



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 1991.

BETWEEN

Mr. S. and Mrs. S., Appellants

-and-

The Peel District School Board, Respondent

Tribunal Members:

Eva Nichols	Chair
Derryn Gill	Member
Noel Williams	Member

Appearances:

S. and S.	Parents
Nadya Tymochenko	Counsel for the Peel District School Board (PDSB)
Bill Wyman	Secretary
Louise Sibbald	Assistant to the Secretary

The hearing on the matter of jurisdiction was held on September 15, 2006 in Mississauga, Ontario.

## INTRODUCTION

On June 15, 2006, the Appellants appealed to the Ontario Special Education (English) Tribunal (the "Tribunal") regarding the special education identification and placement of their child. The child is fifteen years old and attends a secondary school within the Peel District School Board (PDSB). Throughout most of the child's education, the child had been identified as an exceptional student with an exceptionality designation of Communication - Learning Disabilities. The Identification, Placement and Review Committee (IPRC) whose decision was appealed to the Tribunal was initially convened on March 21, 2006 and reconvened on April 11, 2006. The decision was issued in a letter addressed to the Appellants' legal counsel, dated April 19, 2006,

Ms. Nadya Tymochenko, counsel for the PDSB, filed a motion on June 23, 2006, asking the Tribunal to dismiss the Appeal. This motion stated that there are no grounds for appeal in this case because the Board, having received the notice of appeal, granted both the identification and the placement sought by the Appellants. A preliminary hearing for this motion was arranged for August 14, 2006. This hearing was deferred pending mediation, planned for the second half of August. The planned mediation did not go ahead. The Tribunal met on September 15, 2006 to hear arguments 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 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 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 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. The following sections of the Regulation were cited by the parties as part of their arguments.

Subsection 5.(1) A parent of a pupil and, where the pupil is 16 years of age or older, the pupil are entitled,

- (a) to be present at and participate in all committee discussions about the pupil.

Subsection 13.(1) Each board shall prepare a guide for the use and information of parents and pupils that,

- (h) explains that no committee placement decision can be implemented unless.
- (i) a parent has consented to the decision, or
- (ii) the time limit for filing a notice of appeal in respect of the decision has expired and no such notice has been filed.

Subsection 15.(1) A committee that has received a referral under section 14 shall obtain and consider an educational assessment of the pupil.

(2) Subject to the *Health Care Consent Act, 1996*, the committee shall also obtain and consider a health assessment of the pupil by a qualified medical practitioner if the committee determines that the assessment is required to enable it to make the correct identification or placement decision.

(3) Subject to the *Health Care Consent Act, 1996*, the committee shall also obtain and consider a psychological assessment of the pupil if the committee determines that the assessment is required to enable it to make the correct identification or placement decision.

Subsection 16.(1) The committee may discuss any proposal for special education services or special education programs and shall do so at the request of a parent or a pupil who is 16 years of age or older.

(2) The committee may make recommendations regarding special education programs and special education services.

(6) A recommendation under this section is not a decision for the purposes of subsection 26.(1).

Subsection 17.(1) When making a placement decision on a referral under section 14, the committee shall, before considering the option of placement in a special education class, consider whether placement in a regular class, with appropriate special education services,

(a) would meet the pupil's needs; and

(b) is consistent with parental preferences.

Subsection 19.(1) A parent who receives a statement of decision under section 18 may, by written notice delivered to the person specified in subsection (2) within 15 days of receipt of the statement of decision, request a meeting with the committee.

(3) On receiving the request, the principal or designated representative, as the case may be, shall arrange for the committee to meet as soon as possible with the parent and, where the pupil is 16 years of age or older and wishes to attend, the pupil, to discuss the statement of decision.

Subsection 26.(1) A parent of a pupil may, by filing a notice of appeal in accordance with subsection (2) or (3), require a hearing by a special education appeal board in respect of,

(a) a committee decision under Part IV or V that the pupil is an exceptional pupil;

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

Subsection 27.(2) Selections under clauses (1)(a) and (b) shall be made within 15 days of the notice of appeal by the secretary of the board.

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

Subsection 28.(2) The meeting shall be arranged to take place at a convenient place and at a time that is no more than 30 days after the day on which the chair is selected and shall be conducted in an informal manner.

