



ONTARIO SPECIAL EDUCATION (ENGLISH) TRIBUNAL File #60

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 1997

BETWEEN

Ms. T, Appellant

-and-

The Toronto District School Board, Respondent

Tribunal Members:

Marilyn Thain	Chair
Uma Madan	Member
James McCaughey	Member

Appearances:

T	Parent
MJ	Advocate
Brenda Bowlby	Counsel for the Toronto District School Board
Stephen Kelly	Secretary (April 10, May 23, 2006)
Hazel Debrao	Secretary (April 10, May 23, 2006)
Bill Wyman	Secretary (September 19, 2006)
Louise Sibbald	Secretary (September 19, 2006)

The preliminary hearing on the matter of jurisdiction was held on April 10, 2006, May 23, 2006 and September 19, 2006 in Toronto, Ontario.

INTRODUCTION

The appellant, appealed to the Ontario Special Education (English) Tribunal, (the “Tribunal”) regarding the special education placement of the pupil, an exceptional pupil.

The child, a student with autism, was eight years old and in Grade 3 in a Regular Class in the Toronto District School Board (TDSB) at the time of this hearing. The Identification, Placement and Review Committee (IPRC) meeting held on March 7, 2005, identified the pupil as Communication-Autism and placed the pupil in a Regular Class. The appellant signed this decision on March 31, 2005 indicating agreement with the identification, and disagreement with the placement in a Regular Class. At the same time the appellant said she did not want the pupil withdrawn from class.

Several meetings that took place were described as IPRC meetings. The Board said that the IPRC meeting of March 7, 2005, was not “exactly your normal IPRC meeting. It was not intended to be an IPRC meeting, but the parent insisted that it be the IPRC meeting.” The appellant requested an IPRC decision from that meeting. The Board stated that it had no objection even though the meeting on March 7, 2005 was not an official IPRC meeting; the Board instead tried to reach an agreement with the parent on placement.

The Special Education Appeal Board (SEAB) heard the case on June 2, 2005 and recommended that the pupil’s placement for the 2005–06 school year be amended to be Regular Class with Resource Assistance, and that a note be added to the IPRC decision to indicate that the parent had requested that the pupil not be withdrawn from the class. On August 31, 2005, the Board received and approved the recommendations from the SEAB. On September 9, 2005, the school principal sent out an amended IPRC decision to reflect what the parties had agreed to at the SEAB but the appellant did not sign this decision. On October 7, 2005, the appellant filed a Notice of Appeal to the Tribunal. The School Board raised a preliminary objection that the issue was moot as the parties were in agreement on the placement.

At the outset of the hearing a number of preliminary issues were raised by the advocate for the parent. These included difficulties that arose with the timing of the disclosure to the appellant of documents by the TDSB, and difficulties arranging to call TDSB employees as her witnesses. She said that she had been told by the respondent counsel, Ms. Bowlby, that it was the advocate’s responsibility to arrange for the attendance of any witnesses she required to present the appellant’s case, including any witnesses employed by the TDSB. The Tribunal proceeded with the hearing and agreed to allow the advocate to address these issues at the end of the hearing. However, neither issue was pursued by the advocate in her final submissions to the Tribunal.

This hearing took place over three days: April 10, 2006, May 23, 2006 and September 19, 2006.

The advocate had one witness: the appellant, mother of the pupil. Ms. Bowlby had two witnesses: the principal at the Public School, and the supervising principal of special education for the northeast, TDSB.

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, 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:

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 of 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 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 pupils 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,

- (c) 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.

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/guardians in these proceedings. This Regulation provides a mechanism for parents to appeal identification and placement decisions of an IPRC to an SEAB and sets out the time lines that must be met for such an appeal.

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 17 (2): If, after considering all of the information obtained by it or submitted to it under section 15 that it considers relevant, the committee is satisfied that placement in a regular class would meet the pupil's needs and is consistent with parental preferences, the committee shall decide in favour of placement in a regular class.

Special Education Tribunal Case Cited

R. v. The Durham District School Board, 2004, cited by Ms. Bowlby for the Respondent.

Case Cited

E. v. Brant County Board of Education, [1997] 1 S.C.R. 241, cited by the advocate for the Appellant.

ISSUE

The issue before the Tribunal is one of jurisdiction, to decide whether there is a disagreement between the parents and the school board on the placement of the pupil.

Respondent's Position

A preliminary motion made by Ms. Brenda Bowlby, counsel for the Toronto District School Board (TDSB) stated there is no issue between the appellant and the Board over the pupil's identification or placement. The Board stated that the parties actually reached agreement on all the issues raised by the parent at the Special Education Appeal Board (SEAB).

Ms. Bowlby said that subsequent discussions on September 27, 2005 led to agreement between the Board and the parent that the pupil's placement would be a Regular Class with Resource Assistance. Agreement was reached between the parent and TDSB that the pupil would receive all special education instruction in the Regular Class, and would not be withdrawn and that this would be indicated on the IPRC form.

