



# ONTARIO SPECIAL EDUCATION (ENGLISH) TRIBUNAL

Case 2007-04

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

BETWEEN

L. W., Appellant

-and-

The Toronto District School Board, Respondent

Tribunal Members:

Eva Nichols  
Derryn Gill  
Uma Madan

Chair  
Member  
Member

Appearances:

L. W.  
Reva Schafer

Parent  
Toronto Family Network, Representative/Advocate

Paul Howard  
Sheila MacKinnon  
Karen Forbes  
Stephen Hopkins

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

Douglas Harrison

Counsel, Stikeman Elliott LLP

Louise Sibbald

Secretary

The preliminary hearing was held on February 20, March 18 and March 19, 2008 in Toronto, Ontario.

## INTRODUCTION

The appellant appealed to the Ontario Special Education (English) Tribunal (“the Tribunal”) on October 26, 2007 regarding the special education placement of her child, an exceptional pupil.

The Identification Placement and Review Committee (IPRC) met on May 9, 2007. The IPRC identified the child as a student with autism. This identification is not in dispute. The IPRC’s placement decision was a Special Education Class. The parent decided to appeal this decision. The IPRC was reconvened on May 30, 2007 and the placement decision was confirmed. The Special Education Appeal Board (SEAB) heard the parent’s appeal on September 20, 2007. The SEAB overruled the IPRC and upheld the parents’ wishes regarding the student’s placement and placed the child in a Regular Class with necessary supports. On October 25, 2007, the Toronto District School Board (TDSB) accepted and upheld the SEAB’s decision and recommendations.

Ms. Schafer, representative of the appellant, introduced five preliminary motions regarding the school board’s and the Tribunal’s procedures in dealing with parents. The respondent introduced one preliminary motion, arguing that the Tribunal is without jurisdiction to hear the merits of the appeal on the basis that the appellant has not demonstrated that she is dissatisfied with the decision of the SEAB. This decision addresses each of the parties’ preliminary motions.

The Tribunal convened on February 20, March 18, and March 19, 2007, to hear both parties’ preliminary motions.

On March 26, 2008, the Tribunal rendered a decision for one part of the appellant’s motion related to the provision of legal counsel.

## 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***

A number of specific sections of the *Education Act* concerning special education and the powers and duties of school boards in whole or in part were used in the arguments 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.

The appellant also referred to Subsection 170.(1) Duties of boards and Subsection 171.(1) Powers of boards in her arguments, when addressing the motion related to the provision of legal counsel.

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

The *Statutory Powers Procedure Act (SPPA)* applies to proceedings or hearings of tribunals, including the Special Education Tribunal, and is the procedural code for such bodies, unless they have developed their own rules. The following sections of the *SPPA* were cited by the appellant:

Section 4.6 (1) Dismissal of proceeding without hearing:

Subject to subsections (5) and (6), a tribunal may dismiss a proceeding without a hearing if,

- (a) the proceeding is frivolous, vexatious or is commenced in bad faith;
- (b) the proceeding relates to matters that are outside the jurisdiction of the tribunal; or
- (c) some aspect of the statutory requirements for bringing the proceeding has not been met.

Section 10. Right to representation:

A party to a proceeding may be represented by a representative.

Section 12. (3) Form and service of summons:

The summons shall be served personally on the person summoned.

Section 17.1. Costs:

(1) Subject to subsection (2), a tribunal may, in the circumstances set out in rules made under subsection (4), order a party to pay all or part of another party's costs in a proceeding.

(2) Exception: A tribunal shall not make an order to pay costs under this section unless,

- (a) the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith; and
- (b) the tribunal has made rules under subsection (4).

Section 19. (1) Enforcement of orders:

A certified copy of a tribunal's decision or order in a proceeding may be filed in the Superior Court of Justice by the tribunal or by a party and on filing shall be deemed to be an order of that court and is enforceable as such.

Section 23. (1) Abuse of processes:

A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

Section 25.0.1. Control of process:

A tribunal has the power to determine its own procedures and practices and may for that purpose,

- (a) make orders with respect to the procedures and practices that apply in any particular proceeding; and
- (b) establish rules under section 25.1.

Section 25.1 (1) Rules:

A tribunal may make rules governing the practice and procedure before it

***Canadian Charter of Rights and Freedoms, Part I Constitution Act, 1982***

Legal Rights

Section 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 10. Everyone has the right on arrest or detention

- (a) to be informed promptly for the reasons therefore;
- (b) to retain and instruct counsel without delay and to be informed of that right; and
- (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

## Enforcement

Section 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

### ***Ontario Human Rights Code, R.S.O. 1990, c. H. 19***

This provincial legislation mandates the accommodation of persons with disabilities to the point of undue hardship. Under the *Code*, the *Guidelines on Accessible Education*, 2004, confirm that education is a service and that education providers have a duty to accommodate the needs of students with disabilities in order to allow them to access educational services equally.

### ***Regulations under the Education Act***

*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 *Regulation* also covers the process that school boards must follow in addressing the decisions and recommendations of the SEAB and the parents' rights of appeal to the Tribunal, as set out in section 57 of the *Education Act*.

## Part III: Parents' Guide

13. (1) Each board shall prepare a guide for the use and information of parents and pupils that,
- (a) explains the function of a committee on a referral under Part IV and on a review under Part V;
  - (b) outlines the procedures set out in the Regulation or established under section 12 that a committee must follow in identifying a pupil as exceptional and in deciding the pupil's placement;
  - (d) explains the function of the special education appeal board under Part VI and the right of parents to appeal committee decisions to it;
  - (h) explains that no committee placement decisions can be implemented unless
    - (i) a parent has consented to the decision, or
    - (ii) the time limit for filing a notice of appeal in respect of the decision has expired and no such notice has been filed.

## Part IV: Referral of Pupils to Committees

17. (1) When making a placement decision on a referral under section 14, the committee shall, before considering the option of placement in a special education class, consider whether placement in a regular class, with appropriate special education services,
- (a) would meet the pupil's needs; and
  - (b) is consistent with parental preferences.

## Part VI: Appeals from Committee Decisions

30. (1) Within 30 days of receiving the special education appeal board's written statement, the board shall consider the special education appeal board's recommendations, shall decide what

action to take with respect to the pupil and shall give notice in writing of the decision to each of the persons described in subsection 29(1).

31. (1) The board shall implement a decision under subsection 30 (1) when one of the following events occurs:

1. A parent of the pupil consents in writing to the decision.
2. Thirty days have elapsed from receipt of the notice under subsection 30 (1) by a parent of the pupil and no appeal has been commenced in respect of the decision under section 57 of the Act.
3. An appeal under section 57 of the Act from the decision is dismissed or abandoned.

