



ONTARIO SPECIAL EDUCATION (ENGLISH) TRIBUNAL

File No. 2008-02

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 1997

BETWEEN

Ms. W. F., Appellant

-and-

The Ottawa Catholic School Board, Respondent

Tribunal Members:

| | |
|---------------|--------|
| Eva Nichols | Chair |
| Janice Leroux | Member |
| Noel Williams | Member |

Appearances:

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| W. F. | Parent |
| Paul Marshall | Counsel for the Ottawa Catholic School Board (OCSB) |
| Simone Oliver | Superintendent of Student Services and Special Education, OCSB |
| Louise Sibbald | Secretary |

The hearing on the matter of jurisdiction was held on April 22, 2008 in Ottawa, Ontario.

INTRODUCTION

The appellant appealed the placement of her child to the Ontario Special Education (English) Tribunal on January 17, 2008. The child is ten years old and is identified as an exceptional pupil by the school board. The child's identification, which is not in dispute, is Multiple: Communication – Learning Disability and Intellectual -- Giftedness. The child is currently enrolled in French Immersion at a Catholic Elementary School within the Ottawa Catholic School Board (OCSB). The Identification Placement and Review Committee (IPRC) decision under appeal was issued on October 1, 2007. The parent appealed this decision to a Special Education Appeal Board (SEAB) and declined to participate in a reconvened second IPRC. The SEAB met on December 13, 2007 and issued its written recommendations on December 17, 2007. The SEAB upheld the IPRC's placement decision for the child, which was Regular Class with Withdrawal Assistance. The OCSB's trustees met and considered the SEAB's recommendations on January 22, 2008. The trustees endorsed the SEAB's recommendations and issued their decision in a letter addressed to the appellant on January 25, 2008.

The OCSB questioned the Tribunal's authority to hear the case and introduced a multi-part motion seeking an order dismissing the appeal.

The Tribunal met on April 22, 2008, to hear the OCSB's motion for dismissal.

On April 30, 2008, the Tribunal rendered an interim decision, in accordance with the agreement made during the initial teleconference.

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 57 (3): Right of appeal:

Where a parent or guardian of a pupil has exhausted all rights of appeal under the regulations in respect of the identification or placement of the pupil as an exceptional pupil and is dissatisfied with the decision in respect of the identification or placement, the parent or guardian may appeal to a Special Education Tribunal for a hearing in respect of the identification or placement.

Subsection 57 (4): Hearing by Special Education Tribunal:

The Special Education Tribunal shall hear the appeal and may,

- (a) dismiss the appeal; or
- (b) grant the appeal and make such order as it considers necessary with respect to the identification or placement.

Subsection 57 (5): Decision final:

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

Regulation 181/98

Regulation 181/98: Identification and Placement of Exceptional Pupils governs the identification and placement of exceptional pupils; IPRC reviews; appeal procedures; and the role of parents and guardians in these proceedings. This *Regulation* provides a mechanism for parents to appeal the identification and placement decisions of an IPRC to a 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*.

The sections of the *Regulation* cited and relevant to this appeal are as follows:

Part II: Establishment of Committees and Committee Procedures

11. (1) A board shall appoint three or more persons to each committee that it establishes.

12. (1) A board may establish procedures for committees in addition to those set out in this Regulation.

12. (2) Committee decisions made under this Regulation must be consistent with the board's special education plan.

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.

Special Education Tribunal Cases Cited

- B & North York Board of Education, 1984
- R & Carleton Roman Catholic Separate School Board, 1988
- D & Toronto District School Board, 2001
- A & Halton District School Board, 2002
- Y & XX District School Board, 2002
- B & Upper Canada District School Board, 2003
- L & Conseil des écoles catholiques de langue française du Centre-Est de l'Ontario, 2004
- R & Durham District School Board, 2004
- T & Simcoe County District School Board, 2004
- T & Toronto District School Board, 2006
- C & Durham District School Board, 2006
- I & Toronto District School Board, 2006

ISSUES

The issue before the Tribunal was whether the Tribunal has jurisdiction to hear the merits of the appeal of the child's placement. The OCSB raised the jurisdiction issue in its Response to a Notice of Appeal and introduced a motion for the Tribunal to dismiss the appeal. The grounds for this motion are included below in the respondent's position.

