



ONTARIO SPECIAL EDUCATION (ENGLISH) TRIBUNAL

In the Matter of the Education Act R.S.O. 1990, C.E. - 2, Section 57
and
in the Matter of the Ontario Special Education (English) Tribunal
at a preliminary hearing into the matter of
the placement of the minor child

BETWEEN

Halton District School Board, Appellant

And

LA Respondent

Tribunal Members:

Wayne Tompkins (Chairman)
Judith Ross Hendin (Member)
Marilyn Thain (Member)

Appearances:

Mr. Robert G. Keel, Esq.	Counsel for the Halton District School Board
Ms. Nadya Tymochenko	Parent (Applicant)
LA	Student (Applicant)
SA	
Ms. Heather Holden	Executive Director, Learning Disabilities Association of Halton
Mr. Peter Ferren, Esq.	Secretary, Ontario Special Education (English) Tribunal

The hearing was held at the Ramada Inn, 360 Oakville Place Drive, Oakville, Ontario, L6H 6K8 on January 11, 2000, commencing at 9:30 a.m.

Introduction

At the opening of the hearing the Chairman stated that this Tribunal would be guided by the Education Act R.S.O. 1990, C.E.-2, Section 57, the Regulations made thereunder, and the Statutory Powers and Procedures Act, Section 57(4) which delineates the decisions the Special Education Tribunal may make. 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 (of the pupil).

The Chairman also stated: *"In a Tribunal, we attempt to give everyone opportunity to say as much as needs to be said, so that we can arrive at the best possible solution to the problem at hand"* (Transcript — page 4).

The Appellant's Request for the Halton Board

Mr. Keel, counsel for the Board, questioned the authority of the Tribunal. He argued that the Tribunal did not have jurisdiction to hear this matter.

The Respondent's Reply

The mother disagreed with the placement decision made by the Halton District School Board. She is seeking placement for her child in a self-contained class for learning disabilities (Transcript - page 11, lines 19-24). The respondent argues that a Tribunal is required and appropriate to decide the child's placement (Transcript - page 21, lines 5-7).

Witnesses

For the Appellant
Brenda Kearney

For the Respondent
Mary McCully

The Appellant's Opening Submission

Mr. Keel's submission was that Regulation 298, Section 31 is at the heart of the issue and that the Special Education legislation was changed and put into the new Regulation 181. He said that the jurisdiction of the I.P.R.C. and Special Education Appeal Board is contained within that Regulation (Transcript — page 6, lines 19-24).

He advised that the Ministry's definitions deal with the concept of learning disability, but that there is no longer a procedure for the concept of severe, or mild learning disabilities as contemplated by Regulation 298. He also said that the new funding formula deals with funding for students with learning disabilities, but does not deal with the severity of the learning disability. *"The I.P.R.C. and the Special Education Appeal Board dealing with 181 of course, is dealing with the Ministry definitions, is dealing with jurisdiction under 181/98 of the Regulation"* (Transcript - page 7, lines 23-25 - page 8, line 1).

Mr. Keel also explained that the Tribunal is established under the Education Act and that the jurisdiction flows from Regulation 181/98. He explained that Regulation 298 is a matter between the Ministry and the Board of Education, and concluded that: *"the Tribunal is in no different position than the I.P.R. C. or Special Education Appeal Board in dealing with the legal, legislative, and identification issues that come out of Special Education"* (Transcript - page 8, lines 14-18). He said that jurisdiction is under Regulation 181/98, where it deals with the identification of learning disabilities. To the extent that there is a differentiation of severe learning disabilities as in Regulation 298, it is outside of the jurisdiction of the Tribunal, or Special Education Appeal Board, or the I.P.R.C. (Transcript - page 8, lines 19-25 - page 9, lines 1-2). That is a matter between the Ministry and the Board. Mr. Keel said that it is a matter of the funding formula (Transcript - page 9, lines 2-4). He cited the D & Muskoka board of Education case in support, and stated that if it is an issue in terms of ratio, it is a matter between the Ministry and the Board as that is an issue for the Board's Special Education Plan and is not within the jurisdiction of the Tribunal (Transcript - page 9, lines 16-20).

