. 1990, c.E.2, and the regulations made there under. The Tribunal's procedures are governed by both the *Statutory Powers Procedure Act* and by the general rules of 'natural justice' and 'procedural fairness' applicable to administrative tribunals.

Written submissions were received in advance of the hearing from the Appellant and from Mr. Roger Mills, counsel for the Ottawa-Carleton District School Board.

## **Legal Framework**

- ***Education Act***

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***

*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. This *Regulation* provides a mechanism for parents to appeal identification and placement decisions of an Identification Placement and Review Committee (IPRC) to an appeal board and sets out the timelines that must be met for such an appeal.

Subsection 14(1): The principal of the school at which a pupil is enrolled,

- (a) may on written notice to a parent of the pupil; and
- (b) shall at the written request of a parent of the pupil, refer the pupil to a committee established by the board for a decision as to whether the pupil should be identified as an exceptional pupil and, if so, what the placement of the pupil should be.

Subsection 21(1): The principal of the school at which a pupil's special education program is being provided,

- (a) may on written notice to a parent of the pupil;
- (b) shall at the written request of a parent of the pupil; and
- (c) shall, at the written request of the designated representative of the board that is providing the special education program to the pupil,

refer the pupil to a committee established by the board that is providing the special education program to the pupil for a review of the identification or placement of the pupil.

Subsection 21(3): Subject to subsection (4), the designated representative shall make a request under clause (1) (c) when in his or her opinion it is necessary to do so in order to ensure that a review in respect of the pupil is held under this Part at least once in each school year.

Subsection 21(4)(b): Subsection (3) does not apply where,

- (b) parent of the pupil gives a written notice dispensing with the annual review to the principal of the school at which the special education program is being provided

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

- (a) a committee decision under Part 1V or V that the pupil is an exceptional pupil;
- (b) a committee decision under Part 1V or V that the pupil is not an exceptional pupil; or
- (c) a committee decision under Part 1V or V on placement of the pupil

- ***Special Education Tribunal Cases Cited***

*L v. The York Region Board of Education* 1985

*B v. Ottawa-Carleton District School Board* 2003

*L and B v Conseil des ecoles catholiques de langue francaise du centre –est de l'Ontario (CECLFCE)* 2004

*R et al v. Board of Education for the Region of York* 1986

## **Appellant's Position**

Ms. P, mother of the child, and Ms. JS, advocate, presented the appellant's case to the Tribunal. The appellant requested that the Ontario Special Education Tribunal assume jurisdiction for hearing the case of P v. the Ottawa-Carleton District School Board ("OCDSB"), in spite of the fact that the decision of the Identification Placement Review Committee ("IPRC") held on December 8, 2004 to determine the identification and placement for the child, was not appealed by the parents to a Special Education Appeal Board ("SEAB").

The Appellant stated that she and her husband did not proceed to the SEAB, as required under *Regulation 181/98* because they had dispensed with the December 8, 2004 IPRC and wanted their child's education to continue to be guided by the previous IPRC decision issued on November 2, 1999. She stated that the school board went ahead with the IPRC in their absence, which made the December 8, 2004 IPRC and its decision illegal.

The Appellant referred to the January 13, 2005 OCDSB letter sent in response to her modifications of the December 8, 2004 IPRC decision form as the response of the "Board". Therefore, she was appealing to the Tribunal a Board decision and not an IPRC decision. In addition, the Advocate stated that the SEAB could only deal with the identification and placement of an exceptional student, but could not address the issues of process and procedure. Further, she stated that the decision to proceed directly to the Tribunal was recommended to the parents by the Ontario Superior Court of Justice, Divisional Court.

## **Remedies Sought:**

The remedies sought by the parents are:

- 1) The Tribunal assume jurisdiction and hear the case;
- 2) The Tribunal set aside the decision of the IPRC held on December 8, 2004 and compel the board to implement the decision of the IPRC held on November 2, 1999;
- 3) The Tribunal review the procedures the school board used for proceeding with the December 8, 2004 IPRC as well as its related actions and decisions and penalize the school board for its contravention of the *Education Act* and the *Regulations*;
- 4) The Tribunal assume responsibility for considering whether the actions of the school board contravene the *Canadian Charter of Rights and Freedoms* in issuing the IPRC decision; and
- 5) If the Tribunal cannot undertake all of the above, then the appellant requests that it hear the merits of the case focusing on the identification and placement that would be appropriate to meet the needs of the child.