The appellant identified a number of other issues during the initial teleconference. These were:

- (i) The child's identification is not in dispute. Does the board agree that the child's identification is appropriate?
- (ii) Does the board agree that the child is in French Immersion and that this placement is not in question?
- (iii) Does the board agree that the child attends the board's Program for Gifted Learners (PGL) and that the board does not contest this placement?

At the start of the hearing, the appellant informed the Tribunal that these questions had been answered in the board's affidavit, disclosed before the hearing, and were no longer in contention.

Therefore, the Tribunal focused exclusively on the OCSB's jurisdiction motion.

In support of its motion, the school board filed an affidavit and called one witness. The appellant who was not represented at the hearing gave evidence on her own behalf.

THE POSITIONS OF THE PARTIES

Respondent

Mr. Paul Marshall, counsel for the OCSB, presented the Board's position on jurisdiction. Mr. Marshall introduced a motion for an order to dismiss the appeal without a hearing, on the following grounds:

1. Section 57 (3) and 57 (4) of the *Education Act*, as amended;
2. Rules 6.1, 10, 17 of the *Rules of Procedure* of the Tribunal;

3. Section 4.6 of the *Statutory Powers Procedure Act*, as amended;
4. The appellant failed to exhaust all rights of appeal as provided in Ontario *Reg. 181/98* as the appeal was filed before the OCSB had made its decision regarding the child's placement and this procedural error cannot be corrected because the Tribunal lacks jurisdiction pursuant to s.57 (3) of the *Education Act*;
5. The appellant is not dissatisfied with the decision with respect to placement, having confirmed her agreement with the recommendation of placement by the Special Education Appeal Board. By the appellant's own conduct she demonstrated that she was not dissatisfied with the decision and recommendations regarding placement;
6. The appellant is confusing placement with learning styles, staffing and other matters that are not within the jurisdiction of the Tribunal and are within the exclusive jurisdiction of the school board;
7. The appeal is frivolous, vexatious or commenced in bad faith.

In addition, the respondent stated that the appellant's Notice of Appeal was deficient, inasmuch that it did not set out the grounds for the appeal adequately. Therefore, the OCSB's position is that "the appeal is moot because the placement is there, it is in place and it is working".

Appellant

The appellant represented herself at the hearing. Although this was a hearing on jurisdiction, much of the appellant's evidence focused on the merits of the case. The appellant contested the OCSB's position that she had not exhausted her rights of appeal when she appealed to the Tribunal. She also disagreed with the school board's statement that she in any way confirmed her agreement with the recommendations of the SEAB in her actions and in her letter written to the trustees of the OCSB on January 17, 2008.

The appellant confirmed that she agreed with the recommendations of the December 13, 2007 SEAB meeting, but stated that the programs and services her child has received since that time do not meet the child's needs and the SEAB's recommendations are not being respected, addressed or provided by the school or the board. She also stated that the OCSB's range of special education placements, identified in their Special Education Plan, is limited and does not meet the child's needs.

The remedy sought by the appellant is that the Tribunal order the board to create or purchase a placement to meet the child's needs.

SUMMARY OF EVIDENCE

Respondent's Evidence

In support of the board's motion to dismiss the appeal, Mr. Marshall relied primarily on the sworn affidavit of Ms. Simone Oliver, dated March 28, 2008. Since the affidavit had been disclosed to the appellant before the hearing, Mr. Marshall asked a few clarifying questions of Ms. Oliver before the appellant began to cross-examine Ms. Oliver.

Ms. Oliver testified that she was a supervisory officer with the OCSB and had held the position of Superintendent of Special Education and Services since November 1, 2007. Before this, she had been the school board's centrally assigned principal for special education. In response to Mr. Marshall's question, Ms. Oliver stated that she is qualified and knowledgeable about special education in Ontario and in particular within the OCSB.

