



ONTARIO SPECIAL EDUCATION (ENGLISH) TRIBUNAL File #57

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IN THE MATTER OF the *Education Act*, R.S.O. 1990. c.E.2, as amended, ss. 57(3),  
IN THE MATTER OF *Ontario Regulation 181/98*,  
AND IN THE MATTER OF the minor child born in 1994

BETWEEN

C., Appellant

-and-

The Durham District School Board, Respondent

Tribunal Members:

Eva Nichols	Chair
Julie Lindhout	Member
Noel Williams	Member

Appearances:

C.	Parent
Brenda Bowlby	Counsel for the Durham District School Board (DDSB) Superintendent of Special Education, DDSB
Stephen Kelly	Secretary

The hearing on the matter of jurisdiction was held on June 27, June 28 and July 18, 2006 in Oshawa, Ontario.

## INTRODUCTION

On February 9, 2006, the Appellant appealed to the Ontario Special Education (English) Tribunal (the "Tribunal") regarding the special education identification and placement of her child, a student with Autism / Pervasive Developmental Disorder (PDD), who is almost twelve years old. During the 2005/06 school year the child attended a regular Grade 5 class at a school within the Durham District School Board (DDSB). The IPRC whose decision was appealed was convened on September 30, 2005 and reconvened on October 27, 2005.

Ms. Brenda Bowlby, Counsel for the DDSB, filed a motion on April 12, 2006, asking the Tribunal to dismiss the Appeal, as there is no disagreement between the parties regarding the student's identification or placement. A preliminary hearing was arranged for June 27, June 28 and July 18, 2006, to determine whether the Tribunal had the authority to hear the Appeal.

### Relevant Statutory Provisions

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*, the Tribunal's *Rules of Procedure* and by the general rules of "natural justice" and "procedural fairness" applicable to administrative tribunals.

- ***Statutory Powers Procedure Act, R.S.O. 1990, c. S.22***
- ***Education Act, R.S.O. 1990, c. E.2***

A number of specific sections of the *Education Act* concerning special education in whole or in part were used in the arguments presented by the parties. These were as follows:

#### 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 33 (1) : Resident pupil qualification: elementary English-language public district school boards and elementary public school authorities:

A person who attains the age of six years in any year is, after September 1 in that year, qualified to be a resident pupil in respect of a school section of an English-language public district school board.

Subsection 35 (1) : Resident pupil's right to attend more accessible elementary school:

Where a resident pupil who is an elementary school pupil of a school section or separate school zone resides,

- (a) more than 3.2 kilometres by the shortest distance by road from the school that the pupil is required to attend;
- (b) more than 0.8 kilometres by the shortest distance by road from any point from which transportation is provided to the school that the pupil is required to attend; and
- (c) nearer by the shortest distance by road to another school of the same type that is in another section or zone than to the school that the pupil is required to attend,

the pupil shall be admitted to the nearer school of the same type, where the appropriate supervisory officer for the nearer school certifies that there is sufficient accommodation for the pupil in that school.

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.

- **Regulation**

*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.

- **Special Education Tribunal Cases Cited**

*C. v. Simcoe County Board of Education*, 2003

*R. v. Durham District School Board*, 2004

*D. v. Muskoka Board of Education*, 1984

## ISSUE

The issue is whether the Tribunal has jurisdiction to hear the appeal of the minor child's identification and placement.

### Respondent's Position

Ms. Bowlby, counsel for the Durham District School Board (DDSB) presented the Board's position on jurisdiction. In support of her motion that the appeal be dismissed, Ms. Bowlby presented the following facts:

- **Regarding the student's identification**

The student has been identified as exceptional almost since the initial enrolment with the DDSB in 1999. The initial identification was Communication - Autism, determined by an IPRC on January 25, 2000.

On October 1, 2002, an IPRC changed this identification to Multiple Exceptionalities, comprised of Communication - Autism and Physical - Physical Disability.

In February 2005, this identification was changed to Communication (Autism/PDD) on the basis of a psychological assessment, arranged and paid for by the parents. Since that time, this has been the child's identified exceptionality.

Ms. Bowlby stated that the Appellant has taken the position that the DDSB has not identified her child as exceptional because the chair of the September, 2005 IPRC, omitted placing a check mark in the box beside the word "Identified" on the IPRC determination form. The chair of the IPRC did complete the section "Identified Area of Exceptionality", stating the child's exceptionality as Communication (Autism/PDD).