*Regulation 298: Operation of Schools – General* governs a wide range of matters related to the way schools are staffed and carry out their diverse administrative and educational mandates. The section of the *Regulation* that was cited in this appeal by the respondent related to the duties of principals and vice-principals. In the opinion of the Tribunal this was not relevant to the issues before the Tribunal.

### ***Special Education Tribunal Cases***

- B & North York Board of Education, 1984
- C & Dufferin-Peel Catholic District School Board, 2003
- D & Muskoka Board of Education, 1984
- D & Toronto District School Board, 2002
- E & Brant County Board of Education, 1993
- E & Halton District School Board. 2003
- I & Toronto District School Board, 2004 and 2005
- K (K) & Simcoe County District School Board, 2006
- L & Le Conseil scolaire de District Catholique du Centre-Est de l'Ontario, 2001
- L & Conseil des écoles catholiques de langue française du Centre-Est de l'Ontario, 2004
- P & Ottawa Carleton District School Board, 2005
- R & Durham District School Board, 2004
- S & Halton Catholic District School Board, 2005
- T & Simcoe County District School Board, 2004
- W & Simcoe County District School Board, 2004

### ***Special Education Related Case Law***

- Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241

### ***Other Cases***

The appellant's representative cited numerous Supreme Court decisions to support her arguments relating to the provision of legal counsel to unrepresented parties. Most of these cases addressed the issue of the state's obligation to provide legal counsel to persons who appear in a court of law regarding matters such as child protection, labour arbitration, employment termination and the right for an immigrant to remain in Canada, rather than the provision of educational services to a student. In the opinion of the Tribunal these cases have no direct relevance to this case.

## **Documents**

Both parties referred to the Tribunal's *Rules of Procedure, 2007* and *Information for Parties, 2007*. In addition, the appellant's representative referred to the following documents:

*Special Education: A Guide for Educators*, Ministry of Education, 2001

*Parents' Guide to Special Education*, TDSB

TDSB *Special Education Plan, 2005 and 2007 amendment*

*Program Delivery Model, Community Based Resource Model brochure*, TDSB

*Educating Together, a Handbook for Trustees, School Boards and Communities, 2006*

*Education for All*, Ministry of Education, 2004

*Effective Educational Practices for Students with Autism Spectrum Disorders: a resource guide*, Ministry of Education, 2007

*Our Children, Our Schools*, TDSB, 2006

TDSB *Financial Facts: Revenue and Expenditure Trends, 2007*

## **ISSUES**

The issues before the Tribunal are whether the Tribunal:

(a) has jurisdiction to hear the merits of the appeal; and

(b) can or should make the orders sought by the appellant in her five preliminary motions.

Each of these motions is summarized below and is followed by a summary of the parties' evidence and argument on that motion and the Tribunal's decision on that motion with reasons. Motion #1 was withdrawn by the appellant at the outset of the hearing, so only her four remaining motions are considered.

Regarding evidence in support of the motions, the Tribunal notes that the appellant did not call any witnesses and relied on oral argument, presented by her representative, and the documentary record relating to her child's placement decision to support her position. The respondent called two witnesses in support of the jurisdiction motion.

### **APPELLANT'S MOTION #1 [withdrawn by the appellant at the hearing]**

*The Special Education Tribunal order and/or direct each of the parties to the action to be heard by the Tribunal to prepare and disclose any and all documents and list of witnesses to the other party, on the same date, at the same time, through the Secretary of the Tribunal, 30 calendar days before the scheduled hearing dates.*

### **APPELLANT'S MOTION #2**

*The Special Education Tribunal order and /or direct each of the parties to the action to submit one original copy of any and all documents, to the Secretary of the Tribunal, 30 calendar days before the scheduled hearing, in order to be photocopied - one for the Official record, one for each of the Tribunal members, one for each of the parties to the action, one for the Independent Counsel to the Tribunal, one for the Court Reporter, one for the witnesses and one to file as Exhibits, and these documents shall be provided to the other party by the Secretary of the Tribunal, at the same time, fifteen days before the scheduled hearing.*

## **Appellant's Arguments**

Ms. Schafer explained that the appellant's purpose in bringing motion #2 is to guarantee the child access to natural justice and procedural fairness. She stated that this guarantee requires that the parties receive all relevant information and documents from each other at the same time. Ms. Schafer argued that "costs cannot be allowed to create a barrier to the provision of all necessary documents." Ms. Schafer spoke of the financial hardship that the photocopying of the requisite documents for the Tribunal represented for the family.

Ms. Schafer referenced the Tribunal's ability to order costs under section 4 of the *SPPA*. She asked on behalf of the appellant that, by way of remedy, the Tribunal provide reimbursement for all photocopying costs and make a change in the Tribunal's *Rules* to reflect her concerns and recommendations to promote greater equity between the parties. She argued that this step would not in any way jeopardize the Tribunal's impartiality, due to the involvement of the Tribunal secretary.

## **Respondent's Arguments**

The respondent opposed the motion. Mr. Howard stated that the Tribunal's *Rules of Procedure* require staggered disclosure and that this should remain the normal practice. Mr. Howard stated that the purpose of staggered disclosure is to provide for the respondent to respond to the case and to enhance efficient hearing of the matter.

Mr. Howard further stated that the timing of disclosure by both parties is discussed at the initial teleconference and the Tribunal's *Rules of Procedure* 11.1 and 11.2 are applied in a way that reflects the requirements of the specific situation. If requested, extra time can and has in the past been granted to the parties.

Mr. Howard stated that it would be inappropriate to download the document disclosure and delivery function to the Tribunal secretary. The Tribunal, in exercising its quasi-judicial function, is required to act and be seen to act in an impartial manner.

## **Reasons for the Decision**

Regarding the timing of disclosure, the Tribunal agrees with the submissions of the respondent. The Tribunal's *Rules of Procedure* have been developed in accordance with the *SPPA*. *Rules* 11.1 and 11.2 set out the procedure for the exchange of information and disclosure of documents. The usual timing is thirty days before the hearing for the appellant, followed by fifteen days for the respondent before the hearing. Staggered timing is needed for the respondent to be able to know and answer the appellant's case. If the motion to be heard at the hearing is introduced by the respondent, then the reverse process applies, with the respondent disclosing information before the appellant. This is the accepted practice of all administrative tribunals functioning under the *SPPA*. If either party so requests, extra time can be provided for disclosure. Therefore, there is no need to change the Tribunal's current practice regarding the timing of disclosure.

Although no evidence was called in support of her submission, Ms. Schafer argued that the appellant faced hardship in producing the required number of copies of the disclosure documents. If the requirement for the number of copies represents a real hardship for either of the parties, the Tribunal encourages the parties to raise this matter during the preliminary teleconference and provide supporting evidence. Under its *Rules*, the Tribunal can vary its

procedures or application of the *Rules*, “under circumstances that are just”. In the circumstances of this appeal, the Tribunal did, in fact, provide assistance to the appellant to facilitate her meeting her disclosure obligations.

