



IN THE MATTER OF The Education Act, R.S.O. 1990, E2, As amended, 57 (3)
AND IN THE MATTER OF Ontario Regulation 181/98;
AND IN THE MATTER OF the minor child, born 1992.

Between

R. - Appellant

And

The Durham District School Board - Respondent

Tribunal Members:

Paula Barber	Chair
Ann Fudge	Member
Donna Gracey	Member

For the Appellant

R	Parent on behalf of child
MT	Advocate on behalf of child

For the Respondent

Brenda Bowlby,	Counsel for the Durham District School Board
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Tribunal Staff:

Bill Wyman, Secretary to the Tribunal
Stephen Kelly, Policy Analyst, Ministry of Education

The Preliminary Hearing on Jurisdiction was conducted by audio conference on April 6, 2004.

Introduction

At the opening of the Hearing, the Chair stated that this Tribunal would be guided by the *Education Act* R.S.O. 1990, c. E. 2, as amended, section 57, the regulations made there under, and the *Statutory Power Procedures Act*.

The Tribunal scheduled this Hearing to determine the matter of jurisdiction.

Legal Framework

The *Education Act*, Subsection 8 (3) reads, 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.

The *Education Act* Subsection 57 (3) Right of Appeal reads, Where a parent or guardian of a pupil has exhausted all rights of appeal under the regulations in respect of the identification or placement of the pupil as an exceptional pupil and is dissatisfied with the decision in respect of the identification or placement, the parent or guardian may appeal to a Special Education Tribunal for a hearing in respect of the identification or placement.

Regulation 181/98: Identification and Placement of Exceptional Pupils made under the *Education Act*, governs the identification and placement of exceptional pupils, IPRC reviews, appeal procedures and the role of parents/guardians in these proceedings.

Previous Tribunal Decision Referenced

C v. Dufferin-Peel Catholic District School Board, September 18, 2003. (unreported)

C v. Simcoe County District School Board, September 15, 2003. (unreported)

D v. Toronto District School Board, December 24, 2002. (unreported)

D v. Windsor- Essex Catholic District School Board, September 30, 2003. (unreported)

H v. Halton District School Board, February 12, 2004. (unreported)

Issue

Counsel for the Durham District School Board (DDSB) raised a preliminary question about the Tribunal's jurisdiction to hear the parents' appeal. The DDSB based its position on two arguments:

1. The parents, at the Special Education Appeal Board Hearing (SEAB), stated that they wanted a Special Class with Partial Integration, not the Special Class placement that the Board determined.
2. The DDSB stated at the SEAB Hearing that it would change the placement to Special Class Placement with Partial Integration.

The Board therefore argued that the issue is moot and that the Tribunal should not proceed to hear the appeal.

The Durham District School Board's Position

1. The position of the DDSB is that the appeal is moot. During the Special Education Appeal Board Hearing on October 14, 2003, the parents advised the Board that the placement that they wanted for the child was Special Education Class with Partial Integration. The parents' request was reflected in the recommendations that the Special Education Appeal Board made and gave to the DDSB. Upon receiving the recommendations of the Special Education Appeal Board, the DDSB unanimously endorsed the SEAB's recommendations.
2. The Director of Education, C. Burch, wrote to the parent on January 5, 2004 to convene another IPRC meeting to facilitate the SEAB's recommendations. R, the parent, was contacted by the Principal, but indicated in a letter dated January 16, 2004, that she would not attend the meeting. A second invitation was issued on February 10, 2004, and again the parents declined to attend. The parents stated that they would not attend the Identification, Placement and Review Committee (IPRC) meetings because they had requested a Special Education Tribunal Hearing and the meetings with the school staff would not be necessary.