To address the Appellant's concerns, Superintendent Martyn Beckett, at the SEAB hearing in January 2006, said that he would arrange to have the IPRC determination form changed by placing a check mark in the box beside "Identified".

Ms. Bowlby stated that the appeal of identification was moot, because there was no disagreement between the parties on the student's identification.

- **Regarding the student's placement**

Ms. Bowlby stated that the Appellant's appeal was not directly related to the child's placement in a "Regular Class with Resource Assistance". Rather, she appealed placement because of her belief that her child's needs were not being met appropriately.

Ms. Bowlby described the student as a high functioning Grade 5 student, who works with the regular Provincial curriculum for Grade 5. The child receives accommodations in all areas except for the writing strand of the language curriculum, which is modified. The resource assistance provided to the child focused upon social skills, behavioural issues and work habits.

Given the child's success in the current placement, the DDSB did not understand the Appellant's contention that the child's needs were not being met. Although the Appellant had put forward some reasons why she felt this was so, the DDSB requested clearer and more succinct reasons as to how and why the child's placement is not meeting the child's needs.

Ms. Bowlby stated that the appeal of placement was moot, since the Appellant had not requested an alternative placement either at the SEAB hearing or in her Notice of Appeal to the Tribunal.

Ms. Bowlby, on behalf of the Board, requested that the Tribunal dismiss the appeal.

## **Appellant's Position**

The Appellant, representing herself, presented the Appellant's position regarding the appeal. Although this was a jurisdictional hearing, much of the Appellant's evidence focused on the merits of the case. The Appellant contested the DDSB's position that there was no disagreement between the parties on the child's identification and placement.

Although not stated explicitly, her underlying argument regarding the Tribunal's jurisdiction was based on the fact that she had appealed the IPRC decision of September 30, 2005 to the SEAB, held on January 9, 2006, and was still dissatisfied with the DDSB's decision regarding the child's identification and placement. She also stated that the Tribunal should assume jurisdiction for hearing the appeal for the child on the basis of a human rights consideration.

- **Regarding the student's identification**

The Appellant stated that the DDSB had declined to identify the child as an exceptional pupil at the IPRC on September 30, 2005, which was a placement review meeting. The IPRC was reconvened October 27, 2005 to consider both identification and placement. The IPRC decision form was left blank in the area where it is usually indicated whether the student is identified as exceptional or not. However, the form described the child's exceptionality as Communication - Autism / PDD. The Appellant interpreted this (and the similar blank box on the 2001 IPRC decision form) as the DDSB's decision to revoke the child's identification as an exceptional student. She stated, that "the Board has recognized her child as an individual living with Autism, but has declined to identify the child."

Following the recommendations of the SEAB, the Board reissued the IPRC decision with a handwritten amendment on February 15, 2006. The Appellant did not accept this as a proper correction of the situation. She reiterated her concerns about the child's status as a student who is not regarded as exceptional.

Although not stated in the Notice of Appeal, nor raised with the SEAB during that hearing, the Appellant stated during the Tribunal hearing that she wanted the current identification of Communication - Autism/PDD to be changed to a dual exceptionality identification of Communication - Autism/PDD and Physical - Physical Disabilities.

- **Regarding the student's placement**

The Appellant stated in her Notice of Appeal that the child's needs are not being met in the current placement. She requested the Tribunal to order a number of program and service components to meet the child's needs. These included:

- one to one Intensive Behavioural Intervention (IBI) and Applied Behavioural Analysis (ABA) support services,
- speech-language therapy,
- occupational therapy, and
- an upgraded FM (frequency modulated) assistive listening device.

She also asked for an order upgrading the child from Intensive Support Amount (ISA) Level 2 to Level 3, and a direction to the Board to appropriately accommodate the child's "medical handicaps", as identified by Dr. Robert Quilty in the Psychological Assessment of April 18, 2000.

Although in the Notice of Appeal the Appellant did not explicitly appeal the placement from Regular Class with Resource Assistance to an alternative placement, she asked that the description of Resource Assistance be more specific. During the hearing, she also requested placement for the child in one of the two Learning Strategies classes at the child's current school.

Finally, the Appellant requested compensation for the child, reimbursement of lawyer's fees, an inquiry into the DDSB's IPRC process, and reimbursement for lost wages for the father. She stated that she looked to the Tribunal to order the DDSB to meet the child's needs.

### **Respondent's Evidence**

The DDSB presented two witnesses: Mr. Martyn Beckett, Superintendent of Special Education for the DDSB and the principal of the child's school.

The principal, the first witness, stated that, contrary to the Appellant's statement, the child is identified by the DDSB as an exceptional student, with a current exceptionality designation of Communication - Autism/PDD.