Mr. Keel stated that there is no provision for identifying severe learning disability, which leaves an interesting conundrum as to what Regulation 298 really means (Transcript - page 10, lines 14-19). The fundamental legal issue is the identification and use of the application of 31 (a).

Respondent's Opening Submission

The parent [respondent] is seeking a placement for her child in a self-contained class for learning disabilities.

The parent presented her child's school history indicating that her child has remained in a self-contained placement for students with learning disabilities since February 1993. She stated that her child has been assessed since 1992 (Exhibit A) as a student having severe learning disabilities (Transcript - page 15, lines 12-20). She presented

Exhibits F.G1, G2 and G3 to demonstrate the communication that took place following the I.P.R.C. of May 1999. On September 8, 1999, a letter from the Halton School Board placed her child in a mixed exceptionalities class. The parent stated *"this was the first time I had been informed such a placement decision had been made"* (Transcript- page 18, lines 9-10).

The Respondent requested an appeal on August 12, 1999 (Exhibit A). She received a response from Dr. Papke, Director of Education, requesting some clarification to the letter of appeal. The respondent said she had clearly stated she was appealing placement (Exhibit 3, Transcript - page 17, lines 22-23). The Respondent argues *"school boards do not have the discretionary power to decide whether or not to carry on with an appeal"* (Transcript - page 18, lines 16-18).

The respondent cited the case of R. & Carleton Catholic School Board (Exhibit 1 - Tab. 3) to indicate support that the *"approved Special Education Plan does not override the best interests of the students"*. In summary, she stated *"she is appealing the I.P.R.C. placement decision of a mixed exceptionality class"* (Transcript - page 25, lines 19-23).

She requested the Tribunal *"to order the Halton District School Board to maintain the same makeup of the class, the "defacto" self-contained L.D. class to protect her child, so that there is no change made until this matter is resolved"* (Transcript - page 28, lines 7-12).

Opening Submissions in Reply by Mr. Keel

In reply, Mr. Keel stated that what the Board is talking about is identification and placement. The identification is learning disability and the placement is self-contained. He said that in order to fit into 31(a), you must be identified as *"severe"* by an I.P.R.C. or the Special Education Appeal Board or the Tribunal, if there is jurisdiction. Therefore, rather than self-contained, it would be self-contained learning disability. *"But the major issue is the self-contained learning disability, which is ... our position is that that's beyond the jurisdiction of the I.P.R.C. so that's what we're clarifying"* (Transcript - page 30, lines 20-23).

He stated that the class is a *"defacto"* learning disability self-contained class. *"But that the issue is whether or not other exceptionalities could be brought into that class"* (Transcript - page 31, lines 1-3).

Examination of Brenda Kearney

Ms. Kearney is the Superintendent of Education of the Halton District School Board. She explained that in Halton they do not differentiate *"in any of our exceptionalities"* nor does the Ministry outline that (Transcript - page 36, lines 10-12). Therefore, under the Ministry's funding formula and I.P.R.C. procedures, she explained that there is no definition for mild, moderate or severe learning disability.

With respect to the Satellite Program, she explained that more recently, the Satellite Program has changed its focus and has become an *"area program"*, still maintaining the self-contained setting and still maintaining the focus on learning disabilities. However, she explained that with the introduction of the new Special Education funding formula, Halton has lost over 6 million dollars.