Arguments

1. R., the parent and appellant, stated that the parents were not given all of the information necessary to make an informed decision concerning their child's placement. However, Ms. Bowlby pointed out that the child had been placed in associated classes before, and the parents were aware of the program in those classes. She also provided documentation (the draft and the final versions of the October, 2003 Individual Education Plan) that indicated that the child's parents had input into both program and placement decisions.
2. In summary, Ms. Bowlby, on behalf of the DDSB, stated that the Tribunal does not have jurisdiction over the matter because the parents have been offered the placement that they are seeking. She argued that the Tribunal should not proceed to hear the matter because at the Special Education Appeal Board

hearing the parents indicated that they wanted more integration for the child and that they wanted a Special Class Placement with Partial Integration. In her submission, Ms. Bowlby stated that the DDSB has in fact offered the parent the placement that she is seeking for the child, has held an IPRC to implement that placement, but that the parent has refused to come to a meeting with the school staff to allow the staff to implement the placement. Therefore, since the Board has offered the placement the parents are requesting, the appeal to a Special Education Tribunal is moot and the Tribunal should not hear the parents' appeal.

Parent's Position

1. The parent has requested the appeal be heard by the Special Education Tribunal because the placement proposed is not described in sufficient detail for the parents to make an informed decision regarding the appropriateness of the placement to meet the child's needs.
2. She provided some background information on the placement issue. The child has been a student in the Durham District School Board (DDSB) since September 1997. At that time, the child was four years and eleven months old and identified as exceptional and placed in a primary associated class at a Durham Public School. From September 1998 to 1999 the placement remained the same. In the school years 1999 through 2002, the child was placed in a Sensory Associated Class at a different Public School. Some integration occurred in this special class placement. In addition to the IPRC decision under dispute, the parent entered into evidence IEPs (Individual Education Plans), and correspondence between her and officials with the Durham District School Board.
3. On April 8, 2002 an IPRC was held and the parent agreed to a change of placement to a Junior Intermediate Associated Class at another Public School. According to the parent, she was not told that this placement was a full-time special education class. At the beginning of the year the child's placement did not include any integration with the child's mainstream peers. The parent requested integration into Music and Gym classes. The Principal agreed to integration with the Grade 5/6 class one day a week. In Sept. 2003, the child's placement did not include any integration with mainstream peers. In the Individual Education Plan (IEP) dated Oct. 14, 2003 only recess and community outings were indicated. The parent's requests for other integration opportunities were ignored. In November 2003, the parent's request to have the child integrated into a mainstream class for one period each day was refused.
4. The parent explained that integration into a mainstream Gym and Music class recently started to happen, coinciding with this impending Tribunal hearing. The details of this integration were not discussed with her, so she has no idea about

its frequency or how much support is being provided. Although the child's placement is supposed to include integration opportunities such as community outings with the child's mainstream peers, this has not occurred.

5. The parent stated that at an IPRC meeting of May 28, 2003, the IPRC did not consider the range of placement options, services, and supports that would better suit the child's needs. She was not provided with a copy of the Board's *Parents Guide to Special Education* or any other information prior to or at the meeting. She stated that at the end of the meeting, the program's facilitator stated that the IPRC decision was that the present placement was appropriate and should be continued. This placement, in Exhibit A, read "special education class full time". The parent asked to take the document home to discuss it with her husband because this was the first time that special education class full time was mentioned for her child. On June 13, 2003 the parent provided written notice to the School Board of her intention to appeal the IPRC decision. In her letter to Mr. C. Burch, Director of Education, the parent stated that she was concerned that the DDSB's Appeal Board member would not be available until September 2, 2003. In her response to a letter from Mr. D. McLean she reiterated her request for the immediate establishment of the SEAB according to Ministry guidelines.

In a letter dated October 1, 2003, the parent gave Mr. B. Wyman, Secretary to the Tribunal, permission to contact the DDSB regarding the immediate establishment of a SEAB. The DDSB selected a chairperson who would not be available within the 30-day timeframe so the parent requested that the DDSB select a chairperson that would be available within the timeframe. The Chair was ultimately selected and the Special Education Appeal Board Hearing was held on November 28, 2003.

