



ONTARIO SPECIAL EDUCATION (ENGLISH) TRIBUNAL

File No. 2008-01

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 in 1994

BETWEEN

Ms. J. C., Appellant

-and-

The Toronto District School Board, Respondent

Tribunal Members:

Eva Nichols
Derryn Gill
Julie Lindhout

Chair
Member
Member

Appearances:

J. C.
Fran Marinic-Jaffer

Parent
Advocate

Brenda Bowlby
Karen Forbes

Counsel for the Toronto District School Board (TDSB)
System Superintendent, Special Education, TDSB

Louise Sibbald

Secretary

The hearing on the matter of jurisdiction was held on May 1, 2008 in Toronto, Ontario.

INTRODUCTION

The appellant appealed the identification and placement of her child, to the Ontario Special Education (English) Tribunal (“the Tribunal”) on January 3, 2008. The Toronto District School Board (TDSB) questioned the Tribunal’s authority to hear the case, on the grounds that the appellant had not exhausted all her rights of appeal related to the decision of the Identification, Placement and Review Committee (IPRC) held in April 2007. The specific date of the original IPRC and the resulting IPRC decision were not provided to the Tribunal. The IPRC was reconvened on May 15, 2007. This IPRC confirmed the child’s identification as Autism/Developmental Disability and placement as Special Education Class. The appellant disputes her child’s identification and placement and appealed the IPRC decision to a Special Education Appeal Board (SEAB). The appellant abandoned the appeal process before the SEAB could meet and appealed to this Tribunal. The TDSB takes the position that in doing so, the appellant failed to exhaust all rights of appeal before coming to the Tribunal, as required by ss. 57(3) of the *Education Act*, and that the Tribunal is therefore without jurisdiction to hear her appeal.

The Tribunal convened on May 1, 2008, to determine whether it had the authority to hear the appeal.

Relevant Statutory Provisions and Cases Cited

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 the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, the Tribunal’s *Rules of Procedure*, and the general rules of “natural justice” and “procedural fairness” applicable to administrative tribunals.

***Education Act*, R.S.O. 1990, c. E.2**

Several specific sections of the *Education Act* concerning special education in whole or in part were used in the arguments presented by the parties.

Subsection 1: Definitions

“*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,

“*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 evaluation and that includes a plan containing specific objectives and an outline of educational services that meets the needs of the exceptional pupil;

“*special education services*” means facilities and resources, including support personnel and equipment, necessary for developing and implementing a special education program.

Subsection 8 (3): Identification programs and special education programs and services:

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,

(a) 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

(b) 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 or use such prescriptions as established under this clause.

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.

Subsection 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.

Subsection 57 (5): Decision final:

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

Regulation 181/98

Regulation 181/98: Identification and Placement of Exceptional Pupils governs the identification and placement of exceptional pupils; Identification, Placement and Review Committee (IPRC) reviews; appeal procedures; and the role of parents/guardians in these proceedings. This Regulation provides a mechanism for parents to appeal the identification and placement decisions of an IPRC to a Special Education Appeal Board (SEAB) and sets out the time lines that must be met for such an appeal. The sections relevant to this appeal are as follows:

Part VI: Appeals from Committee Decisions

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

(2) A notice of appeal in respect of a committee decision under Part IV shall be filed with the secretary of the board,

- (a) if no meeting is held under section 19, within 30 days of receipt of the statement of decision under section 18 by the parent who is seeking to appeal.

27. (1) The special education appeal board shall be composed of,
(a) one member selected by the board in which the pupil is placed;
(b) one member selected by a parent of the pupil; and
(c) a chair, selected jointly by the members selected under clauses (a) and (b) or, where those members cannot agree, by the appropriate regional manager of the Ministry.

(2) Selections under clauses (1) (a) and (b) shall be made within 15 days of receipt of the notice of appeal by the secretary of the board.

(3) The selection of a chair under clause (1) (c) shall be made within 15 days of the last selection under clauses (1) (a) and (b).

(5) No person who has had any prior involvement with the matter under appeal may be selected under subsection (1).

28. (1) The chair of the special education appeal board shall arrange for a meeting of the members of the special education appeal board to discuss the matter under appeal and shall give notice of the meeting, in accordance with subsection 5 (5), to a parent of the pupil and, where the pupil is 16 years of age or older, the pupil.