### **Respondent's Position**

Mr. Mills, counsel for the OCDSB, outlined the Board's position on the following three jurisdictional matters regarding the appeal:

- 1) As the appellant bypassed the statutory right of appeal to the Special Education Appeal Board in section 26 of *Regulation* 181/98, the appellant has not met the requirements of section 57(3) of the *Education Act*.
- 2) The principal has the statutory authority to refer a student to an IPRC despite the appellant dispensing with a review of the 1999 IPRC determination.
- 3) The Special Education Tribunal is not a court of competent jurisdiction for the purpose of granting *Charter* remedies. In addition, the appellant cannot re-litigate the same facts and issues that have been dealt with and decided upon by the Ontario Human Rights Commission.

Notwithstanding the above three jurisdictional issues, counsel for the OCDSB urged the Tribunal to hear the appeal.

### **Appellant's Evidence**

The Appellant testified at the hearing on jurisdiction and gave the following evidence:

- On November 2, 1999, the child was identified as an exceptional student with no exceptionality specified and was placed in a regular classroom at an Elementary School.
- On November 17, 2004, Mr. Neill, Superintendent of Instruction for the OCDSB sent a letter to the parents stating that an IPRC meeting was scheduled for the child for Monday, December 6, 2004, at 3:30 p.m.
- On November 24 and 26, 2004, letters were sent by the parents to the school board regarding reinstating supports and services and indicating that there was no need to hold an IPRC meeting because they wanted the child's education to continue to be determined as set out in the IPRC decision of November 2, 1999.
- In the letter of November 24, 2004, the parents also referred to an incident at school involving their child, which significantly influenced the follow up actions of the parents and the school board, although it had no obvious relevance for the identification and placement of the child.
- The school principal, Ms. Wilson, responded to the parents' November 24, 2004 letter on the following day clarifying the need for an IPRC. She stated that under *Regulation* 181/98 governing IPRCs, it is required to hold a review at least once a year. Given the fact that there had been no reviews since the November 1999

IPRC, the determination of that IPRC could not be seen as valid in terms of describing the child's strengths and needs. Therefore, she stated, it was essential to hold an initial IPRC to consider the child's identification and placement for the next school year.

- The appellants responded to Ms. Wilson's November 25, 2004 letter on November 30, 2004, taking exception to the description of the planned IPRC as an initial IPRC, stating that they were quite satisfied with the decision of the 1999 IPRC and did not require another initial IPRC. If the principal wished to hold an IPRC review, then they were prepared to consider this request.
- The Appellant met with Mr. Neill on November 30, 2004 to discuss some non-special education matters. At this meeting, she explained that they could not attend an IPRC on December 6, 2004, but agreed to attend accompanied by an advocate on December 8, 2004. The Appellant stated that she was pleased that an IPRC was coming forward.

The issues related to an October incident and subsequent references to trespassing, complicated the dialogue between the Appellant and school board personnel.

- On December 2, 2004 Mr. Neill and Ms. Wilson responded in a letter to the Appellant's concern about the status of the IPRC, indicating their willingness to proceed with an IPRC review rather than characterizing the meeting as an initial IPRC.
- On December 7, 2004, the appellants agreed to attend this review IPRC with their Advocate. They went on to state that if approval for the Advocate to attend was not received by the end of the day on December 7, 2004 they were giving written notice to dispense with the IPRC review under *Regulation 181/98*, s. 21(4)(b). They gave the following reasons for dispensing with the IPRC:

*"We are content with the initial IPRC; the child is not presently accommodated according to [the child's] existing IPRC and our right to an advocate will be denied in the refusal to authorize attendance."*

- A written response was received from Mr. Neill during the late morning of December 8, 2004, confirming that an initial IPRC would be held at 3:30 p.m. on that day and giving approval for JS to attend as an advocate. The letter also set out some ground rules for the meeting and reminded the parents that the IPRC proceedings could not be taped
- The Appellant went to the school at 1 p.m. on December 8, 2004 to ask to defer the IPRC, as her advocate was no longer available this day. This did not happen; the IPRC went ahead, as scheduled, without the parents being present.
- On December 9, 2004, the parents received the IPRC decision for the previous day's initial IPRC identifying the child as a student with an Intellectual disability and indicating a future special education placement in a regular Grade 6 class

with the support of a Special Education Learning Centre at a second Elementary School.