In her affidavit, Ms. Oliver addressed the issue of the appellant's apparent dissatisfaction with the child's placement. Ms. Oliver described that the appellant's appeal is based on the IPRC placement decision dated October 1, 2007. At the time of the IPRC, the child was registered in Grade 5 at an Elementary School. Mrs. Oliver pointed out that the appellant's Notice of Appeal did not allege that the placement does not meet the child's needs, and that the appellant has not since provided an explanation or the grounds in support of her supposed dissatisfaction.

Ms. Oliver testified in the affidavit that before the SEAB meeting she suggested to the appellant that they [the appellant and Ms. Oliver] should meet with the school's acting principal to discuss the dissatisfaction the appellant had expressed regarding the child's placement. This meeting could have been considered a reconvened IPRC. Ms. Oliver testified that the appellant did not accept this invitation and that the appellant told her that the reason was that she felt that the proposed meeting would have a limited agenda and would not be necessary or useful.

Ms. Oliver stated that the board is perplexed by the appellant's appeal, because the child's placement has been consistent since the child's initial IPRC in June 2006. Ms. Oliver stated that the board has described the child's needs in great detail in the Individual Education Plan (IEP), which has been the subject of regular and ongoing consultation with the parent and stressed that the child's placement continues to meet the child's needs.

The affidavit addressed at length the process whereby the SEAB met and considered the appeal. Ms. Oliver pointed out that the appellant, after receiving the SEAB's recommendation dated December 17, 2007, and without discussing the matter with school personnel, withdrew the child from [the child's school] and went to [the previous school] to re-register the child in the French immersion program. Ms. Oliver stated that she and the board had deduced from this step that the appellant was in agreement with the SEAB's recommendations. Ms. Oliver stressed that the appellant's actions, coupled with the contents of her letter sent to the OCSB's chair, dated January 17, 2008, made it very clear that the appellant had no real disagreement with the SEAB's recommendations. The letter from the appellant contained the following statement:

"Mr. Clarke's decision was submitted December 17. Although limited in his authority, he made a number of recommendations that were in [my child's] best interests and for the most part common sense. I immediately demonstrated my respect for the effort of the SEAB board and the special education process by cooperating fully in moving forward with the SEAB directive, and so that the board/school could achieve success in their efforts to implement services for [my child]."

During cross-examination, the appellant's questions to Ms. Oliver focused on many issues that were not relevant to the matter of jurisdiction. She also questioned Ms. Oliver at length about her interpretation and the OCSB's implementation of "inclusion". The Tribunal did not focus on these matters when making its decision on the jurisdiction motion before it.

When responding to the appellant's questions, Ms. Oliver attempted to clarify certain contentious items. These included the following, which are relevant to the jurisdiction issue:

- i) In response to the appellant's statement that the committee members and placement decision of the June 13, 2006 and September 2006 IPRC were not the same, Ms. Oliver clarified that the committee members had not changed, the description of the child's strengths and needs were the same and the identification was the same. The only item that had changed was "Resource with Withdrawal" which was changed to the correct language used in the OCSB's Special Education Plan, which was "Withdrawal Assistance".
- ii) The appellant asked several questions about the child's return to [the previous school] before the Christmas break. She asked Ms. Oliver whether anyone from the school

board had contacted her during that period. Ms. Oliver confirmed that she had not been contacted during that period and went on to explain that the school board received the SEAB report on December 17, 2007. Schools were then closed for two weeks, but that, just as importantly, the letter containing the SEAB recommendations had not yet been received and considered by the OCSB. Therefore, the SEAB's recommendations had no official status and could not be implemented. That did not prevent staff of the board from giving ongoing support to students, but they could not officially act on the recommendations, until they were formally informed of the board's decision. Ms. Oliver explained her view that in deferring contact with the appellant under these circumstances, the board was correctly following section 30 of Regulation 181/98 of the *Education Act*.

At the end of Ms. Oliver's cross-examination, the appellant said that she had asked all the questions that she did, and touched on the merits of the case in order to obtain a better understanding of her child's needs.