She also explained that in the past, she would present a model of delivery for Special Education to the Board, which was felt would best meet the needs of students. The trustees would accept that model of delivery, understand the costing which would be incurred with that model, and then raise the mill rate in order to support that (Transcript - page 38, lines 3-10). However, with the present funding formula, it is a *"one size fits all – X is X"* (Transcript - page 38, line 12). She said that in Policy Program Memorandum No. 8, written in 1982, the Ministry outlined with specificity the terms *"mild"*, *"moderate"* and *"severe"* for disability (Transcript - page 40, lines 12-14); whereas, the Ministry released new definitions, she believed last November, December or January, which are now in place and, she stated that they have clarified the situation. In the new definition's, *"which Boards are bound by, they have no longer used the terms mild, moderate or severe"* (Transcript - page 40, line 25 - page 41, lines 1-3).

She explained that in Halton in the I.P.R.C. procedures *"we identify them as encapsulated by the Ministry's own definition, learning disabled"* (Transcript - page 41, lines 6-8). She explained that all students in Halton identified as learning disabled are not in self-contained settings, and that when a child is identified as a learning disabled child, *"then through discussions with the school resource team at the school, the teacher, the principal and the Special Education teacher and the parent, we look at the delivery model that best meets the needs of that child"* (Transcript - page 41, lines 17-22). The majority of the learning disabled children receive service in the regular classroom with resource support, she explained. They do offer a self-contained placement for those with severe needs and she said that they are one of the few Boards that offer a self-contained setting at the secondary level, which is the Satellite Program.

Ms. Kearney explained that it is a “catch 22” situation because of the funding formula. *“In the Special Education review, when we look at that issue, the funding formula, the balance between self-contained settings and the resource support teachers and the programs that we are offering, it became really a juggernaut”* (Transcript - page 44, lines 1-5). She explained that the Satellite Program, which always had different exceptionalities, with a focus on Learning Disabilities, had not changed. However, instead of the ratio of 1 to 8, the Ministry said the Board could “load” this class at 1 to 16 under subsection (g) of 31.

Ms. Kearney said they had asked the Ministry if they have students with dual exceptionalities, could they congregate or place those students in a self-contained class for mixed exceptionalities, specifically, the Satellite Program. They were told they could. She explained that the Satellite Program was being “loaded” as a (g), as a class with different exceptionalities (Transcript - page 47, lines 3-5). When asked if she had discussions with the Ministry about how (a) would apply given the new definitions and new formula, she explained that they could not afford to limit the class or restrict class size at 8 to 1 because the funding formula actually favours integration and not self-contained. She explained that the Satellite Program is an individualized, structured program based on the needs of the students.

Mr. Keel asked Ms. Kearney if she was working under 31(g), in effect. Her answer was: “mmhmm” (Transcript 54, lines 1-3). She also said that in terms of costing, they were running about 1.5 million over the envelope, and that to apply 31(a) in a more rigorous manner would cost \$850,000.00 in Halton. If that sum were multiplied across Ontario, the figure would be staggering. She also noted that the Ministry had not ruled on any of the Boards’ Plans.

Cross-Examination of Brenda Kearney

Ms. Kearney stated that the students in the Satellite Centre all have learning disabilities (Transcript- page 62, lines 2-3). When asked how parents would know that the nature of the class had changed from a self-contained learning disability placement to a mixed exceptionality placement, a discussion followed with the parent continuing to try to illicit an answer to her question. Ms. Kearney said that *“it is a self-contained class through the I.P.R. C. definition, it’s a class with different exceptionalities; however, all of the students have some form of learning disability”* (Transcript - page 67, lines 17-20). She explained that the Ministry requires that they provide a range of services. In Halton, the range is from resource support to self-contained.

Mrs. Abraham then focussed on the Special Education Plan and asked where in the plan it refers to children with mixed exceptionalities. She was told that it doesn't. Ms. Kearney said that the Ministry's outline did not require that. It did not ask the Board to indicate ratios. It asked Boards to outline a range of services.

Reading from the plan, the parent said *"some students at the secondary level are identified as having a severe learning disability"* (Transcript - page 72, lines 22-25). Ms. Kearney concluded by saying *"that's the only place that we deal with the learning disability in a self-contained setting"* (Transcript - page 73, lines 19-22).