She explained that this school is not the child's home school, and attends there under the DDSB's alternative attendance policy. The child began to attend this school on a half-time basis in 2002, prior to the principal's arrival at the school.

The principal spoke at length about the child's current placement at the school, which is Regular Class with Resource Assistance. The principal described the child as a successful Grade 5 student. She spoke about the program within the regular class setting, the support that the child receives from the educational assistant and the help the child receives during the one period of withdrawal on a daily basis. In the opinion of the witness, the current placement and the programming that the child receives is quite appropriate and is meeting the child's needs. She stressed that the child has been very successful throughout the current school year and has made gains in all areas of the curriculum.

The principal stated that it has not been necessary to modify the regular Ontario curriculum to meet the child's needs. She stated that the child's IEP demonstrates that in the areas of reading, mathematics, social studies, science and technology the child receives accommodations, but the program is not modified. Modifications are only provided to the child in the area of writing. The child is exempted from French. Instead, English writing skills are substituted for this exemption. In the non-academic areas of behaviour, work habits, social skills and communication skills, the child receives

programming with alternative expectations. The principal also described how the child's current IEP was reviewed and discussed with the father in May 2006.

She stated that the child's class is provided with the support of a half-time (0.5) educational assistant (EA). This EA works with the child when the child requires help with implementing some of the strategies to deal with frustration and anxiety. The classroom teacher also has ongoing support in programming for the child from the Special Education Support Team. This team includes a Speech and Language Pathologist, an Educational Audiologist and a Special Education Instructional Facilitator.

The principal described how the child's exceptionality designation was changed in February 2005. Prior to that date the child was identified as having Multiple Exceptionalities, comprised of Communication - Autism and Physical - Physical Disabilities. In February 2005 the child's identification was changed to Communication - Autism/PDD, with parental approval. This change was made on the basis of a new assessment provided to the school by the parents.

The principal next spoke about the IPRC in September 2005 and the error that she had made by not checking the box to indicate that the child is identified as an exceptional student. She described how this was corrected following the SEAB meeting in January 2006. She stated that she provided the parents with an amended IPRC decision form on February 15, 2006.

The principal was also asked by the DDSB's Counsel to comment on various other issues included in the Appellant's appeal. These, although not related to the issue of jurisdiction, included information about access to certain types of programming, staff training at the school, discipline files, the child's behaviour and the type of FM listening device utilized by the child.

Mr. Martyn Beckett, Superintendent of Special Education for the DDSB was the next witness for the Respondent. Most of Mr. Beckett's evidence focused on the difficult relationship between the DDSB and the family as well as the often contradictory information the Board has received from the two parents regarding the child's identification and placement.

Regarding the jurisdiction issue before the Tribunal, Mr. Beckett described how at the SEAB meeting in January 2006, he offered to arrange for the IPRC decision form to be amended by checking off the box beside "identified". This was one of the recommendations of the SEAB. Once this had been done, in his opinion there was no disagreement about the child's identification.

Regarding the child's placement, Mr. Beckett stated that there had been no concerns expressed at the SEAB about the placement. However, subsequently, the Appellant initiated an appeal, without stating what placement she wanted for her child.

Mr. Beckett, in response to cross-examination by the Appellant and to questions from the Tribunal, spoke about the availability of and the process for accessing Section 20 placements through the DDSB and Kinark, which includes Intensive Behavioural

Intervention (IBI) treatment for students who need this. He stressed that Section 20 placements are initiated by parents through the co-ordinating care and treatment agencies and are not placements made through the IPRC process.

In her summary statement, Ms. Bowlby reiterated that the DDSB wants to work co-operatively with parents in the best interests of students. She also reiterated that there is no disagreement regarding the child's identification or placement.

### **Appellant's Evidence**

The Appellant presented her arguments as well as attesting on her own behalf. She spoke at length on issues that are not directly related to jurisdiction. She began by asking the Tribunal to consider evidence relating to the Board's conduct and standard practices. She then turned to jurisdiction by asking the Tribunal to "consider jurisdiction in these categories: identification, placement and an interpretation in the context of location, special education programs, special education services, special education process."

Following that, the Appellant again asked the Tribunal to comment on issues not related to jurisdiction, such as the appropriateness of the research conducted on both her children, and pleaded for the Tribunal to take jurisdiction of the case as a matter of basic human rights for the child to have the situation thoroughly reviewed. She also read into the record a letter from Superintendent Beckett, which she believed prohibited her from attending the child's most recent IPRC meetings, at which she would have expressed her concerns about the child's identification and placement.