6. At the Appeal Board Hearing of November 28, 2003, the parent stated that since she had been told in a previous meeting with the Principal that it would be difficult to accommodate the child in a mainstream class for one period each day, she [the Principal] had refused to discuss this further, therefore the parent believed that she needed sufficient detail about the recommended special education programs, services, and supports in order to agree to the placement proposed for the child.
7. Following the Appeal Board decision letter of January 5, 2004, which supported the parent's request for a Special Education Class with Partial Integration, and the DDSB's unanimous vote to adopt the Appeal Board's recommendations, the parent received a letter inviting her to an IPRC meeting to change the child's placement. The parent wrote to Mr. Wyman on January 16, 2004 requesting an appeal to the Special Education Tribunal regarding the placement of her child. The parent received a letter from the Principal on January 19, 2004 stating that

an IPRC review was scheduled for February 4, 2004 at 1:00 pm. On January 26, 2004 the parent wrote to the Principal that a second meeting would not be necessary and that she had forwarded a letter to the Special Education Tribunal with notice that she is appealing the IPRC decision and the subsequent SEAB decision to a Special Education Tribunal.

8. Again, on February 10, 2004 the parent stated that she was notified that the IPRC review would be taking place on February 25, 2004 and that she was invited to attend. The parent responded by e-mail on February 17, 2004 that, in her opinion, the IPRC meeting was not necessary. In the same e-mail she requested the rationale on why the child was not included in the Junior Division excursions and what accommodations would be made to ensure that the child had the same opportunities for participation as [the child's] non-disabled peers. She also asked if the DDSB would honour, in writing, her request to not put the child's harness on while the child is participating in such excursions, out of respect for the child's dignity. She asked what supports would be provided to ensure the child's safety. The parent stated again in the e-mail that she was appealing the IPRC decision of May 28, 2003 and the subsequent SEAB decision of January 5, 2004 to the Ontario Special Education Tribunal.

The parent stated that she hopes that at the end of this hearing the Tribunal will find that it has jurisdiction to hear her appeal on behalf of the child.

Preliminary Matter

At the beginning of the Hearing, MT, advocate for the family, expressed his concern that counsel for the Board sent more than the 30 pages that the Secretary to the Tribunal said could be faxed. The parent had additional material that she would have sent had she not limited herself to 30 pages. The Appellant asked the Tribunal not to allow any additional pages from the Respondent that were not sent to her, and to rule in favour of receiving her four additional pages.

The Tribunal determined that it would receive any additional documents from the parent and explained to both parties that the 30-page limit for faxes occurs when there is an electronic hearing that finds parties and Tribunal members in many locations throughout the province, making it difficult for the staff of the Tribunal to fax large quantities of paper in a timely manner. There is no restriction on the amount of material that would be presented at a "live" hearing and therefore the Tribunal stated that it would accept any additional information that either party wanted to send and affirmed that both parties would receive this information as well as Tribunal members. Additional materials sent to the Tribunal and the parties would be read after the teleconference and before the Tribunal convened to make its decision.

Reasons for the Decision

1. The Tribunal accepts the Board's argument that there is no reason for the Special Education Tribunal to hear the appeal. The parent has requested a Special Education Class with Partial Integration placement, and the Board has agreed that this is an appropriate placement and is prepared to place the child in that setting.
2. The Board made several requests to have the parents meet to formally change the child's placement from the Special Class placement and to begin the process to place the child in the placement requested, but the parents would not meet with the Board officials to discuss that new placement and make the arrangements for the child to attend this placement.
3. Although the parents were correct in believing that a request for a Special Education Tribunal requires a "stay of placement" for the child until the Tribunal renders its decision, that is the child would remain in the placement that was in effect at the time the appeal was initiated, there is no "stay" of the IPRC meeting to make the necessary arrangements so that the placement requested by the parent would begin. As pointed out by Ms. Bowlby, despite another proceeding regarding an appeal, it is expected that IPRC meetings will continue to be held to allow adults to respond to the changing needs of a child.
4. There was ample evidence of reciprocal communication between the parents and the Board in previous IPRC meetings and IEP meetings in which the parents' requests were acknowledged and subsequent changes made to the child's program plan (IEP). As well, there was evidence that suggestions by the parents were acknowledged at IPRC meetings. The last IPRC meeting lasted an hour, indicating that there was a discussion of the child's needs and current placement. The Tribunal found no evidence or reason to think that when an IPRC meeting is held to explain the details of the proposed placement that both parties have already agreed upon, that there would be insufficient information for the parents to make an informed decision. Previous IEP's were well detailed and the needs had been identified on the IPRC form. Therefore the Tribunal rejects the parent's argument that this was a similar case to *D. v. Toronto District School Board*, December 24, 2002 (unreported) in which the Tribunal granted the parent the right to appeal to a Special Education Tribunal because there was not sufficient information about the proposed placement to make an informed decision about the placement recommended for their child.
5. With reference to *D v. the Windsor-Essex Catholic District School Board*, September 30, 2003 (unreported) the Tribunal believes that is a different situation in that these parents were aware of the resources available in the placement that the child is currently in, and that the IEP adequately described