Respondent's Arguments

In his submissions, Mr. Marshall addressed the contents of the appellant's Exhibit #6 – Placement Needs. This document consists of eleven items that the appellant identified as being necessary to meet the child's needs. Mr. Marshall pointed out that, although the child already has access to most of these in the current placement, they cannot be incorporated in their entirety into a regular classroom. He stated that Withdrawal Assistance is a necessary part of providing appropriate special education programs and services to exceptional students and this is what the board has undertaken to meet the child's needs. Further, he stressed that the appellant had endorsed the provision of Withdrawal programming to meet the child's needs as a gifted student by agreeing to the child's participation in the PGL.

Mr. Marshall stressed that one of the issues that was brought forward in Ms. Oliver's evidence, and confirmed by the appellant in her evidence, was that much of the grievance that precipitated this appeal dealt with learning styles, teaching methods and staffing. Such matters are not within the Tribunal's jurisdiction.

Mr. Marshall further pointed out that the appellant was satisfied with the services provided, but she was not satisfied with the location where or by whom they are being provided. He described her conduct as "not in keeping with those of a person [who] is dissatisfied with the placement, as required under section 57 of the Education Act".

With respect to the appellant's submission that the board did not follow timelines set out in the Regulations during the Christmas Break period of 2007, Mr. Marshall argued that the board had met the applicable timelines and pointed out that Regulation 304 of the Education Act, as amended, exempts school holidays including the Christmas Break from the computation of days.

The respondent stated that the board was prepared to listen to and accept any representations by the parent. As such, the OCSB's process is completely compliant with Regulation 181/98 as well as the rules of procedural fairness and natural justice.

The respondent further stated that the parent has not exhausted all rights of appeal under the regulation, as required by section 57(3) of the Education Act and, therefore, the appeal must be dismissed.

Appellant's Evidence and Arguments

The appellant presented her own arguments and acted as her own witness, giving her evidence under oath.

The appellant entered into evidence her point-by-point response to Ms. Simone's 57-point affidavit. This document had been disclosed before the hearing, but was not a sworn affidavit. As the appellant gave her oral evidence, she rarely referred to the contents of this document. Instead, she entered into evidence and spoke about the following exhibits:

- a) the first page of the child's IEP from the Grade 3 year which listed the child's assessment data;
- b) a contact note from the OCSB's psychological services covering the discussion during the October 1, 2007 IPRC review, which is under appeal;
- c) a number of partial speech and language assessments from 2003 and 2005; and
- d) a one page document, titled Placement Needs, which she presented to the SEAB on December 13, 2007.

The appellant began by telling the Tribunal about her child, the child's early history, the child's strengths as a gifted learner and the child's many difficulties relating to [having] learning disabilities, hearing impairment, the child's difficulties with sensory integration (crossing the midline) and the problems that the child has in an educational system that primarily teaches children in an auditory or Socratic way. The appellant acknowledged that this was a jurisdiction hearing, but in spite of that, her evidence primarily focused on the merits of the case.

The appellant described at length the difficulties that the child had in school up to and during Grade 3, when the teacher suggested that the child be assessed, because [he believed] that the child appeared to be developmentally delayed. It was after that assessment that the child was first identified as an exceptional student with Multiple as the exceptionality designation. The first IPRC determined that the child's Multiple designation consisted of Communication – Learning Disability and Intellectual – Giftedness. The child's placement was Regular Class with Withdrawal Assistance, which the appellant supported.

The appellant testified that at the child's former school, the child was placed in a regular French Immersion class, received Withdrawal Assistance from the former vice-principal, and went to the PGL one day a week. The appellant confirmed in her testimony that she had supported this arrangement.

The appellant described in her evidence that when the vice-principal who had been providing Resource Assistance on a withdrawal basis to the child changed schools, the appellant asked, in response to the vice-principal's invitation to do so, to transfer the child to [another school], with the understanding that the same placement and Withdrawal Program arrangement would continue. The appellant testified that on May 15, 2007, she attended an IPRC review with the school's principal and vice-principal. The IPRC decision form confirmed the child's identification and placement, specifying that the Withdrawal Program starting in September 2007 would be at [the other] Elementary School and would be provided by the vice-principal who was going to transfer to [that same school] in September 2007. The appellant agreed to this IPRC decision on May 15, 2007.