(2) The meeting shall be arranged to take place at a convenient place and at a time that is no more than 30 days after the day on which the chair is selected and shall be conducted in an informal manner.

(3) Despite subsection (2), with the written consent of the parents of the pupil and the designated representative of the board, the meeting may be scheduled for a time that is more than 30 days after the day on which the chair is selected.

Special Education Tribunal Cases Cited

I. & The Toronto District School Board, 2004;
I. & The Toronto District School Board, 2006;
C. & The Toronto District School Board, 2006.

ISSUE

The issue is whether the Tribunal has jurisdiction to hear the appeal of the child's identification and placement, as determined by the IPRC, held in April 2007 and reconvened on May 15, 2007.

POSITIONS OF PARTIES

Respondent

Ms. Brenda Bowlby, counsel for TDSB, presented the TDSB's position that the Tribunal does not have jurisdiction to hear the appeal, because the appellant has failed to exhaust her appeal rights in accordance with Regulation 181/98. Therefore, she has not satisfied the statutory prerequisite of sub-section 57 (3) of the *Education Act*. Based on this, the TDSB requested that the Tribunal dismiss the appeal.

Appellant

In her opening statement, Ms. Marinic-Jaffer, advocate, stated that the appellant has exhausted her rights of appeal and therefore, the Tribunal should hear the merits of the case. She described that the appellant no longer trusts the TDSB and does not believe that a SEAB would act fairly and neutrally in the child's best interests. This lack of trust was based, according to Ms. Marinic-Jaffer, on the appellant's:

- previous experience with the Tribunal and the TDSB's refusal to implement the Tribunal's orders;
- experience with the TDSB in general; and
- the delays in the SEAB process, which she attributes totally to the TDSB.

Ms. Marinic-Jaffer also stated that she advised the appellant to abandon the SEAB process and appeal directly to the Tribunal.

SUMMARY OF EVIDENCE

Respondent

In her opening statement, Ms. Bowlby reviewed the steps taken by the TDSB to address the appellant's concerns. She outlined the events that took place between the time that the appellant initiated her appeal to the TDSB and the time she filed her the appeal to the Tribunal. Ms. Bowlby presented one witness, Ms. Karen Forbes, the TDSB's system superintendent for special education.

Ms. Forbes testified that this was not the first time that the parent had appealed to the Tribunal. She testified that a previous tribunal panel had decided that the child's placement should be in a Special Education Class. Ms. Forbes said that the TDSB implemented that placement, and a routine IPRC review was held in April 2007. The IPRC was reconvened on May 12, 2007. Ms. Forbes stated that once the parent appealed the decision of the IPRC, the appeal was turned over to her [Ms. Forbes] to manage.

Ms. Forbes described the steps she took to communicate with the appellant about the appeal process.

The board received the appeal filed by the appellant on May 25, 2007.

The appeal request was forwarded to Ms. Forbes. She provided the appellant with the name of and contact information for the board's nominee to the SEAB and asked the parent to name her nominee. She also included information about the appeal process.

Ms. Forbes stated in her evidence that in mid-June 2007, Ms. Marinic-Jaffer contacted the TDSB to indicate that the appellant was having difficulties finding a nominee. Ms. Forbes testified that she wrote to the parents and offered to extend the time for appointing a nominee to September 11, 2007.

Ms. Forbes stated that on June 27, 2007, she received a letter from the appellant, agreeing to the extended time line.

Ms. Forbes testified that, on September 10, 2007, she received a letter from the appellant, dated September 8, 2007, that named the appellant's nominee to the SEAB. Ms. Forbes stated

that she responded by writing a letter to the appellant requesting her to have the nominee contact the TDSB's nominee.

Ms. Forbes described that on September 26, 2007, she wrote another letter to the parents, because the time line for choosing a chair had now once again passed. She offered to extend the deadline by another 15 days to enable the nominees to contact each other to choose a chair.

Ms. Forbes stated in her evidence that at the end of October 2007, the board's nominee informed her that the appellant's nominee still had not contacted her, and the board's nominee's own attempts to contact the parents' nominee had failed.