Regarding the child's identification, the Appellant presented as evidence the October 27, 2005 IPRC decision that does not have the box for "Identified" ticked. She argued that this meant that the child's identification as an exceptional student had been revoked. She stated that the DDSB recognized the child as a "child living with autism" but the child was not formally identified as autistic. During her cross-examination of the principal, the Appellant also questioned why the IPRC accepted the recommendation of Dr. Ford to have the child's previous identification of Multiple Exceptionalities - Communication - Autism and Physical - Physical Disabilities changed to Communication - Autism/PDD. Because Dr. Ford is a psychologist and not a physician, the Appellant questioned his qualification to recommend this change in identification.

Following a question from the Tribunal, the Appellant stated that she wanted the child's identification to be the dual exceptionality of Communication - Autism/PDD and Physical - Physical Disabilities.

Regarding the child's placement, the Appellant stated that the child's needs are not being met in the current placement. She listed a number of issues as the grounds of her appeal of placement. These include the qualification of the educational assistant, the quality of the FM devices that the child uses in the classroom, the lack of occupational therapy and speech-language therapy, the lack of access to IBI, and other similar issues. She further stated that the child has no sense of danger and that is engaging in

self-injurious behaviour at school, which is not done at home. She argued that if the child's needs were being met at school, this would not be happening.

She stated that she wanted the child placed in a Learning Strategies class at the current school. According to her, the child is not performing well in the current placement, and is self-injurious because of the stress level of the current placement. She admitted that she had not requested that placement at the IPRC or at the SEAB because she was not aware at that time that such a placement existed.

As part of the evidence, the Appellant introduced a letter from the principal, dated May 12, 2006. This was addressed to the father and dealt with a series of questions regarding potential alternative placements for the child, namely Regular Class with Withdrawal Assistance or placement in a small class Learning Strategies Program. In the letter, the principal explained why neither of those alternative placements would be appropriate for the child.

In spite of this evidence, near the end of the hearing, the Appellant stated that she wanted the child to be placed in the Learning Strategies program at the current school.

In addition to the evidence and arguments presented by the Appellant on her own behalf, she questioned two witnesses, whose evidence had no bearing on the jurisdiction issue.

Ms. Denyse Newton of Children's Case Co-ordination Services of Durham Region presented evidence about her and her agency's role in the education of the child and the relationship between the family and the DDSB. Ms. Newton described that she became involved with the family at the family's request. She represented the Appellant at meetings with school board personnel in order to improve communication between the board and the parents. She acted as an intermediary to ensure the child's continued placement at the current school and participated in discussions regarding the child's programming, including exemption from French. She also facilitated the child's referral to Durham Access to Care for occupational and speech therapy.

The Appellant's second witness was Ms. Cindy Waugh, Special Education Facilitator for the DDSB. Ms. Waugh's brief evidence focused on her very limited involvement in the development of the child's Individual Education Plan (IEP). Further, she provided information to the Appellant in writing about the types of special education classes that the DDSB offers to exceptional students in the area. It was through this document that the Appellant became aware of the existence of the Learning Strategies classes at her child's school.

In her summary statement, the Appellant reiterated her many concerns about the situation of her child as a student within the DDSB.

## **REASONS**

The Tribunal's authority is set out in Section 57 of the *Education Act*. To assume jurisdiction, the Tribunal must be satisfied that the parents have fully exhausted their

rights of appeal of their child's exceptionality identification or special education placement or both and that the parents are dissatisfied with the identification or placement decision or both.

**a) Exhausted all rights of appeal**

The evidence presented demonstrated that the Appellant had followed the legislated process for appealing the IPRC's identification and placement decision to a Special Education Appeal Board (SEAB). The IPRC was held on September 30, 2005 and was reconvened on October 27, 2005.

The SEAB met on January 9, 2006. The Appellant received the Board's written response, dated January 30, 2006, to the decision and recommendations of the SEAB. She appealed to the Ontario Special Education (English) Tribunal on February 9, 2006.

Therefore, the Appellant has exhausted all the appeal rights available to her.

**b) Dissatisfaction with identification and/or placement**

**(i) The issue of identification**

The Tribunal considered the evidence presented by the Appellant, which indicated her dissatisfaction with the current identification of the child, as recorded on the IPRC decision forms dated October 27, 2005 and February 15, 2006. She stated during the hearing that she wanted the child's identification to be a dual exceptionality designation of Communication: Autism/PDD and Physical: Physical Disability. Further, she wanted to be assured that the DDSB identified the child as an exceptional student.