Once the 2007-08 school year began with the child now located at [the new school], the appellant testified that she was no longer satisfied with the programming and Resource Withdrawal Assistance provided to the child. The appellant testified that it was at this time that she was told that the May meeting had not been a proper IPRC review and that the decision made at that meeting had no validity for the child programming at [the child's current school].

The appellant requested an IPRC, which was held on October 1, 2007.

The appellant described in her evidence that she was told that "services and programming to support the placement " of her child were not going to be discussed at this IPRC. As a result, immediately after the IPRC, she spoke with the acting principal, stressing that she was not satisfied because "things were removed and no programming or services put in place to replace what had been removed." She went on to emphasize that her expectations had not been met and the child had not received the programming that she had been promised. She testified that the child was unhappy and failing math and did not want to go to school.

The appellant clarified that she did not sign the IPRC decision form for the October 1, 2007 IPRC because the placement description was different from the previous IPRC document she signed on May 15, 2007. She stressed, that "the form was not signed because the services that were promised were not provided."

The appellant described in her evidence that on October 12, 2007, she served notice that she was appealing the IPRC decision to the SEAB and described her experiences with the SEAB as essentially positive.

The appellant testified that, after she received the written decision of the SEAB on December 17, 2007, and before the OCSB had considered the SEAB recommendations, she decided to return the child to [the former school]. She confirmed that the SEAB recommendations were in her child's "best interests", and made "common sense". She also said "the recommendations were so general that what I wanted (for the child) could have come out of the discussion." The appellant stressed that she wanted her child back "with the child's friends" and in a "class being enriched for what the child is gifted in and being remediated or having differentiated programming for what the child is falling behind in."

The appellant described at some length the child's experiences in the current placement, what the appellant believes is missing in this placement and what the ideal placement, which would meet the child's needs and enable the child to reach the child's potential, would look like. She testified that describing the ideal placement that the child needs and deserves was the purpose of the document (Placement Needs) that she presented to the SEAB in December.

On cross-examination, the appellant, still under oath, described her concerns about the inadequacy of the special education qualifications and skills of the teachers who work with the child. She testified about her discussions with board personnel about private schools, and about the fact that she does not believe that the OCSB has a placement that fits the child's multiple complex special education needs. When Mr. Marshall asked what that ideal placement would look like, the appellant described a small class size, no more than 15 students, all of whom would have an exceptional learner profile similar to the child's, teachers with appropriate special education qualifications in both learning disabilities and giftedness, and in-class resource supports in a classroom of the child's peers, where the staff would have adequate time to offer the child one on one support.

The appellant agreed that she supported the child's placement of Regular Class with Withdrawal Support, as described on the earlier IPRC forms, but that she appealed the most recent one because the child was not receiving the programs and services that the appellant had been

promised in that placement.

In response to a question from the Tribunal, the appellant clarified her position that, although the child needs to be withdrawn to meet the child's gifted needs in the PGL, she does not want the child to be withdrawn for the other exceptionalities. The appellant went on to state that if the child were in a small class where the teachers were properly qualified and "had more time and devoted half the programming to enriching the child's gifted needs, then [maybe] the child would not have to go to PGL".

In her closing statement, the appellant addressed the OCSB's argument that she had not exhausted her rights of appeal.