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

*D. v. Toronto District School Board*, 2002, cited by the Appellants

*D. v. Windsor-Essex Catholic District School Board*, 2003, cited by the Appellants

*R. v. Durham District School Board*, 2004, cited by the Respondent

### ***Ministry of Education Documents Cited***

Policy and Program Memoranda (PPM):

PPM #8: Learning Disabilities, 1982

PPM.#11: Early Identification of Children's Learning Needs, 1982

### ***Other Documents Cited***

Canadian Charter of Rights and Freedoms, 1982

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

United Nations Convention on the Rights of the Child, 1989

Guidelines on Accessible Education, Ontario Human Rights Commission, 2004

## **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. Tymochenko, counsel for the PDSB, presented the Board's position on jurisdiction.

In response to the Appellants' Notice of Appeal submitted to the Tribunal, the Board's position is that the identification and placement requested by the Appellants had already been granted. Furthermore, the Board is prepared to amend the child's identification to be the dual identification of Communication - Learning Disabilities and Behaviour.

Thus, the Board submits that there is no disagreement on either identification or placement between the parties and therefore the appeal is moot. Ms. Tymochenko, on behalf of the PDSB, requested that the Tribunal dismiss the appeal.

## **Appellants' Position**

The Appellants, cited subsection 57(3) of the *Education Act*, as the basis of their appeal to the Tribunal. They stated that they have exhausted all rights of appeal under the regulations in respect of the identification and placement of their child. Furthermore, the Appellants stated that they are dissatisfied with the identification and placement of their child. The Appellants cited subsection 57. (4) of the *Education Act* and stated that, since they have fully satisfied the conditions of subsection 57(3), the Tribunal must hear their appeal.

The Appellants stated that they wanted their child to be clearly identified as an exceptional student with both Communication - Learning Disabilities and Behaviour designation. They also stressed that they wanted the Board to develop and utilize a more comprehensive needs statement to describe the child's strengths and needs, such that the special education program, as described in the child's Individual Education Plan (IEP), can be appropriate, rather than generic.

The Appellants did not identify a specific special education placement for their child. Instead, they stated that they are not satisfied with the child's current placement because it does not meet the child's academic and social needs. They stressed that they wanted the child to be in a Regular Class placement with programs and services that will enable the child to achieve the child's potential.

## **SUMMARY OF EVIDENCE**

### **Respondent's Arguments**

In support of her motion for the Tribunal to dismiss the appeal, Ms. Tymochenko presented the following evidence, both oral and written, on behalf of the PDSB.

At the IPRC meeting of October 18, 2005, the child was identified as an exceptional student with the exceptionality designation of Communication - Learning Disabilities. The child's placement was Learning Support Level 1 (LS-1), which is a Regular Class placement with Resource/Withdrawal support in the form of a General Learning Course (GLE).

On November 17, 2005, the PDSB received correspondence from the Appellants requesting a second meeting with the IPRC.

On February 28, 2006, the PDSB invited the Appellants to an IPRC, scheduled for March 21, 2006. The decision of the IPRC meeting of March 21, 2006 was deferred until April 11, 2006. This was done in order that the IPRC have time to review a psychological assessment that was provided by the Appellants during the meeting of March 21, 2006. During the intervening period, counsel for the Board responded to questions raised by the Appellants' counsel, both in earlier correspondence and during the March 21, 2006 IPRC meeting.

On April 11, 2006, the IPRC reconvened to discuss the child's identification and placement. The Appellants requested that the child be identified as Behaviour. The IPRC determined that the child should not be identified as an exceptional student and should no longer be placed in a special education placement for the school year 2005/06. However, the Board promised to continue to provide the child with "informal accommodations" through the development and implementation of an "informal Individual Education Plan (IEP)" to address the child's needs. This decision was communicated to the Appellants in a letter addressed to their legal counsel from the PDSB's legal counsel, dated April 19, 2006.

The Appellants appealed the decision of the IPRC. In a Notice of Appeal, dated May 2, 2006, they requested that the Special Education Appeal Board (SEAB) disagree with the IPRC decision and recommend that the child be identified as an exceptional student on the basis of Communication - Learning Disabilities and/or Behaviour; and the placement be designated LS-2. This is described by the PDSB as "support for students who require ongoing monitoring and assistance, but may not require or profit from the intensive intervention offered in the GLE course".

The PDSB stated that in spite of its reservations it was prepared to agree to the identification and placement requested in the Notice of Appeal. On May 12, 2006, Ms. Tymochenko notified the Appellants' legal counsel in writing of the Board's decision to identify the child as Behaviour and to provide the child with the requested LS-2 placement. The Appellants were notified of this decision by Ms. Tymochenko on May 18, 2006.