The Tribunal does encourage parties to consider carefully what documents and evidence are really needed to put their case forward and to limit the quantity of information exchanged to that which is relevant and helpful to their positions and arguments. Parties are also encouraged to ensure that the documentary evidence placed before the Tribunal is not only relevant but does not, for example, duplicate the materials submitted with the original Notice of Appeal or Response to a Notice of Appeal.

With respect to the part of the motion that asks that the Tribunal accept from each party only one copy of their materials, the Tribunal notes that the current *Rules* require the parties to provide to the Tribunal the number of copies of materials which are in fact needed by the Tribunal in order to hear the case. The effect of the appellant’s motion, if granted, would be to alter the Tribunal’s *Rules* and shift to the Tribunal the economic cost of preparing the paper record for the parties. The *SPPA* was relied on by the appellant’s representative as support for the argument that the Tribunal can or should pay parties’ copying costs. The Tribunal notes that the statutory provision for ordering payment of costs against parties whose conduct is “unreasonable, frivolous, vexatious or in bad faith” [s. 17. (1)(2)(a)], not only has not been adopted by the Tribunal as required by s. 17.(1) (4), but also does not apply to a procedural matter such as photocopying costs. Accordingly, this argument does not assist the appellant regarding the costs of photocopying.

## **Decision**

The motion is dismissed.

## **APPELLANT’S MOTION #3**

*The Special Education Tribunal order and /or direct that any and all aspects of the procedure relating to the summons of witnesses be addressed and administered by the secretary of the Tribunal on receipt of the witness list, from each of the parties, 30 calendar days before the scheduled Tribunal hearing date.*

## **Appellant’s Arguments**

Ms. Schafer indicated that the appellant’s purpose in bringing motion #3 is to guarantee that the parties are accorded procedural fairness. She argued that unrepresented parties need assistance to call the witnesses necessary for a “full, fair, and complete” presentation of the issues. No witnesses were called in support of this motion.

Ms. Schafer contends that the process for serving a summons to a witness is too complicated and too costly for parents. The unrepresented parent’s ability to represent his or her child is diminished by the difficulties involved in summoning and paying for the necessary witnesses. Therefore, she stated that this procedure should be undertaken by the Tribunal secretary. By contrast, the school board typically has in-house counsel and public funds to summons and pay for witnesses.

Ms. Schafer stated that under section 25.1 of the *SPPA*, the Tribunal is empowered to make rules governing its procedures. She stated that the appellant is asking the Tribunal to change its

*Rules* to take over the process and cover the costs of summoning witnesses for all parties.

In reply to the respondent's arguments, Ms. Schafer noted that the *SPPA* does "not address who that person is who must administer the serving of the summons or pay the costs for the servicing or fees of the summons... If the Tribunal, as an independent body, were to serve the summons of both parties, it would not only reinforce its appearance as impartial but also as one of an authority that will not allow the effectiveness and efficiency of the Tribunal to be compromised."

### **Respondent's Arguments**

Mr. Howard stated that it would be inappropriate to download the process of summoning witnesses to the Tribunal secretary. He referred the Tribunal to Section 12 of the *SPPA* that states that each party serves the summons to its witness. That is the standard practice for tribunals operating under the *SPPA* and there is no reason to change that procedure.

### **Reasons for Decision**

The Tribunal notes that the appellant provided no testimony or evidence in support of her contention that the summons process is beyond the comprehension and the means of unrepresented litigants. The Tribunal agrees with the submissions of the respondent. The Tribunal's procedures are governed by the *SPPA*. It is the accepted practice of all administrative tribunals functioning under the *SPPA* that, while tribunals have the authority to issue a summons, it is the party requesting the summons, which is responsible for service of the summons and for paying the costs of attendance of the person whom they are summoning. This process is also consistent with the process used in the Ontario courts.

The Tribunal also notes that in its *Rules* and dealings with parties, it requires exchange of witness lists and encourages parties, where possible, to co-operate to minimize the necessity of either party having to compel a witness to attend using a summons.

### **Decision**

The motion is dismissed.

### **APPELLANT'S MOTION #4**

*The Special Education Tribunal consider for order and/or direction that (a) the Toronto District School Board provide legal counsel for the child, or (b) determine that the Tribunal provide legal counsel for the child, and (c) that legal counsel retained by all parties be collaborative lawyers.*

### **a) Regarding the motion that the Tribunal order the TDSB to provide legal counsel for the child**

#### **Appellant's arguments**

Ms. Schafer stated that to determine whether the Tribunal should order the TDSB to provide legal counsel for the child, the Tribunal should consider whether, at an administrative tribunal hearing, the provision of legal counsel is a right, based on statute or case law, as well as the

right thing to do, based on the principles of natural justice and procedural fairness.

The appellant's representative, Ms. Schafer took the position that because the *SPPA* s. 10, (which states that "a party to a proceeding may be represented by a representative") contemplates that parties may have a representative as do the Tribunals' *Rules* ( 3.1 and 3.11), the Tribunal is required to ensure that both parties before it are represented. To do otherwise amounts, in the appellant's view, to an "abuse of the process", as defined in the *SPPA*. The right to legal counsel in this context, according to Ms. Schafer, is not only a fundamental right but also the right thing to do.

She linked this right to the child's right to an education and stated that, where a child's rights are at stake, the reasons for providing legal counsel increase considerably. Ms. Schafer also cited the protection offered to persons under section 7 of the *Charter* as the grounds for ordering the provision of legal counsel for the child.

Ms. Schafer stated that no legislation or board policy gives the TDSB the right to hire outside legal counsel "to represent the position of staff employed by the TDSB". She spoke of the board's duties to act "as a reasonable, careful or prudent parent", which in this context would have demanded that, if the board hired a lawyer for itself, it should also have done so for the child. She spoke at length about procedural fairness, which, in the appellant's opinion, demands that the TDSB provide legal representation for students and parents as well as for itself.

Ms. Schafer stressed that education is an important matter for all, but especially for children with "additional needs" and their families. She stated that parents are at a major disadvantage when they have to deal with legal matters, such as a Tribunal hearing. When this situation is further complicated by the school board being represented by two litigators, this becomes "an almost impossible situation".

## **Respondent's Arguments**

The respondent opposed all parts of the motion. Mr. Howard stated that under its enabling statute, the *Education Act*, and under the *SPPA*, the Tribunal has no jurisdiction to order one party to provide legal counsel for the other party. He stated that the Tribunal has no power to award legal costs to any party, let alone order a party to pay for the legal costs of the other party.

Mr. Howard cited the *SPPA* regarding the conditions under which some tribunals award costs (section 17) but stated that since the Tribunal's *Rules* make no reference to the awarding of costs, "that should be sufficient to end the inquiry".