The appellant submitted that she decided to appeal to the Tribunal because the child needed programming and services and had gone all these months without any programming or services to support the child's placement. She stated that she had written to the board to say that nothing that the SEAB had recommended had been put in place for the child and that was why the appellant had decided to appeal to the Tribunal. She further emphasized that she had been led to believe by board staff that the SEAB recommendations were not going to be accepted and in any case she had not received a decision. She argued that nothing had happened and therefore, she had no option but to appeal to the Tribunal. She concluded her arguments with the following: "*So I mean, to go back and to say what would happen if I would have known beforehand, if they would have met and talked and we would have come to an agreement, really no one knows for sure what would have happened, but for sure at this point [my child] is not receiving programming and services, [my child] is not receiving a special education placement, [my child's] not receiving an education, and I am dissatisfied.*"

REASONS

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

1. Regarding the board's position that the appeal should be dismissed on the basis of deficiencies in the appellant's Notice of Appeal, the Tribunal rules that such deficiencies are not sufficient to deprive the Tribunal of jurisdiction to hear the appeal.
2. The respondent cited section 57 (3) and the Tribunal's *Rule 6.1* to state that the appellant had not exhausted her rights of appeal before initiating an appeal to the Tribunal. The rationale for this was the fact that the appellant filed her Notice of Appeal before the OCSB had considered and made a decision on the recommendations of the SEAB. The OCSB's decision was communicated to the appellant on January 25, 2008, while the Notice of Appeal to the Tribunal was dated January 17, 2008.

The appellant testified that she had been led to believe that the school board was not going to support the SEAB's decision and that she had no idea as to whether the board was going to support the SEAB's recommendations. The respondent is technically correct when he states that the parent failed to take into account that *Regulation 304* of the *Education Act* exempts from the computation of days the 14 day period during the Christmas Break, which are defined as 'school holidays', pursuant to *Regulation 304 section 2(4)*, as amended. However the Tribunal is convinced that the appellant did not have a full understanding of the process nor does the Tribunal expect that a parent would be fully aware of *Regulation 304* and its implications.

Therefore, the Tribunal does not consider this an adequate reason to determine that it has no jurisdiction.

3. The respondent submitted that the appeal should be dismissed on the basis that it was initiated in “bad faith”, within the meaning of section 4.6 of the *SPPA* and the Tribunal’s *Rule 17*. On the totality of evidence, it is apparent to the Tribunal that both parties are concerned about the child’s best interests and are committed to meeting the child’s educational needs. Despite this, the evidence indicated that the parties have both experienced what they perceive to be unclear or frustrating actions on the part of the other party in their efforts to assist and support the child. The board’s representative acknowledged that some procedural errors were made by the OCSB in the course of addressing the child’s needs. The Tribunal does not find that those errors were made in bad faith. Similarly, the Tribunal accepts that the appellant’s efforts to bring this appeal to the Tribunal were motivated by her concern for her child’s needs and rights to an appropriate education. The Tribunal heard no evidence to substantiate that the appellant initiated this appeal in bad faith or that the appeal is frivolous or vexatious.

For these reasons, the claim of bad faith is not established on the evidence presented to the Tribunal. Therefore, the Tribunal determined that the claim of bad faith is not an appropriate reason to dismiss this appeal.

4. Mr. Marshall argued that there is no disagreement between the parties regarding the child’s special education placement and therefore, the Tribunal should declare the appeal to be moot. Mr. Marshall used the term “moot” as meaning that “there’s nothing to talk about”. The Tribunal does not accept this interpretation, that is, that the parties have nothing to talk about. It notes that there is an ongoing dispute between the parties on a number of matters, primarily related to programming, services and accommodations, and therefore, there is a great deal to talk about in terms of the child’s best interests. The Tribunal does not consider it appropriate to dismiss the appeal on the grounds that it is moot.

5. The remaining grounds are the most significant from the point of view of the Tribunal:

- i) Whether the appellant is satisfied or dissatisfied with the IPRC’s and SEAB’s placement recommendations, confirmed by the OCSB, and thereby satisfying the second statutory prerequisite set out in section 57 (3); and
- ii) Whether the dispute between the parties is a disagreement about placement or about learning styles, teaching methodologies, staffing and other matters that are not within the jurisdiction of the Tribunal.

(i) Dissatisfaction with the Placement Decision

Regarding the appellant’s compliance with section 57 (3) in terms of her dissatisfaction with the placement decision, Mr. Marshall argued that the appellant in fact agreed to the placement decision. The appellant stated that she did not agree. The Tribunal finds that the evidence shows that the appellant is dissatisfied with the child’s programming and services, but not with the placement decision of Regular Class with Withdrawal Assistance.