Despite the Board's compliance with the Appellants' request, the Appellants on May 28, 2006, initiated a further appeal to the SEAB. The Board responded on June 2, 2006, stating that the appeal was moot, because the Appellants' identification and placement request had been granted. Therefore, the Board declined to appoint a member to an SEAB.

The PDSB received a copy of the Appellants' Notice of Appeal to the Tribunal, dated 15 June, 2006. In response to this Notice of Appeal, the Board's motion for dismissal was forwarded to the Tribunal on June 23, 2006. The Board's position is that the identification and placement requested by the Appellants had been fully granted. Furthermore, the Board is prepared to amend the child's identification to include the dual identification of Communication - Learning Disabilities and Behaviour.

To support the Board's decision, Ms. Tymochenko cited *R. v Durham District School Board*, 2004. In that case, the Tribunal declined to assume jurisdiction and hear an appeal when the parent had been granted the identification and placement sought. Ms. Tymochenko stated that the appeal for the child before the Tribunal parallels the *R.* case.

The PDSB submitted that the Tribunal does not have jurisdiction to hear the appeal in the present circumstances, because there is no disagreement between the parties regarding the child's identification or placement. The Board is prepared to discuss with the Appellants their requests related to programs and services. However, such issues are outside the Tribunal's mandate. Hence the appeal is moot and should be dismissed by the Tribunal.

### **Appellants' Arguments**

The Appellants provided the following information to the Tribunal, both oral and written, to support their appeal for the Tribunal to assume jurisdiction and hear the merits of their case.

In their Form A: Notice of Appeal, the Appellants cited three IPRC meetings as the grounds for their appeal. These were the IPRC meetings held on October 18, 2005, March 21, 2006, and April 11, 2006.

Their child attended elementary school within the Dufferin-Peel Catholic District School Board. The child transferred to the Peel District School Board for Grade 9 as of September 2005. An IPRC was convened by the PDSB on October 18, 2005. The decision was communicated to the Appellants in a letter, dated October 31, 2005. The IPRC identified the child as an exceptional student with Communication - Learning Disabilities, as the exceptionality and Learning Support Level 1 (LS-1) as the placement. The Appellants requested a second meeting with the IPRC. The IPRC was not reconvened.

The Appellants attended the next IPRC meeting on March 21, 2006. This meeting was adjourned so that the committee members could consider a new psychological assessment report, arranged and paid for by the Appellants. The IPRC was reconvened on April 11, 2006. On April 19, 2006, the decision of the IPRC was issued in a letter, not on a standard form. This stated that the child would no longer be identified as an exceptional student and that the child would no longer be placed in a special education placement.

On May 2, 2006, the Appellants sent a letter to the secretary of the Board stating that they had not been given a standard IPRC form with the option to approve or appeal the IPRC statement of decision. They stated that they wanted to appeal the IPRC's decision to demit the child from the identification as an exceptional student. They nominated a SEAB member.

The Board did not convene a second IPRC meeting or a SEAB meeting within the timelines set out in *Regulation 181/98*. Instead, the PDSB sent a letter to the Appellants to state that "in order to dispose of the appeal", they would change the child's identification

and placement to those requested by the parents. This decision appears to have been made “behind closed doors”, without consultation with the parents. The Board stated that these changes in identification and placement disposed of the appeal of the IPRC decision of April 19, 2006, and for this reason the Board did not provide the name of a representative to the SEAB.

The Appellants initiated an appeal to the Tribunal on June 15, 2006. In response to this appeal, the Board offered to change the child’s identification to include Communication - Learning Disabilities. The PDSB has twice offered to change the child’s identification without convening a further meeting to consult with the parents.

The Appellants stated that they look to the Tribunal to order the PDSB to comply with *Regulation 181/98* and the *Education Act*. They expressed their concerns about the way in which the PDSB deals with the development of needs statements and IEPs for exceptional students; provides access to parents to a student’s Ontario Student Record; and manages the IPRC process.

The Appellants stated that from their reading of previous Tribunal decisions, it is clear that the description of appropriate programs and services is directly linked to the issue of placement. Further, that a placement is only meaningful if the parents are familiar with the programs and services attached to the placement. The Appellants said that School Board staff did not describe the programs and services available to their child in the current placement sufficiently clearly for them to make a decision about the appropriateness of the placement. They asked that the Tribunal take jurisdiction to hear the merits of the case and make an appropriate decision about both the identification and the placement that would best meet the child’s needs. They reiterated their request that the child be provided with an appropriate placement that will ensure that the child is “engaged with learning” and that will enable the child to succeed and achieve the child’s goals.