The Appellant testified about matters that focused more directly on the merits of the case rather than the Tribunal's jurisdiction. The Appellant gave evidence regarding the various assessments carried out to determine the child's needs and current levels of functioning. These included educational assessments done by the school board, speech and language assessments and psychological assessments done by Dr. Merrett of the Children's Hospital of Eastern Ontario.

The Appellant restated her concerns about the lack of assistance and accommodation for the child during the past few years of the child's schooling. She also referred to information received from the school board about the role of an educational assistant in the child's classroom at the second elementary School.

She clarified that the child's French immersion placement began in 2001 and continued to the present, following an appeal to the courts. She stated that at that time the child had an Individual Education Plan ("IEP") and the report cards indicated that the child was making good progress in [the child's] schooling. The Appellant stated that the supports were removed as of December 1, 2003 and since that time the child has had virtually no support to assist [the child's] learning.

The Appellant reiterated that the IPRC decision was made in the absence of both parents and their advocate. Therefore, she decided to prepare and submit her own IPRC decision to the school board. This IPRC decision, dated December 18, 2004 and signed by the parents, identified the child as an exceptional student with no stated exceptionality and recommended placement in a Grade 1 French Immersion Class at the elementary school, with supports. This was sent to the school board on December 22, 2004.

On January 13, 2005, Mr. Neill wrote to the parents to inform them that the altered IPRC document was not acceptable to the board. He stated that the parents had until February 4, 2005 to appeal the December 8, 2004 IPRC decision to a Special Education Appeal Board. His letter also indicated that the board was prepared to provide additional supports to the school to assist with meeting the child's needs and to assist with the transition to the new placement "*should the IPRC decision be upheld following your anticipated appeal.*"

The Appellant indicated that '*it was the January 13, 2005 Board decision as communicated to her by M. Neill, and not the December 8, 2004 IPRC, that she was appealing to the Tribunal.*'

### **Respondent's Arguments**

Mr. Mills, counsel for the OCDSB, summarized the arguments around three jurisdictional issues.

Issue #1: Can the Appellant bypass the Special Education Appeal Board and proceed directly to the Special Education Tribunal?

Mr. Mills submitted that the appellant elected to bypass the Special Education Appeal Board and appealed directly to the Tribunal. Counsel pointed out that through this action, the appellant had not met the conditions of subsection 57(3) in that the appellant had not exhausted all rights of appeal and cannot be 'dissatisfied with' a decision of the Special Education Appeal Board given there had been no Special Education Appeal Board constituted. Counsel reiterated that since the conditions have not been met, the Tribunal should decline jurisdiction. This position was supported by the recent decision of *L and B v Conseil des écoles catholiques de langue française du centre –est de l'Ontario (CECLFCE)* 2004.

Despite the above argument that the Tribunal should decline jurisdiction, Mr. Mills submitted that the OCDSB would consent to the Appellant's request that the case proceed directly to the Tribunal as the child's best educational interests would be met. Counsel cited the case of *L v. York Region Board of Education* as precedent for the Tribunal hearing and determining an appeal even when it is apparent there is no actual jurisdiction.

Additionally, Mr. Mills noted that the appellant did file an appeal from the December 2004 IPRC determination in a timely manner and therefore should have the appeal heard.

In summary, counsel indicated that the Tribunal could proceed to hear the appeal as a result of: a) the decision in the *York Regional* case, b) the fact that the appellant did file a notice of appeal in a timely manner, and c) the willingness of the OCDSB to consent to the Tribunal hearing the appeal even though it did not have jurisdiction.