In coming to this conclusion, the Tribunal relies on the following facts established in the evidence:

- a) The child has had an IEP since Grade 2, although at that time the child was not identified as an exceptional student. The child was assessed when in Grade 3. On the basis of that assessment, the child was identified as an exceptional student with a designation of Multiple: Communication – Learning Disability and Intellectual – Giftedness. The initial IPRC (June 13, 2006), designated the child’s placement as Regular Class with Withdrawal Assistance and stated that the withdrawal in question was the child’s participation in the board’s PGL. The parent supported this decision.

- b) During Grade 4, a review meeting for the child's identification and placement was held on May 15, 2007. The parent understood this to be an IPRC and received an IPRC decision form confirming the child's identification and placement, with which she agreed and signed. Although the board argues that this was not an IPRC, because there was no quorum at the meeting; the placement decision specified the school at which the withdrawal was to occur; and it named the staff member who was to provide the withdrawal assistance, this is the only IPRC decision form for the child for the year 2006-07. If this was not an IPRC, then there was no annual IPRC review for the child during the 2006-07 school year. But the parent clearly supported this placement decision.
- c) The IPRC, convened in October 2007, during the child's Grade 5 year at the Catholic Elementary School, confirmed the same identification and placement, as was the case in the previous years, except that the decision did not specify either a school name or staff name for the Withdrawal. This is the IPRC decision that the parent appealed to an SEAB.
- d) The appellant entered into evidence a Contact Note for the OCSB's Psychological Services, summarizing the discussion that took place at the October 2007 IPRC. This note reflects the appellant's stated concerns about the child's program and progress at the school. It also states, that "The appellant continues to want her child to participate in PGL". Therefore, the parent apparently supported the placement decision.
- e) The appellant declined to participate in a reconvened IPRC.
- f) The SEAB was convened on December 13, 2007. The SEAB confirmed the IPRC decision. In discussing placement, the SEAB report states that the parent wants the PGL placement to continue. At the same time, the SEAB confirmed in its report many of the parent's concerns, primarily about the child's accommodations in the child's Regular Class placement, and about the need for improved communication and partnership between the home and school. The SEAB also recommended that the child return to French Immersion at [the former school].
- g) On December 19, 2007, the appellant returned the child to [the former school], demonstrating her support for the SEAB's recommendations.
- h) On January 17, 2008, the appellant wrote a letter to the chairperson of the OCSB, stating: *"Although limited in his [the chair of the SEAB] authority, he made a number of recommendations that were in the child's best interests and for the most part common sense. I immediately demonstrated my respect for the effort of the SEAB and the special education process by cooperating fully in moving forward with the SEAB directives and so that the board/school could achieve success in their efforts to implement services for the child."* This letter covered other topics related to the child's programming and the board's procedures, but did not ask the board to overturn the SEAB's recommendations.
- i) During the initial teleconference, the appellant asked the board to confirm that the child's placement in the PGL is not in contention. At the start of the hearing, she stated that the board did this in its affidavit.

Based on the evidence cited above, the Tribunal accepts the OCSB's argument that the appellant apparently agrees with the placement of her child, as decided by the IPRC and the SEAB, and confirmed by the OCSB. The appellant stated that she wanted her child to be in a Regular Class, but she also wanted the child to be in the PGL. This is only possible with a placement decision of Regular Class with Withdrawal Assistance.

ii) Focus on Programs and Services rather than Placement

The Tribunal notes from the appellant's evidence that she is definitely dissatisfied with aspects of the child's programming and the services and the accommodations that the child is receiving in the Regular Class placement.

The Tribunal accepts that these may be valid disagreements, but notes that such matters as class size, the characteristics of other students, the qualifications of teachers, the intensity of the programming provided to her child (one to one support), the type of technology, etc., described in her exhibit called Placement Needs, are deemed to be outside the jurisdiction of the Tribunal.