The respondent also commented on the appellant's arguments linked to the *Charter*. He stated that section 7 has no bearing on the issue of legal representation, while section 10 talks about the right to counsel in a criminal context only, which is not relevant in this case.

Mr. Howard stated that even if the Tribunal had the jurisdiction and discretion to make the order requested by the appellant, it would not be appropriate to do so. He stated that:

1. The Tribunal usually deals with unrepresented litigants and its procedures clearly reflect the statement that the Tribunal does not expect parties to be represented.
2. If the Tribunal were to order the TDSB to provide legal counsel in this case, it would have to do so in every case in the future.

3. Such an order is unworkable, because it would have no limits in terms of costs, timing, and the selection and accountability of the chosen counsel and could create a conflict of interest for counsel.

### **Reasons for the Decision**

The Tribunal's mandate is set out in section 57 of the Education Act. That section provides for the Tribunal to make orders regarding identification and/or placement that it considers necessary. However, it does not allow for the Tribunal to order school boards to provide legal counsel for unrepresented parties and their exceptional children. The Tribunal must comply with the statutes under which it receives its authority and cannot go beyond its mandate. Although the *SPPA* does allow tribunals, under certain specified conditions, to award costs, the Ontario Special Education Tribunals have not adopted a rule for the awarding of costs. Therefore, the Tribunal cannot order costs.

### **Decision**

The appellant's motion is dismissed. The Tribunal does not have jurisdiction to order the TDSB to provide legal representation for the appellant's [child].

**N.B.** This interim decision, without reasons, was released on March 26, 2008, in accordance with the Tribunal's *Rules of Procedure* 13.3.

### **b) Regarding the motion that the Tribunal provide legal counsel for the child**

#### **Appellant's Arguments**

Ms. Schafer stated that since under the *SPPA* (section 25.1) tribunals can make their own rules, this Tribunal could decide to provide legal counsel for any unrepresented party appearing before it. She cited section 10 of the *SPPA* and stated that the section creates an "entitlement to representation" at the discretion of the Tribunal. She also stressed that in order to avoid "abuse of the process" (section 23.1 *SPPA*), the Tribunal has the power and must exercise this power to provide legal representation.

Ms. Schafer argued that the appellant is not capable of representing her child's interests completely, adequately and effectively, because of the complexity of the legal issues. This, in her opinion, creates an obligation on the Tribunal to ensure that legal representation is provided.

In reply to the respondent's arguments, Ms. Schafer stated that the right to representation in administrative proceedings is the established norm in Canadian administrative law. She cited the *Administrative Tribunals Act* from British Columbia, to support this argument. She argued further that the state, which in this case means the Tribunal in her submission, has an obligation to provide legal representation as a means of enforcing a person's section 7 (Charter) rights. She stated that this is the appropriate interpretation of section 24 of the Charter.

Further, Ms. Schafer stated that since the Tribunal's expressed obligation is to act in the best interests of the child and to proceed in a manner that reflects the principles of fundamental justice, the Tribunal must address the question of the provision of legal representation and should ensure that legal counsel are provided for all parties. She went on to state that providing legal counsel for students would enable and empower families to advocate on behalf of their

children, rather than give up due to the barriers that they face.

### **Respondent's Arguments**

Mr. Howard stated that in the Tribunal's *Information for Parties* (section 3.2) it states that the Tribunal does not expect parties to be represented. He further stated that if the Tribunal were to provide legal counsel for the child that decision would create a precedent whereby all parties would look to the Tribunal to provide them with legal representation. He stated that many administrative tribunals operating under the *SPPA* regularly deal with self-represented litigants. In that regard, this Tribunal is no different from any of the other administrative tribunals.

The respondent also addressed the fact that in his opinion it would be "unworkable" and inappropriate for the Tribunal to engage legal counsel for a party. He raised a series of questions about the scope of the work, and how the Tribunal could manage it in an appropriate and fair manner.

### **Reasons for the Decision**

The Tribunal's procedures are governed by the relevant sections of the *SPPA* and its own *Rules*, developed in accordance with the *SPPA*, section 25.1. That same section also states that the Tribunals' *Rules* must be consistent with the *SPPA* and with other Acts to which the *SPPA* relates. This means that, although the Tribunal can apply its own *Rules* as it wants, it cannot go beyond the limits set for it by Ontario law. Therefore, legislation from B.C. is not relevant to the functions of an Ontario tribunal.

Section 10 of the *SPPA* states that "a party to a proceeding may be represented by a representative". Section 3.11 of the Tribunal's *Rules* defines "representative" as a person appointed by a party to represent that party in the appeal, including legal counsel or a licensed paralegal, in accordance with Section 10 of the *SPPA*. Neither the *SPPA* nor the Tribunal's *Rules* mean that parties must be represented or are entitled to be provided with legal representation by the Tribunal. That is, neither creates a positive entitlement for a party to be represented by legal counsel.

The Tribunal is aware of the argument advanced by the appellant that the high cost of retaining legal counsel may represent a barrier to equity for parties both within the courts and the quasi-judicial system of administrative tribunals, such as the Ontario Special Education Tribunal. No evidence was called by the appellant to support her argument regarding her inability to adequately make her case to the Tribunal without the assistance of legal counsel. Indeed, the appellant was represented at the hearing by Ms. Schafer, who conducted the case on the appellant's behalf.

With respect to the contention that retaining legal counsel is prohibitively costly for many parents, the Tribunal notes that it has developed the *Information for Parties* document and launched its website to provide information to all parties and to assist them in presenting their case. The *Information for Parties* document states that the Tribunal does not expect parties to be represented when they appear before the Tribunal. However, it does suggest that under certain circumstances, unrepresented parties may wish to obtain legal advice.

The Tribunal continues to explore ways in which the tribunal process can be made more accessible to both parties. The Tribunal is not a court and is able to function in a more informal way than courts do. Its mandate is to focus primarily on the best interests of students. Funding

legal representation for either party by the Tribunal could be seen as unfair and the Tribunal cannot order costs. However, the Tribunal is aware that unrepresented parties may benefit from obtaining advice and help in presenting their case to the Tribunal and assists parties to the extent possible, by clarifying the process without providing legal advice or in any way demonstrating bias.

With respect to the appellant's *Charter* arguments, the Tribunal is not persuaded that the Supreme Court of Canada cases and other authorities, from which Ms. Schafer argued by analogy, establish a *Charter* right to counsel representation in the case of special education identification and placement. Such an argument, if it were to be made, would require an evidentiary foundation specific to special education, which was absent in this case, as no evidence was provided to the Tribunal by the appellant in support of this contention.