## **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 still dissatisfied with the identification or placement decision or both.

### **1) Exhausted All Rights of Appeal**

The evidence presented demonstrated that the Appellants had followed the legislated process for appealing the IPRC’s identification and placement decision.

Despite requests to reconvene the IPRC or to have the matter heard by the SEAB, no second IPRC was held and the SEAB was not convened.

Therefore, the Appellants have exhausted all the appeal rights available to them under *Regulation 181/98*.

## **2) Dissatisfaction with Identification and Placement**

### **(i) Identification**

The Appellants stated that they were dissatisfied with the identification of the child, as determined by the IPRC's of October 18, 2005, March 21, 2006 and April 11, 2006, and contained in the letter dated May 12, 2006, in which the identification decision of the April 19, 2006, IPRC decision letter was amended to Behaviour. The Appellants stated during the hearing that they wanted the child's identification to be a dual exceptionality designation of Communication - Learning Disabilities and Behaviour.

Therefore, the evidence before the Tribunal is that the Appellants are dissatisfied with the child's identification set out in the documentation provided to them by the PDSB.

### **(ii) Placement**

The Appellants stated that they were dissatisfied with the child's current placement. They did not specify the placement that they wanted for the child in their Notice of Appeal. In the request for the establishment of a SEAB, they stated that they believed that their child requires a placement in "LS-2, a placement which is not implemented via the GLE course".

During the hearing they stated that they wanted the child to be in a Regular Class with no withdrawal but with appropriate resource supports. They want the placement to meet the child's identified needs in terms of access to technology, access to the accommodations that the child needs, and the involvement of a social worker. They want the placement to provide programs and services that will enable the child to be successful in the child's education and to meet the child's potential. Further, the Appellants said that they had inadequate information about the new placement proposed for the child to enable them to assess whether it is in the child's best interests.

Therefore, the evidence before the Tribunal is that the Appellants are dissatisfied with the child's current placement.

## **DECISION**

The Tribunal has jurisdiction over the appeal because the Appellants showed that they:

- a) have exhausted all rights of appeal; and
- b) remain dissatisfied with their child's identification and placement; and
- c) have appealed to the Tribunal for a hearing.

In such circumstances, subsection 57(4) of the *Education Act* states that the Tribunal shall hear the appeal.

The Tribunal determined that it has jurisdiction to hear the merits of the appeal of the April 19, 2006, IPRC decision, further amended by the Board on May 12, 2006, regarding the special education identification and placement of the minor child. A Tribunal hearing to consider the merits of the case will be scheduled. Both parties will be invited to participate

in a conference call for the purpose of setting dates and making arrangements for the hearing.

**OBITER**

Counsel for the PDSB stated that the Board wants to “dispose of this appeal”. The PDSB communicated to the Appellants’ lawyer on May 12, 2006, that “despite the Board’s reservations, the Board is prepared to agree to the identification and placement requested in the Notice of Appeal”. The Board changed the IPRC determination for the child’s identification to Behaviour and the placement to Learning Support 2, effective September 2006. During the hearing, Ms. Tymochenko stated that the PDSB is willing to further amend the child’s exceptionality designation to include Communication - Learning Disabilities.

However, these amendments were not made at an IPRC or a SEAB meeting, where the parents would have had the opportunity to participate meaningfully in the process, in accordance with *Regulation 181/98*.

Clearly, the PDSB has reservations about the changes it has agreed to make, and the parents are not in agreement with these proposals. That means that neither party is confident that the currently proposed arrangements for the child are the appropriate ones.

The Tribunal is concerned that the offer to change the child’s identification and placement was made by the PDSB in the absence of any new or real evidence that the amended identification and placement are in the child’s best interests. The Tribunal encourages mediation and is in favour of the parties reaching a resolution to their concerns outside the Tribunal process. Such a resolution may result in a mutually agreed upon Settlement Agreement and the Appellants may at that time withdraw their appeal. That is not the case here: notwithstanding the offer made by the PDSB, the Appellants have asked the Tribunal to hear the appeal and to make a determination, based on the evidence, of where the child’s best interests lie.

Eva Nichols, Chair \_\_\_\_\_

Derryn Gill, Member \_\_\_\_\_

Noel Williams, Member \_\_\_\_\_

Date October 11, 2006