Ms. Forbes described that in response to this, on October 25, 2007, she wrote another letter to inquire whether the appellant wanted to continue the appeal. Ms. Forbes stated that the appellant responded on October 30, 2007, stating that she wanted to continue with the appeal, but that her nominee had been unable to speak to the TDSB's nominee. She also requested that in future all communication from the TDSB be in writing and not by telephone.

Ms. Forbes stated that when the communication problems were finally sorted out, the time for selecting a SEAB chair was again running out and she once again offered to extend the timeline. The parents agreed. Ultimately a chair was selected in late November 2007.

Ms. Forbes testified that December 19, 2007, was set as the date of the scheduled SEAB hearing, with December 12, 2007, as the date for submitting documents. She stated that the TDSB submitted its documents by the agreed upon date; the parents did not.

Ms. Forbes stated that while she was aware that this disclosure had not happened, the SEAB chair's e-mail of December 16 was the first indication she had that the parents might not proceed with the SEAB hearing. The SEAB chair's e-mail of December 17 confirmed that the appellant had decided to abandon the process. Ms. Forbes testified that she wrote a letter to the appellant on December 18 asking her to confirm that it was her wish not to proceed with the SEAB. She testified that she did not receive a reply to that letter.

On cross-examination, Ms. Forbes testified that she keeps track of the timelines and tries to intervene, if the appeal process is stalling. She also stated that she felt that she was doing a favour for the parents by offering them an extension to the fall, as the deadline to appoint their nominee had passed. She confirmed that the board already had two SEABs scheduled for the summer.

Ms. Forbes stated that she thought that she and the appellant were working "very collaboratively" during all this time

Appellant

The appellant called one witness, the appellant herself, the child's mother.

The appellant testified under oath that she did not agree with the identification and placement decisions of the May 15, 2007 IPRC. She stated that she made a request for an appeal to the TDSB, in accordance with the rules governing the appeal process.

The appellant testified that she asked Ms. Marinic-Jaffer to contact Ms. Moira Sinclair at the Ministry of Education to request help with finding a nominee to the SEAB because she felt that someone referred by the Ministry would “act in good faith with regard to [her] child”. She stated in her evidence that the Ministry was not able to supply a nominee within the regulated timelines. She also stated that she could not recall whether she had agreed to an extension of the timelines.

The appellant testified that she recalled that the parent and board nominees to the SEAB had difficulties contacting one another, but they eventually agreed to the selection of Mr. John Fauteux, as the chair of the SEAB.

The appellant stated in evidence that, although she had spoken to her nominee about the disclosure process for the SEAB, she could not recall the expected date for the disclosure and did not know what documents she was to have submitted.

The appellant testified that before the SEAB was convened, she contacted her nominee and told her that she would not be submitting any documents. She stated that she told her nominee that the family had decided that they weren’t interested in continuing with the SEAB process, because they had no faith that the TDSB would deal fairly with their child. She also informed her nominee that she had conveyed that same information to Mr. Fauteux. The appellant testified that she could not remember when she contacted these people.

The appellant confirmed that she felt that she and Ms. Forbes had been “collaborating very, very well through the process”.

In answer to questions from Ms. Bowlby, the appellant agreed that she had received a letter from Ms. Forbes, which stated that “the SEAB will require all documentation presented at the IPRC”. She testified that she could not remember receiving the *Parent Guide* and the *Highlights of Regulation 181/98* that were included with that letter. She agreed that after receiving that letter she had spoken to Ms. Marinic-Jaffer more than once. She stated that she felt that Ms. Marinic-Jaffer was knowledgeable about the appeal process, but she couldn’t recall whether she had spoken to Ms. Marinic-Jaffer about what documents she would need to produce for the SEAB.

When asked by the Tribunal chair why she chose not to proceed with the SEAB while she waited for the Tribunal hearing date, the appellant replied that she had “lost all faith in the school board trying to resolve things”.

REASONS

The Tribunal’s authority is set out in section 57 of the *Education Act*. The issue is whether the Tribunal has jurisdiction to hear the appeal of the child’s special education identification and placement.

The testimony of both parties showed that both parties contributed to the delay in having the SEAB consider the appeal of the child’s identification and placement, in accordance with the time lines set out in Regulation 181/98. However, it was the parent who decided to abandon the appeal prematurely and bypass the SEAB, on the advice of her advocate.