that program in enough detail for the parents to understand if the program was meeting the child's needs.

6. In reference to the case law cited by the Board's counsel, supporting the Board's arguments regarding jurisdiction, the Tribunal accepted the Board's arguments that there were similarities to *C v. Dufferin-Peel Catholic District School Board*, September 18, 2003 (unreported) in which the Tribunal found in that Tribunal hearing that there was an adequate description of the current placement and that a parent could make an informed decision based on the information provided by the Board at the IPRC meeting and through other methods, such as the development of the IEP.
7. With respect to the arguments put forward by the parent stating that the Board has not followed timelines, the Tribunal does not accept that the arguments put forward by the parent regarding timelines are within the jurisdiction of the Tribunal. The issue of timelines in this Tribunal is not relevant to the decision that the Tribunal was asked to make - whether the Tribunal has jurisdiction to hear the appeal of the appropriateness of the placement for the child.
8. Regarding the reference to the meaning of "day" and "school day" which arose in the context of the parent's concern about SEAB not meeting in the summer months, the Tribunal in *H. v. Halton District School Board*, February 12, 2004 (unreported), noted,

Although the Education Act and Regulations relating to Special Education do not specifically define "day", when another description of day is mentioned in the Regulations, a descriptor of the "day" is used. For example, in Reg. 181, 6. (8),

'Within 30 school days after placement of a pupil in a program, the principal shall ensure that the plan is completed....

And

7. (7) Within 30 school days of an implementation of a change in placement or, where the placement is confirmed, within 30 school days or receiving the notice under subsection (1), the principal shall ensure that...

And

With reference to the use of "school holiday",

'Where the time limited by this Regulation for doing anything expires or falls on a school holiday within the meaning of Regulation 304 of the Revised Regulations of Ontario, 1990, the time so limited extends to

and the thing may be done on the next day following that is not a school holiday.'

It is the opinion of the Tribunal that when the Ministry does not specify whether it is a "school day" or a "school holiday" that "day" means a regular day and that the timelines referred to in Regulation 181 must be adhered to using the common understanding of "day", not "school day", as Mr. Keel and Ms. Tymochenko argued.

Section 2 of Regulation 181 makes it clear that school holidays as defined under Regulation 304 are only relevant where the time allowed for a step expires on a school holiday, at which point the expiration date becomes the next day following that is not a school holiday expressed its opinion that the meaning of "day" in Regulation 181 means "regular" or 'calendar " day unless the Regulation states "professional development day", "holiday" or "'school day" as it does when it refers to the length of time a Board has to complete an IEP .

9. Nevertheless the date of the SEAB hearing in this case had no bearing on the decision from this Tribunal. This Tribunal is rejecting the family's request to hear the appeal due to the communication that the Board has offered the parents the placement that they want for their child, and the Board intends to explain the details to the parents whenever the parents agree to meet with school officials.
10. From the evidence presented, the Tribunal believes that the Durham District School Board has taken appropriate actions to try to resolve this situation without a Tribunal hearing and that it will continue to have considerable discussion at the IPRC meeting with the family so that the family is aware of the services and resources available in the proposed placement, Special Class with Partial Integration. With the communication that existed prior to the start of this appeal process, the Tribunal is of the opinion that the Board will continue to provide the parents with adequate information so that the parents can discuss the child's needs and the relevant special education services and programs before coming to a decision about placement in future years.

Decision

The Tribunal declines jurisdiction to hear the appeal, as the issue is moot.

On behalf of the Tribunal,

Paula Barber, Chair
May 19, 2004