#### Issue #2: Did the Principal have the statutory authority to refer the child to the IPRC?

Mr. Mills submitted that Ms. Wilson chose to call an initial IPRC under subsection 14(1) (a) of *Regulation* 181/98 due to the five-year gap since the November 2, 1999 IPRC determination. Counsel reiterated this was an appropriate decision given that there had been no IPRC reviews for the five subsequent years and that there had been no identified exceptionality on the 1999 Determination Record.

In addition, Mr. Mills indicated that the child had ceased to be a pupil of the OCDSB for a period of time and therefore a new IPRC determination was required upon the child's return to the Board.

Counsel indicated in his submission that the appellant wished to characterize the Principal's referral as a referral pursuant to subsection 21(1)(a) of *Regulation* 181/98 rather than subsection 14 (1)(a). This course of action would render the principal's referral to be in the nature of a review of the November 2, 1999 IPRC determination rather than an initial determination. By having the referral treated as a review, the appellant could attempt to invoke section 21 (4)(b) of *Regulation* 181/98 in order to dispense with the review of the 1999 IPRC determination.

Mr. Mills submitted that the appellant's reasoning over this matter was in error due to the fact that subsection 21(4)(b) can only be applied when a review is called by the 'designated representative of the board' as outlined in subsection 21(1)(c) of the *Regulation*. The 'designated representative' for the OCDSB is the director of education. In this situation, Ms. Wilson made the referral. Mr. Mills submitted that this was consistent with subsection 14(1)(a) and subsection 21(1)(a) of the *Regulation* and therefore the appellant's dispensation of a review does not impact on the principal's decision to refer the child to an IPRC. Counsel stated again that the December 8, 2004 determination was valid and as such could be appealed.

Issue #3: Can the Special Educational Tribunal grant remedies under the *Charter of Rights and Freedoms* and the *Ontario Human Rights Code*?

Mr. Mills pointed out that the *Notice of Appeal* alleged that aspects of the *Charter of Rights and Freedoms* and the *Ontario Human Rights Code* had been violated. Mr. Mills submitted that case law had clearly established that the Special Education Tribunal was not a court of competent jurisdiction to hear such matters or to grant remedies. *R et al. v Board of Education for the Region of York* (1988) 63 O.R. (2d) 767 (H.C.J.) was cited to support the argument.

In addition, Mr. Mills submitted that the appellant had raised the same allegations before the Ontario Human Rights Commission in 2001. Counsel pointed out that the Commission had made a decision and therefore the Appellant could not re-litigate the same facts and issues.

In summary, Mr. Mills asked the Tribunal to hear and decide the appeal based on the submitted arguments.

### **Reason for the Decision**

Subsection 24(1) of *Regulation* 181/98 provides for a parent who disagrees with the identification and/or placement decision of the IPRC to have a second meeting with the IPRC. Subsection 26(1) of *Regulation* 181/98 provides for the parent to file a written notice of appeal requesting a hearing by a Special Education Appeal Board in respect of the IPRC decision.

There was no evidence of a request for a second meeting nor did the parents exercise their right to appeal to the Special Education Appeal Board. Mr. Neil's letter of January 13, 2005 informed the appellants of their right to appeal, but the Appellant indicated that there were other things that got in the way and that she was in no condition to have a second IPRC meeting or to move forward with an appeal to a special education appeal board. However, as Mr. Mills stated, the Appellant did appeal to the Special Education Tribunal and did so within the required timelines, even though she appealed to the wrong place. The problem is that the legislation does not provide for the omission of the Special Education Appeal Board.

Even though the appellant and the school board appear to be in agreement to bypass the appeal board, it is an important part of the process that should not be overlooked

and cannot be ignored by the Tribunal in determining its jurisdiction. Parties, through their consent, cannot give the Tribunal jurisdiction that it does not otherwise have.

Subsection 57(3), of the *Education Act*, clearly sets out the mandate of the Special Education Tribunal. In order for the Tribunal to have jurisdiction, the parents must have exhausted their rights of appeal. The evidence shows that the parents have not exhausted their rights to appeal. It does not matter whether the IPRC was an initial IPRC or a review IPRC. In either case, parties are required to go to the SEAB before appealing to the Tribunal.