## **Decision**

The motion is dismissed. The Tribunal, in accordance with its enabling legislation, the *SPPA*, and its own *Rules*, does not have jurisdiction to order legal representation for a party to an appeal, cannot order costs and therefore cannot provide legal counsel for the appellant's child.

### **c) Regarding the motion that legal counsel retained by all parties be collaborative lawyers**

#### **Appellant's Arguments**

In addressing this issue, Ms. Schafer described legal counsel representing the TDSB at this hearing as "litigators". She raised the question that if the TDSB felt that it was truly necessary to retain legal counsel, why did the board decide to use litigators to represent it? She stated that the TDSB's mandated duties and obligations and stated mission and value statements, human rights statements and commitment to equity statements should ensure that they focus on collaborative processes based on "mutual respect and trust". What this means from the appellant's perspective is that the board should have hired legal counsel who apply collaborative law principles and negotiation techniques rather than litigation counsel who use an adversarial approach and mediation techniques.

In her submission, the appellant's representative also used the term "adversarial" to describe the tribunal process by the respondent's legal counsel during the initial teleconference. She stated that if the board had hired two collaborative law lawyers, they would have approached the case from the viewpoint of the best interests of the child and a win-win outcome.

In reply to the respondent's arguments, Ms. Schafer presented the Tribunal and the respondent with a package of materials related to the topic of collaborative law. She disagreed with the respondent's suggestion that this motion was personally aimed at the respondent's specific legal counsel. She took the position that the appellant believes that the adversarial approach is negative and counterproductive and must be replaced by a positive and collaborative approach. Once again, no witness evidence was called by the appellant in support of the relief sought.

#### **Respondent's Arguments**

The respondent stated that he did not know what the appellant meant by the term collaborative law lawyers. He stated that this is not a term defined in the *Education Act*, the *SPPA* or even the *Law Society Act*. Since the term does not describe a specific qualification, the respondent

questioned who would determine the eligibility of a lawyer to meet the expectation of being an adequately collaborative lawyer. He argued that it would be inappropriate for the Tribunal to determine what lawyer a party, in this case the TDSB, should choose to represent it. The respondent stressed that nowhere in legislation is a tribunal given a power that so significantly interferes with a party's right to counsel or a party's right to choose their own legal representative.

### **Reasons for the Decision**

The Tribunal agrees that, in general terms, the best resolutions for parties' disputes are often those arrived at through a non-adversarial process. The Tribunal encourages parties to consider mediation as a means of resolving their disputes. By the time proceedings reach the Tribunal, parties are often looking for assistance in reaching a common understanding of the best interests of the child whose identification and/or placement is in dispute. While the Tribunal makes efforts at each step of the process to encourage parties to co-operate with each other in preparing, presenting and potentially resolving their case, the Tribunal cannot force parties to do so.

Under Ontario law, including the *SPPA* and its own *Rules*, the Tribunal cannot direct how parties choose to present their case including what form of representation, if any, they choose. As long as the representative chosen by a party meets the definition of representative or advocate in the Tribunal's *Rules*, the Tribunal has no jurisdiction to interfere with the selection of legal counsel by a party.

### **Decision**

The motion is dismissed. The Tribunal does not have jurisdiction under the *SPPA* or its *Rules* to issue an order specifying the qualifications or expertise of the legal counsel chosen to represent a party.

### **APPELLANT'S MOTION #5**

*The Special Education Tribunal consider for order and/or direction that in order to ensure compliance, by the Toronto District School Board, to the Tribunal's decision and recommendations, and in the best interests of the child, the Tribunal shall provide, as per Section 19 (1) of the Statutory Powers Procedure Act, "a certified copy of a Tribunal's decision" to the Superior Court of Justice in order that the decision "on filing shall be deemed to be an order of that court, and is enforceable as such".*

### **Appellant's Arguments**

Ms. Schafer stated that the appellant has lost faith and trust in the TDSB. She stated that the appellant has attempted, through constant and continual communication, "to achieve staff and board compliance with their mandated legal requirements", but has not been successful.

Ms. Schafer stated that the appellant "recognizes that unfortunately the court may be the only avenue available to her to achieve what is in the best interests of her child because it may only be through the court that the board will finally comply with the *Regulation*". The appellant believes that the child's rights will be protected only by filing the Tribunal's decision with the Superior Court of Justice.

Ms. Schafer cited section 19 (1) of the *SPPA* which states, "A certified copy of a tribunal's decision or order in a proceeding may be filed in the Superior Court of Justice by the tribunal or by a party and on filing shall be deemed to be an order of that court and is enforceable as such".

Ms. Schafer stated that the appellant believes that the Tribunal should file its decision in this case with the court because:

- the Tribunal has the right to do so;
- if the Tribunal files the decision with the court, the decision will have greater credibility; and
- the filing process would be problematic and stressful for the family, especially since the parent has no access to legal representation.

### **Respondent's Arguments**

Counsel for the respondent argued that:

- the request to have the Tribunal file its decision is premature. The time for the Tribunal to consider whether to file its order is after the order has been made.
- the Tribunal has the option of remaining seized over the implementation of its decision (rule 16.1).
- although the Tribunal has the right to file its decision with the court, it isn't required to do so.
- the appellant retains the right to file the decision with the court.

### **Reasons for the Decision**

The Tribunal's procedures are governed by the relevant sections of the *SPPA* and its own *Rules*, developed in accordance with the *SPPA*, section 25.1. Neither the *SPPA* nor the Tribunal's *Rules* compel the Tribunal to file its decisions with the court and the Tribunal does not consider it appropriate to commit to filing its decisions with the Superior Court of Justice. The Tribunal issues its decision in writing with reasons in all matters before it. Parties can file such a decision with a court, if they so choose.

### **Decision**

The motion is dismissed.

### **RESPONDENT'S MOTION ON JURISDICTION**

*The preconditions set out in s. 57 of the Education Act have not been met, as a result of which this Tribunal, respectfully, has no jurisdiction to hear the appeal. In the alternative, it is submitted that in view of the parties' agreement on the central issues of identification and placement, this appeal is moot and, respectfully, should not be heard by the Tribunal.*

### **SUMMARY OF EVIDENCE**

#### **Respondent's Evidence**

The respondent called two witnesses.

Mr. Stephen Hopkins was the vice-principal and lead on the special education portfolio at the Public School, at the time that the IPRC and SEAB meetings for the child took place during 2007. Recently, Mr. Hopkins was promoted to principal and has changed schools in February 2008.

Mr. Hopkins stated that from the time the child entered school in September 2003 until 2006, the child was in a Regular Classroom. The special needs assistants (SNAs) assigned to the classroom spent the "vast majority of their time working with [the child] directly".

Mr. Hopkins said that in September 2006, the child was in a Regular Classroom for the majority of the day. The child received withdrawal assistance in the smaller Home School Program (HSP) setting with an experienced special education teacher for three periods or 120 minutes per day. The child's program was modified for language and math, at the Grade 1/2 level. The other subjects were "heavily accommodated".