Thus, the evidence before the Tribunal is that the Appellant is dissatisfied with the child's identification set out in the documentation related to the September 30, 2005 IPRC under appeal.

**(ii) The issue of placement**

The Tribunal considered the evidence presented by the Appellant, which indicated her dissatisfaction with the child's current placement. The Appellant did not specify the placement that she wanted for the child in her Notice of Appeal. However, she stated categorically that, in her opinion, the current placement is not meeting the child's needs adequately and appropriately. During the hearing, when asked to specify what placement would be more appropriate for the child, she stated that a Learning Strategies class at the current school would be the preferred placement.

The DDSB gave evidence that the Regular Class placement with Resource Assistance was adequately meeting the child's needs. Evidence was also presented that the SEAB upheld the appropriateness of this placement.

The evidence before the Tribunal clearly indicated that the Appellant is dissatisfied with the child's placement.

**c) Jurisdiction**

The Tribunal has jurisdiction over the appeal because the Appellant (a) has exhausted all rights of appeal; and (b) remains dissatisfied with the child's identification and placement.

**d) Other issues**

In response to the arguments presented by the Appellant, Ms. Bowlby, on behalf of the DDSB, offered to change both the child's identification and placement to those requested by the Appellant. However, Ms. Bowlby also indicated that the Board is concerned about how the father, who agreed to both the child's identification and placement in September 2005, might react to this change. Ms. Bowlby stated on behalf of the DDSB, that, because the Learning Strategies classes are both full at the named school, the Board would agree to change the child's placement to a Learning Strategies class at another school. She also suggested that the Board would consider implementing a "reverse integration" approach to provide the child with access to the Learning Strategies class at the current school as an interim step.

Ms. Bowlby suggested that the Tribunal could adjourn the hearing, pending a fall IPRC meeting, where the desired identification and placement for the child can be approved.

In response to the Respondent's offer to change the child's identification and placement to accommodate her wishes, the Appellant stated that she was not satisfied with this and would not withdraw her appeal. She urged the Tribunal to assume jurisdiction in order to resolve these matters and to ensure that the child receives the education to which the child is entitled, as a student with autism.

The Tribunal is concerned that an offer to change the child's identification and placement was made by the DDSB during the hearing in the absence of any evidence before the Tribunal that the amended identification and placement are in the child's best interests. Once the requirements of subsection 57(3) of the Education Act are met, the Tribunal has jurisdiction to hear the appeal and it is up to the Tribunal to determine the child's identification and placement based on the evidence before it. Indeed, on the limited evidence that was tendered during this hearing, it does not appear to the Tribunal that placement in a Learning Strategies class, established to serve students with learning disabilities, is in the child's best interests. Furthermore, the categories of exceptionality are defined in the *Education Act* and are further clarified in the Ministry of Education's document *Special Education: A Guide for Educators*, 2001. To change the child's category of exceptionality and to determine what identification is most appropriate, further assessment information is required.

**DECISION**

Based on the evidence received, the Tribunal unanimously determined that it has jurisdiction to hear the merits of the appeal of the September 30, and October 27, 2005, IPRC decisions, further amended on February 15, 2006, regarding the special

education identification and placement for the minor child. A Tribunal hearing to consider the merits of the case will be scheduled, if the parties are unable to resolve the issues between them. Both parties will be invited to participate in a conference call for the purpose of setting dates and making arrangements for the hearing.

Regarding the Appellant's claim for the reimbursement of expenses, the Tribunal has no authority to order costs. Therefore, there are no costs ordered.

## **COMMENTARY**

Since the Tribunal's decision is focused only on the matter of jurisdiction, no orders are issued at this time. The Tribunal urges the parties, namely the Board and both parents, in determining their next steps, to focus on the child's best interests and how the child's needs can be met in the most enabling manner possible. To determine this, it would be beneficial to have available up-to-date educational, psychological and medical assessment information for the child.

The Tribunal believes that it may be possible to resolve the differences between the parties with the help of an outside facilitator or mediator, once new assessment information is available. Another member of the Tribunal, such as the Tribunal Chair, who is not involved in this appeal, may be able to assist the parties in mediating their disagreement regarding the child's identification and/or placement and arriving at a mutually agreeable and appropriate settlement agreement. The parties should contact the Tribunal if they wish to pursue this option.

Eva Nichols, Chair

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Julie Lindhout, Member

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Noel Williams, Member

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Date September 21, 2006