The following evidence was provided to the Tribunal, on the basis of which the Tribunal determined that the parent had not exhausted fully her rights of appeal, before initiating her appeal to the Tribunal:

a) The appellant did not appoint a nominee to the SEAB within the 15-day period set out in Regulation 181/98.

b) The TDSB agreed to extend the timeline for the appointment of a nominee by the appellant for three months to September 2007. The appellant accepted this extension.

c) The appellant appointed a nominee to the SEAB on September 8, 2007. But, because of ongoing communication problems between the board's and the appellant's nominees, the chair of the SEAB was not selected until late November 2007. The appellant confirmed in her evidence that she was aware that Mr. Fauteux had been chosen as the chair.

d) The SEAB meeting was scheduled for December 19, 2007. The appellant's advocate confirmed that she had advised the appellant to abandon her appeal to the SEAB and to apply directly to the Tribunal for a hearing. On the basis of that advice, the appellant notified her nominee and the chair of the SEAB two days before the scheduled SEAB, on December 17, 2007, that she was going to appeal directly to the Tribunal and abandon her SEAB appeal.

e) During the initial teleconference, the panel chair urged the advocate to encourage the parent to participate in a SEAB hearing to eliminate the need for a jurisdiction hearing. The parent declined.

The representatives of both parties cited former Tribunal decisions on jurisdiction motions.

The appellant's advocate stated that the present case is similar to *I. & The Toronto District School Board*, 2004, in which the Tribunal assumed jurisdiction because the school board did not establish the SEAB within the regulated timelines and did not provide the parent with adequate information prescribed in *Regulation 181/98*.

The Tribunal does not agree that the facts in these two cases, the current appeal of the child's identification and placement and *I. & TDSB*, 2004, are similar. Although the SEAB in the current appeal was scheduled for eight months after the IPRC, which is a much longer time line than is specified in *Regulation 181/98*, the delay in the establishment of the SEAB began with the appellant's difficulties with finding and appointing a nominee; continued with the difficulties that the two nominees had in making contact with each other and in selecting a chair. But, it was clear to the Tribunal from the evidence presented by both parties that each step in the delay was agreed upon by both parties. Further, the appellant received the TDSB's *Parent Guide to Special Education and Highlights of Regulation 181/98* at the start of the appeal process. Therefore, the appellant was provided with adequate information about the appeal process by the TDSB.

The respondent's counsel cited *I. & TDSB*, 2006, as a similar case, in which the Tribunal determined that it did not have jurisdiction to hear the merits of the case, because the appellant had not exhausted her rights of appeal. The Tribunal agrees that there is similarity between these two cases.

DECISION

The Tribunal finds that it does not have jurisdiction to hear the merits of this case. The appellant has not demonstrated that all her rights of appeal have been exhausted, in accordance with section 57 (3) of the *Education Act*.

COMMENTARY

It is thirteen months since the IPRC met to consider the child's identification and placement. The lost time has not been in the child's best interest. It is most regrettable that the appellant, on the advice of her advocate, abandoned the appeal process at such a late stage, when a thoughtful and well-constructed decision by the SEAB might have enabled her to achieve what she wants for her child. It would have been in the child's best interest, if the advocate had done everything possible to assist the appellant to expedite the SEAB process. Had the SEAB hearing taken place in December 2007 or preferably earlier, the TDSB could have acted on the decisions by January 2008. Or, if the appellant had not been satisfied with the SEAB decision, the Tribunal could have heard the merits of the case within essentially the same time needed to hold this jurisdiction hearing.

The appellant's advocate asked at the start of the hearing whether the SEAB could be reconvened, if the Tribunal did not assume jurisdiction to hear the merits of the case. The Tribunal has not and cannot assume jurisdiction. The Tribunal also cannot order the parties to reconvene a SEAB.

However, the Tribunal recommends that the appellant and the TDSB meet as soon as possible, preferably before the end of the current school year, to consider and make a series of appropriate decisions about the child's identification and placement, including the programs, services, accommodations and transition components that [the child] needs to be successful during the next school year. The Tribunal hopes that if both parties focus on the child and the child's best interests, they will be able to resolve their outstanding disputes in a mutually satisfactory manner.

Dated June 6, 2008

Eva Nichols, Chair

Derryn Gill, Member

Julie Lindhout, Member