Placement, which is not defined in the Education Act, is intertwined with programs and services. Therefore, when parents are in disagreement with placement, it is important that they state the grounds for their dissatisfaction clearly and specify the remedy that they are seeking. However, when the parents' dissatisfaction is primarily or exclusively focused on such matters as programming, services, class size, the provision of educational assistant support, staff qualifications, and so on, parents cannot expect the Tribunal to issue orders on these, because it does not have jurisdiction to do so. In *L & Conseil des écoles catholiques de langue française du Centre-Est de l'Ontario, 2004*, cited by both parties, the Tribunal stated (among other things) that it did not have the jurisdiction to direct school boards to hire staff with specific qualifications, experience or expertise. The Tribunal has not changed its position on this matter.

The Tribunal finds that the dispute between the parties is not about the placement decision itself, but about the details of the child's programming within that placement.

INTERIM DECISION

On April 30, 2008, the Tribunal released the following decision to the parties:

"The Tribunal unanimously finds that it does not have jurisdiction to hear the merits of this appeal. The Tribunal's full decision on jurisdiction, including reasons, and its response to the OCSB's motion for dismissal will be issued within the timelines set out in the Tribunal's *Rules of Procedure*."

DECISION

As stated in the interim decision, the Tribunal unanimously finds that it has no jurisdiction to hear the merits of the appeal of the special education placement for the child, as the evidence establishes that the appellant's dissatisfaction is not with the placement ordered by the IPRC and confirmed by the SEAB and the OCSB, but rather with the details of her child's programming within that placement. Therefore, the appellant has not met the statutory requirements set out in section 57 (3) of the *Education Act*.

Although the Tribunal does not support all the grounds cited by the OCSB in its preliminary motion, it dismisses the appeal without a hearing on the merits of the case.

The parties should also note that this decision does not represent a review of or concurrence with the IPRC placement decision, which was under appeal.

COMMENTARY

The Tribunal receives its authority through the Education Act. This authority is limited to the identification and placement of exceptional pupils. 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 Tribunal did not hear the parties' 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.

Throughout this preliminary hearing, the Tribunal observed that improving the communication between the parent and the school board would help the parties to reach a placement decision that would best serve the child's needs. The Tribunal therefore urges the parties to consider exploring mediation or other forms of facilitated communication or dialogue to resolve the appellant's outstanding concerns.

The Tribunal notes that matters were raised by both parties that do not directly relate to the pupil's identification and placement and are outside the Tribunal's mandate. The school board acknowledged a number of errors that it had made in its communication with the parents including convening and communicating the outcome of a meeting, which may or may not have been an IPRC; the role assumed by a vice-principal in providing Withdrawal Assistance to the child; and others. Counsel for the respondent stated that these had not been made in bad faith. The Tribunal accepts that claim, but encourages the OCSB to ensure that such errors are not repeated. The Tribunal does not expect that a parent would be aware of such matters as the required quorum for an IPRC or of circumstances when an IPRC decision form is not deemed valid for a child's special education placement.

The Tribunal notes that both the parent and the school board supported the recommendations of the SEAB regarding the provision of appropriate programs and services for the child. It is encouraging that both parties were focusing on the child and the child's best interests in this regard. However, there were still elements of the recommendations that appeared not to be clearly understood. The Tribunal urges the parties to discuss and clarify these outstanding issues at an IPRC review meeting before the end of the 2007-08 school year to specifically address how the SEAB's recommendations will be implemented, as the child begins the Grade 6 year in September.

There also seemed to be some confusion as to what the process is for appealing to a Tribunal. It is important that parents are fully informed of this process. The Parent Guide, which school boards are required to provide to parents, should be readily available to parents and its contents should clarify the process of appeal.

The appellant described for the Tribunal the placement and programming that she considers most appropriate to meet her child's needs. The placement decision must always reflect the best interests of the student and consider parental wishes, in accordance with *Regulation 181/98*. The Tribunal hopes that if both parties continue to focus on the child and the child's best interests, their outstanding differences will be resolved in a mutually satisfactory or at least an acceptable manner.

Date May 26, 2008.