The child continued to have difficulties applying math concepts. The classroom teacher and the special education teacher recommended an additional period in a smaller class setting. The teachers believed that the appellant agreed that this additional withdrawal assistance should be continued until the end of June 2007. Mr. Hopkins stated that at the time of the May 2007 IPRCs, the child "was developing some skills but wasn't developing them at the rate of his or her peers. The difference between their skill sets was great".

The IPRC decision of May 7, 2007, was Special Education Class, with the recommendation that the child attend a Grade 4 regular class with Home School Program support. The Special Education Class designation would allow for greater than 50 percent of the day in the smaller class setting. A second IPRC meeting on May 30, 2007 confirmed the Special Class placement.

Mr. Hopkins stated that in an email on September 17, 2007, the appellant gave her permission for the child to receive special education support for between one and two hours per day. In subsequent conversations, it was agreed that the child would spend two periods or about 100 minutes per day in the Special Education Classroom.

Mr. Hopkins confirmed that the SEAB had "made a decision recommending in favour of [the appellant's] request that [the child] remain in a Regular Class with necessary support". Mr. Hopkins stated that the SEAB also recommended additional assessments including a speech and language assessment and a psycho-educational assessment. The appellant wanted a private assessment done for speech and language and did not agree to have a psycho-educational assessment done by the board.

Mr. Hopkins stated that the Pervasive Developmental Disorder/ Autism Spectrum Disorder (PDD/ASD) team had made recommendations about the child and that those recommendations have been implemented. Mr. Hopkins said that the staff at the school had received Applied Behavioural Analysis (ABA) training from Surrey Place, in an effort to better support the child.

Mr. Hopkins testified about the consultation log on the child's IEP. The log shows numerous occasions on which the appellant was consulted about the child's IEP. At the appellant's request and after consultation with the special education consultant, changes were made to the child's IEP.

Mr. Hopkins stated that at this time, the child remains in the Regular Classroom with Resource Withdrawal for 100 minutes per day.

On cross-examination, Mr. Hopkins confirmed that the March 2006 IPRC placement decision for the child was Regular Class. The reason for that placement stated that “[the child] is experiencing success in the Regular Class setting.” In response to a question about the rationale for the May 2007 IPRC placement decision of Special Education Class, Mr. Hopkins answered that at that time the child “required more support than [is available] in a full day Regular Class placement to ensure academic and social gains”.

Ms. Karen Forbes, the system superintendent of special education for the TDSB, testified to her part in ensuring that the SEAB process was carried out according to *Regulation 181/98*. She stated that, in an effort to be fair, she sent the appellant an outline of the staff report to the board, which indicated that the staff supported the decision of the SEAB. She offered the appellant the opportunity to submit a supplementary report to the board for consideration.

Ms. Forbes testified that the Board accepted the staff recommendations and also accepted the SEAB recommendations. Ms. Forbes, when questioned about the staff’s rationale for endorsing the SEAB decision and recommendations to the board of trustees, spoke about the need for additional assessments and contact with the PDD/ASD team to determine what supports the child needs in the current placement. Ms. Forbes also stated that it is not intended to have the next IPRC overturn the SEAB’s and TDSB’s placement decisions for the child.

On cross-examination, Ms. Forbes was questioned primarily about procedural matters such as the TDSB’s parents’ guide, its approach to the community-based resource program and the board’s policy on inclusion, none of which have any direct relevance to the jurisdiction issue facing the Tribunal.

### **Respondent’s Documentary Evidence**

a) The Decision of the IPRC of May 9, 2007. The Placement indicated on the form is “Special Education Class”. The appellant signed the decision on May 11, 2007. She indicated that she did not agree with the placement and she wrote: “I am appealing this decision. [The child] should be in a Reg. Class with necessary and appropriate supports.”

b) A letter signed on October 26, 2007 by Ms. G. Connelly, Director of Education and Secretary-Treasurer of the TDSB, which states: “The Board decided to approve the recommendations of the Special Education Appeal Board for [the child], as follow: 1.That [the child] remain in a Regular Class placement, with necessary supports”.

c) An email sent on September 14, 2007 from Mr. Stephen Hopkins to the appellant stating in part, “In sum, in order to satisfy your request for only 2 periods, and as a gesture of goodwill and good faith, we are willing to have [the child] attend the HSP Class for 2 periods each day (from 12:30 p.m. to 2:10 p.m.), even though this will result in a reduction of HSP support compared to what [the child] was receiving last year.” (Exhibit #13)

d) A note in Mr. Hopkins’ handwriting suggesting that the appellant had agreed to 100 minutes per day in the HSP Class for the child. Although undated, the parties agreed that note was written on October 24, 2007. (Exhibit #14)

e) An email sent on September 17, 2007 by the appellant to the principal of the school and Mr. Hopkins stating: “Therefore I expect [the child] to be receiving Special Education support for between 1 hour and 2 hours per day.” (Exhibit #15)

f) The child's 2007-08 timetable, which shows that the child is withdrawn from the Regular Classroom for two periods (1.66 hrs) per day. (Exhibit #16)

g) The child's IEP for 2007-08, dated December 19, 2007, and signed by Mr. Hopkins, Vice-Principal. The IEP was signed by the appellant on December 31, 2007 and was received by the school on January 7, 2008. The placement recorded is Regular Class with Withdrawal Assistance.

### **Respondent's Arguments**

Mr. Howard requested that the Tribunal "decline jurisdiction to hear this appeal". He argued that the Tribunal has no jurisdiction to hear the merits of the case on three grounds:

1. The Tribunal cannot grant the remedies set out in the appellant's Notice of Appeal. The Notice of Appeal made no reference to the placement of the child, but focused exclusively on due process matters.
2. Although the appellant has exhausted fully her rights of appeal, she has not presented any evidence to the Tribunal that she is dissatisfied with the school board's placement decision.
3. Since the statutory pre-conditions have not been met, the appeal should be declared to be moot.

Mr. Howard stated that the issues listed in the appellant's Notice of Appeal related exclusively to concerns regarding procedure and due process. Mr. Howard quoted from earlier Tribunal decisions *K (K) & Simcoe County District School Board, 2006* and *R & Durham District School Board, 2004*, to demonstrate that the Tribunal has previously refused to assume authority to review the conduct of other administrative bodies.

Mr Howard quoted *W & Simcoe County District School Board, 2004* to show that the Tribunal does not hear appeals that refer to "a particular method or strategy". The Tribunal hears only those appeals in which an appellant has an objective dissatisfaction with his or her child's placement. Mr. Howard stated that in this case, there is no such objective dissatisfaction with placement.