Witness: Mary McCully

Ms. McCully was a Department Head in the Satellite Centre at Lord Elgin High School for the period that began a year after the Satellite Centre opened until June 1998 when she retired. Ms. McCully stated that the *"primary diagnosis was typically learning disabilities"* (Transcript - page 78, lines 7-8). The parent stated that the criteria for a self-contained learning disability placement had a ratio of 8 to 1 and was for students with severe learning disabilities. Ms. McCully indicated that the Satellite Centre *"met this criteria"*. She also indicated that a ratio of 1 to 8 was in place for the Satellite Centre up to her retirement in June of 98 (Transcript - page 80, lines 14-15).

Mr. Keel did not cross-examine.

Closing Submissions of Mr. Keel on the Preliminary Issues

Mr. Keel reiterated what was said in his initial submissions, and added that the evidence is clear, the definitions of self-contained, the Satellite Program, and how the funding model impacts on that, is all contained in the Board's Special Education Plan, which was filed with the Ministry at the time of the preliminary hearing, but had not yet been approved (Transcript—page 83, lines 1- 2). He stated that Regulation 298 was in *"... no person 's land because we have Regulation 298, which did at one point dovetail with the definitions of for example, learning disabilities and that regulation, in effect, was superseded by the new definitions, which talk only about learning disabilities and the new funding model which, of course, do not support the Regulation"* (Transcript - page 83, lines 7-13). Mr. Keel explained that the practical reality for the child is that at the time of the hearing, there is an 8 to 1 ratio in the class, but he said obviously, there is a concern about the future. He reiterated that *"in terms of applying the Regulations in terms of the impact of the Plan and the impact of the funding model, these are all issues that are clearly outside of the jurisdiction of the Tribunal"* (Transcript - page 83, lines

24-25 — page 84, lines 1- 3). He stated that *“the basic reality is that the funding model is not working and I don’t think anyone in this room would dispute that, but how to make it work is another issue”* (Transcript - page 84, lines 9-12). He said that Regulation 298 has now been superseded by new Ministry procedures and processes and that the identification is learning disabilities and placement is self-contained. *“Nothing has really changed for this particular student”* (Transcript - page 84, lines 17-22).

He also stated that all of the definitions are within the Plan; the Plan, as defined in D & Muskoka Board of Education is within the jurisdiction as between the Ministry and the Board; it is outside of the jurisdiction of the Tribunal (Transcript - page 85, lines 13-19).

Closing Submission of the parent

The parent stated that she is appealing her child placement in a mixed exceptionality class and that she is seeking a self-contained placement in a self-contained learning disability class of I to 8.

She explained that she *“has exhausted all rights and the Tribunal must hear this placement disagreement”* (Transcript - page 86, lines 5-8). She referenced Hansard, December 8, 1988, which stated that decisions must be made in the *“best interests of individual pupils”* (Transcript - page 88, lines 2-9).

Tribunal Observation

End Note: The Tribunal notes that although Counsel for the Halton Board indicated that Regulation 298 had been superseded by Regulation 181, the Board, as evidenced by Ms. Kearney’s testimony was still applying Regulation 298 to determine the nature of classroom placement for learning disabled students.

Tribunal Ruling. on the Question of Jurisdiction

The Tribunal members have reviewed the transcript and the materials presented at the hearing on January 11, 2000. In light of the evidence presented to the Tribunal, the Tribunal will review the matter of the placement of the child as this falls within the jurisdiction of the Tribunal.

The Tribunal finds that Regulations 298 and 181 are in full force and effect in Ontario and that the funding model does not supersede the Regulations.

The Tribunal finds that the Board did not follow the procedures set out in the Regulations, more particularly Regulation 181 at Section 26.

Wayne Tompkins Chairman

Judith Ross Hendin Member

Marilyn Thain Member

October 30, 2000