The Tribunal declines to follow the decision in *L v York Region Board of Education*. That decision is not directly applicable as *Regulation 554 (currently Regulation 181/98)* had been recently enacted and the circumstances of that case are significantly different. At the time of the *L* decision, the process for an appeal to the Tribunal was just evolving. The Tribunal should not take jurisdiction of an appeal simply because the parties want to go directly to the Tribunal. The statutory preconditions to the Tribunal's jurisdiction should not be circumvented in this way.

### **Decision**

The Tribunal finds that it does not have jurisdiction to hear this case. The appellant has not demonstrated that all rights of appeal have been exhausted. The respondent's reasons to request the Tribunal to conduct a hearing, combined with the appellant's case, were compelling, but are not reason enough for the Tribunal to assume jurisdiction.

### **Recommendation**

During this proceeding, both parties have suggested a willingness to accept mediation. The Tribunal notes that the Appellant in her Notice of Appeal indicated her willingness to consider mediation. Mr. Mills stated that there was a "*need for a third party to break the log jam and we are asking the Tribunal to do it.*" However, the Tribunal's mandate is to adjudicate rather than mediate, and recommends that consideration be given to access mediation to resolve the present situation. The Secretary to the Tribunal could offer suggestions for potential mediators if this would be of assistance to the parties.

If mediation is not successful, the Tribunal urges both parties to follow the process set out in the Legislation. It is important that the parties come together to arrange for a Special Education Appeal Board to consider the best interests of the child in terms of the exceptionality identification and special education placement.

### **Commentary**

The parents disputed the IPRC held on December 8, 2004 and concluded that the revised IPRC decision submitted by them should be accepted, with the board having a responsibility to implement that decision. The Tribunal notes that there is no provision in the *Act* or the *Regulation* for parents to revise IPRC decisions. Rather, the parents do have the right to appeal under subsection 26(1) of *Regulation 181/98*.

The board complied with the IPRC process, providing written notice to the parent in a reasonable and correct manner. The appellant did have a choice to attend, having knowledge that her advocate could be present. The appellant's demands for receiving notice by a specific time to allow her advocate to be present only provided a barrier to conducting the IPRC. The board on the other hand could have been more flexible in their scheduling, considering that the information regarding the agreement to allow the advocate's presence had been given to the parent on very short notice. Parents have the right to an advocate and under these particular circumstances, which were known by both parties, a more appropriate time frame should have been provided so that the parents could arrange for the advocate to be present.

The revised IPRC decision submitted by the parents has no standing, either as an IPRC decision or as a form of appeal. The Tribunal accepts the fact that an IPRC did take place on December 8, 2004 and that this IPRC was consistent with the process established under *Regulation 181/98*. It is this decision that is subject to an appeal. The appellant's argument that the December 8, 2004 IPRC is illegal does not assist her. To accept that argument means that there is no decision to appeal.

The board should establish appropriate processes and procedures to ensure that all board staff are fully aware of and appropriately apply the *Regulations* pertaining to special education, such as conducting an annual review IPRC for all identified students and developing and implementing IEPs for all students receiving special education programs and services.

The following evidence presented at the hearing supports this need:

- Following the November 1999 IPRC decision, there had been no review of the identification and placement for the child until the IPRC scheduled for December 8, 2004. An annual review is required under *Regulation 181/98* subsection 21(3).
- Two of the most recent report cards dated June 4, 2004 and March 5, 2005 did not indicate that the child was on an IEP. In accordance with *Regulation 181/98* all students identified as exceptional must have an IEP

Although it is not the task of the Tribunal to comment on appropriate special education placement at the preliminary hearing on jurisdiction, we want to point out that having a twelve year old placed in a grade one class is inappropriate. Despite the OCDSB's intentions of providing additional support while in this placement, a more meaningful age-appropriate placement should be considered.

Parents and school board officials cannot continue to place barriers in front of resolving what is in the best interests of the child. The Tribunal agrees with Justice McKinnon's final statement "*I can only express the hope that continuing litigation, played out in the public eye, will not adversely affect the progress of these two young children*".

The best interests of the child must remain at the forefront of all discussions and communications.

Marilyn Thain, Chair

---

James McCaughey, Member

---

Eva Nichols, Member

---

July 19, 2005