Mr. Howard summarized the evidence of his witnesses. He reminded the Tribunal that Mr. Hopkins testified that the school is attempting to carry out the SEAB recommendations for assessment and monitoring. The child is in a Regular Class with a teacher and an SNA, who spends most of her time assisting the child. He also stressed the credibility of Mr. Hopkins, as a witness.

Mr. Howard also stated that the appellant had many opportunities, through the Notice of Appeal, the disclosure process, and during the hearing, to state the areas of her dissatisfaction with the child's placement, but she has not done so.

Mr. Howard quoted from an arbitration decision of *St. Joseph's Hospital and Ontario Public Services Employee Union and its local 206*, in 2005, in which it was determined that one party had done everything that the other party could expect to alleviate the first party's dissatisfaction. The Board of Arbitration determined that it was appropriate for it to exercise its discretion to

decline to hear the merits of the case. Hr. Howard stated that, similarly, the TDSB has done everything possible to alleviate the appellant's dissatisfaction and that, in fact, the child is in the Regular Class placement with the necessary supports that the appellant requested. Mr. Howard said, therefore, that the Tribunal should use its discretion and decline to accept jurisdiction of the appeal on the merits of the case.

### **Appellant's Evidence [responding to the jurisdiction motion]**

The appellant called no witnesses.

### **Appellant's documentary evidence**

- a) The IPRC placement decision of May 9, 2007, was "Special Education Class". The appellant signed the decision on May 11, 2007, adding the following statement: "This decision form is null and void without the addendum provided attached to it. I am appealing this decision."
- b) The IPRC decision dated and signed on May 30, 2007, on which the appellant wrote: "I am disappointed that the reconvened IPRC did not consider the importance of inclusion and the requirements of *Regulation 181/98* and the *OHRC Code*."
- c) The SEAB decision, dated September 25, 2007, stated the following: "Regarding the decision around [the child's] placement, the Special Education Appeal Board recommends in favour of [the appellant's] request that [the child] remain in a Regular Class placement with necessary support. This was a unanimous decision."
- d) A letter from Ms. Forbes to the appellant dated October 1, 2007, which described the process when the board receives the SEAB's decision and recommendations. It included a summary of the staff report going to the board and an invitation to the appellant to send her own report to the board, regarding the SEAB's decision. The appellant was concerned about the statement in this letter that "staff supports the recommended decision and recommendations of the SEAB because it will give staff time prior to [the child's] annual IPRC review to gather further documentation in the areas identified by the SEAB".
- e) An email from the appellant to Ms. Forbes, dated October 4, 2007, which expressed the appellant's concerns about the process and the board's lack of compliance with the *Regulation*.
- f) A letter from Ms. Forbes to the appellant, dated October 10, 2007, which provided further comments on the board's process in receiving the SEAB's decision.
- g) An email from the appellant to Ms. Forbes and other staff at the TDSB and the Ministry of Education, stating that she will not be submitting a report to the board when it considers the SEAB's decision, because this is not a mandated part of the process.
- h) A letter from the appellant to the trustees of the TDSB, dated October 18, 2007, expressing her concerns about the procedures of the board in dealing with the SEAB's decision and other related matters. In this letter the appellant stated that the "The SEAB decision is very clear, it states each party's position; it states the decision; it states the reasons for the decision; it states its recommendations. To provide an additional report to the Board could be considered to alter the intent of the Special Education Appeal Board."

i) A letter dated January 18, 2008, from Barry Finlay, Acting Director, Special Education Policy and Program Branch, Ministry of Education, to the appellant, in response to her letter of December 17, 2007, addressed to Bruce Drewett, regarding several due process concerns. Mr. Finlay clarified in his response that the Minister of Education does not directly provide education programs to students. Mr. Finlay also described briefly the duties and accountability of school boards in this regard. (Exhibit #11)

j) A letter from Dr. Linda Yolles, M.D., stating that because of her illness, the appellant should not be required to testify at a Tribunal hearing. (Exhibit #12)

### **Appellant's Arguments**

Ms. Schafer presented the appellant's arguments on jurisdiction. She stated that it is hard to focus exclusively on jurisdiction without straying into the merits of the case. However, she stated that she would try to do this (i.e., not talk about the merits of the case), in order to be fair.

Ms. Schafer stated that the Tribunal's role is set out by the statute, namely the *Education Act* and *Regulation 181/98*. She cited section 8 (3) of the *Act*, regarding the parental right of appeal and section 57 of the *Act* to address the statutory pre-requisites for launching an appeal. She stated that "[the appellant] will provide evidentiary support to indicate that the Tribunal does, in fact, have jurisdiction to hear the case regarding [the child's] placement". She went on to say that to prove that the Tribunal has no jurisdiction, the respondent must prove with evidentiary support that the appellant is satisfied with the placement decision.

Ms. Schafer spoke at length about the appellant's wishes for a Regular Class placement for the child and her dissatisfaction with the IPRC process and decision, which denied any satisfaction. She cited the earlier IPRC decision, which reported a Special Class placement for the child, when in fact the child was in the Regular Class in Grade 3.

Ms. Schafer confirmed that the SEAB unanimously overturned the IPRC decision, but went on to say that the SEAB did not discuss the details of "necessary supports". The program components for meeting the child's needs were presented to the SEAB by the appellant, but were not included in the SEAB's decision.

The TDSB confirmed the SEAB's placement decision, but again did not include the programming requirements that the parent views as essential to meet her child's needs. Ms. Schafer stated that since the SEAB's decision is not legally binding, the appellant felt that she had no option but to appeal to the Tribunal. Further, she said that the TDSB has not ensured implementation of the intent and meaning of this placement decision. Ms. Schafer further stated that the appellant felt that in the child's best interests and in the interests of natural justice, she had to look to the Tribunal to order the programs and services that the child needs.

Ms. Schafer went on to state the following: "The appeal was filed by [the appellant] in the best interests of her [child]. While the appeal relates to matters that are outside the jurisdiction of the Tribunal, [but] the appeal is within the jurisdiction of the Tribunal. The appeal was filed to achieve an appropriate program for [the child]. The appeal was filed in good faith. [The appellant] appealed to the Tribunal because her personal experiences with the TDSB and staff led her to believe that she had no alternative but to do so."

In her closing arguments, Ms. Schafer reiterated that "[the appellant] was dissatisfied with the placement decision of [her child] and was dissatisfied that she did not have procedural fairness

and due process throughout the IPRC and the appeal procedure. She was dissatisfied and that's a question of jurisdiction.”

### **Reasons for the Decision**

The Tribunal's authority is set out in section 57 of the *Education Act*.

The respondent argued that the Tribunal has no jurisdiction to hear the merits of the case and put forward three grounds to support this statement. Two of these grounds are (a) the apparent deficiency in the Notice of Appeal and (b) the request to declare the appeal moot. For the brief reasons that follow, the Tribunal does not consider either of these alleged grounds to be a basis for dismissal of the appeal.

Although the appellant's Notice of Appeal did not address the issue of the child's special education placement, the Tribunal believes that such an omission in the Notice of Appeal is not in itself an adequate reason for the Tribunal to determine that it has no jurisdiction.

Mr. Howard argued that since there is no dispute between the parties regarding the child's special education placement, therefore the Tribunal should declare the appeal to be moot. The term “moot” can mean a legal question or point that has not yet been determined by a court or one that is only of academic interest. While Mr. Howard did not specify the exact definition of the term in his motion, the Tribunal understood from his submissions that what he meant was that there is no question or point to be decided, because there is no disagreement. The Tribunal recognizes that there is an ongoing dispute between the parties on a number of matters, and therefore, the Tribunal is not prepared to dismiss the appeal on this basis.

The third ground put forward by Mr. Howard is related to the appellant's agreement with the SEAB's placement decision.

The Tribunal agrees that the appellant has exhausted all the rights of appeal available to her under Regulation 181/98. Therefore, the first statutory prerequisite set out in Section 57(3), is satisfied.

Section 57(3) of the *Education Act* sets out a second prerequisite regarding the parent's dissatisfaction. Mr. Howard argued that the appellant agreed to the placement for her child. The Tribunal carefully considered the oral and documentary evidence presented by the parties on this point and finds that the evidence shows that the appellant did, through her written words and her actions, agree with the placement of her child.

Evidence was provided to the Tribunal of the following facts:

a) The May 2007 IPRC decided to place the child in a Special Education placement. The appellant disagreed and appealed this decision to an SEAB.

b) The SEAB overturned the IPRC decision and decided unanimously as follows:

“Regarding the decision around [the child's] placement, the Special Education Appeal Board recommends in favour of [the appellant's] request that [the child] remain in a Regular Class placement, with necessary support.”

c) The staff of the school board, when submitting the SEAB's decision to the school board, endorsed this decision and recommended that the board accept the decision for implementation.

d) Before the board meeting convened to decide on the SEAB's decision, the appellant was invited to submit a report to the board. In her October 18, 2007, letter to the school board, the appellant wrote of the due process deficiencies that she saw in the school board's practices, but did not suggest that the board should overturn or in any way alter the SEAB's decision. There was no suggestion that she was dissatisfied with the SEAB's placement decision.

e) On October 24, 2007, the TDSB approved the SEAB's placement decision and recommendations for the child.

f) The appellant has appealed to the Tribunal, but gave no evidence to clarify the nature or extent of her dissatisfaction with the SEAB's and TDSB's decisions regarding the child's placement. She has not suggested what alternative placement she seeks for the child. Although in her opening comments, Ms. Schafer stated that "[the appellant] shall provide evidentiary support to indicate that the Tribunal does, in fact, have jurisdiction to hear the case regarding [the child's] placement", this did not happen. Her written statements and the arguments put forward by her representative all focused on her dissatisfaction with the board's procedures and on her wish to have the Tribunal carry out a "thorough independent review of the evidence".

g) In the disclosure materials submitted on February 5, 2008, the appellant stated that she is "in agreement with what is written as a placement decision, however, the written placement decision is not a reality." The Tribunal heard no evidence to clarify this statement, that is, what placement the appellant wanted other than the one confirmed by the TDSB on October 24, 2007.

h) Ms. Schafer stated, "The appellant was dissatisfied with the placement (because) she did not have procedural fairness and due process throughout the IPRC and the appeal procedure. She was dissatisfied and that's a question of jurisdiction." In her closing statement Ms. Schafer reiterated that placement cannot be separated from process.

Ms. Schafer's statement that "[The appellant] would not have appealed if she had not been dissatisfied" is not enough to give the Tribunal the requisite jurisdiction to hear the merits of this appeal of placement. The Tribunal heard that the appellant wants the school board to comply with the *Education Act* and the *Regulation*. Addressing that concern is not within the Tribunal's jurisdiction.

According to the written evidence presented to the Tribunal, the appellant wants the child to be in a Regular Class with support. The appellant also agreed to up to two hours a day withdrawal support. The SEAB's and TDSB's decisions confirmed this placement and the child's most recent IEP also lists Regular Class with support as the placement. It might have been helpful for the Tribunal to hear directly from the parent about her wishes regarding her child's placement and to clarify why she is appealing the placement that she apparently supports.

## **DECISION**

The motion is upheld. The Tribunal finds that it has no jurisdiction to hear the merits of the appeal of the special education placement for the child. The appellant has exhausted all rights of appeal under the *Regulations*. However, having stated that she is in agreement with the

placement decision made by the SEAB and confirmed by the TDSB, she has not met the statutory requirements of Section 57(3) of the *Education Act*, to prove that she is dissatisfied with the placement.

## COMMENTARY

The Tribunal receives its authority through the *Education Act*. This authority is limited to the identification and placement of exceptional pupils.

Placement, which is not defined in the *Education Act*, is often intertwined with programs and services. Therefore, when parents are in disagreement with either identification or placement, it is important that they state the grounds of disagreement clearly and specify the remedy that they are seeking. In *K & Simcoe County Board of Education* (cited by Mr. Howard), the Tribunal stated: "No evidence will be heard in regards to the conduct of the school board during the hearing of the appeal because the due process issue has no relevance to the identification or placement of the child. The hearing will deal solely with the issues of identification and placement."

The appellant stated that the grounds for her appeal relate to what she believes are breaches to the *Education Act* and the *Regulations* by the TDSB. She stated that the remedies that she is seeking are an order from the Tribunal to the school board to change its special education policies and procedures and to direct the Ministry of Education to monitor the school board's compliance with the legislation. The Tribunal cannot do that given its legislated mandate.

The purpose of special education in Ontario is to meet the identified strengths and needs of students with special needs and to provide them with appropriate special education programs, services and accommodations in the most enabling placement. The placement decision must always reflect the best interests of the student and consider parental wishes. The Tribunal hopes that if both parties continue to focus on the child and the child's best interests, the remaining differences will be resolved in a mutually satisfactory manner.

The Tribunal urges the parties to this dispute to consider exploring mediation or other forms of facilitated communication or dialogue to resolve their outstanding concerns.

The Tribunal did not hear evidence regarding the merits of the case and is, therefore, not able to express an opinion about the most appropriate placement, programming, services or accommodations for the child. In the submissions on behalf of the appellant, however, there was repeated reference to frustrations with her dealings with the school board. Some frustration was also evident in the board's evidence.

The Tribunal recommends that the upcoming IPRC review, in spring 2008, should focus on determining and very clearly communicating to the parties the details of the necessary supports that the child requires in order to be successful in his or her education.

Date May 3, 2008