Ms. Bowlby stated that, therefore in these circumstances there is nothing left to appeal. Ms. Bowlby said that since the Appeal to the Tribunal, the appellant has stopped talking

to the principal, whereas before the Appeal, she would meet with the principal every one to three weeks.

Appellant's Position

The appellant's advocate presented the appellant's position to the Tribunal. The advocate stated that the appellant's position is that the services her child is receiving, or is not receiving have "not been proven". The appellant thinks that the spirit of the agreement made with the SEAB is not being implemented.

The advocate stated that *Regulation 181/98* states that a Regular Class placement includes appropriate services. The appellant's position is that there is no evidence to indicate that the pupil is receiving the services the pupil requires. The advocate said that the pupil is capable of talking about what goes in a school day and that the pupil has said that no one is there to help.

As outlined in the Notice of Appeal, the remedies sought by the appellant were:

1. A change in the placement to Regular Class with Resource Assistance without Withdrawal;
2. A full inclusion model with accommodations and direct supports to meet the pupil's academic, safety, communication and socialization needs;
3. No removal from the class other than that stipulated by the parent; and
4. Confirmation that the pupil's identification is Communication-Autism.

SUMMARY OF EVIDENCE

The appellant stated that during the IPRC meeting of March 7, 2005, the principal said that programs and services would not be discussed at that meeting. The appellant said she wanted to discuss the social interaction skills and safety issues that were not in the pupil's profile of needs. She also wanted to discuss the pupil's communication needs, but the meeting was ended before that discussion could take place. The principal refuted the appellant's testimony indicating that he did not refuse to discuss program and services at that IPRC meeting.

On March 31, 2005, the mother appealed the IPRC decision to the SEAB. The supervising principal of special education called T on April 4, 2005, and offered to correct the decision on the IPRC form or reconvene the IPRC meeting again. The appellant asked the supervising principal if the meeting would include a discussion of the pupil's profile of needs, and the appellant said that the supervising principal said that there would be no discussion of the pupil's profile of needs. The appellant testified that the supervising principal also said that there would be no discussion about programs and services or how the resource assistance would be delivered. The supervising principal however, refuted this testimony, stating that she did not make such a statement to the appellant, and that, to the contrary, she would have encouraged discussion of the pupil's profile of needs as such discussion is part of the Board's IPRC protocol.

Academic Needs

The principal indicated that the pupil was doing exceptionally well in Grade 3. He said the pupil has no grades less than B and has several A's. The pupil seems extremely happy and the staff is pleased to see the pupil's continued progress.

The principal reported on a case conference that took place on February 7, 2005, which lasted approximately one and a half hours. School personnel, including the classroom teacher, a speech pathologist, and the special education teacher, described the success that the pupil was experiencing. They believed that the pupil was “tremendously successful” in the Regular Class and that the pupil was appropriately placed. The meeting ended because of insufficient time, as other parent conferences were scheduled. The principal said that he understood that the pupil’s parents did not feel the pupil was being successful at school.

The principal said that the pupil demonstrated no intellectual or cognitive delays based on the pupil’s academic performance at school. The principal told the advocate that the pupil has been quite successful in the three years that the pupil had been at the Public School. He also stated that, based on provincial exemplars, the pupil is meeting, or exceeding the provincial standards. The principal confirmed that the pupil is progressing very well and the pupil has had no difficulty meeting the Ontario Curriculum expectations.

Both the appellant and the principal presented information on the pupil’s Diagnostic Reading Assessment (DRA) results. The appellant indicated that the pupil did not do well especially in retelling a story. The principal said that the test results were at grade level overall.

The advocate told the Tribunal that the pupil has a private tutor. The advocate stated that the tutor had said that she doesn’t see the academic achievements, as described by the principal at the hearing, in the tutoring work she does with the pupil. The tutor, who was not identified by name, did not testify, nor was any information provided to the Tribunal as to the qualifications and training of the pupil’s tutor.

The appellant testified that the pupil’s classroom teacher gave the pupil an A and a B in language; she said that these results were different from the ones the pupil’s tutor would suggest. The appellant said that she asked the teacher if the pupil’s needs were being met in the curriculum, and the teacher indicated that she did not need to follow the Ontario Curriculum in her teaching, as she had been teaching for many years. The principal refuted this statement on behalf of the school, stating that the teacher, along with all other teachers in the school, does teach the Ontario Curriculum, and is required to prepare long-range plans at regular intervals, which clearly outline the expectations of the Ontario Curriculum. He also noted that the school’s report card makes clear reference to the curriculum expectations and that students’ letter grades are assigned based on student strengths and weaknesses, measured by comparison to those curriculum expectations.

Communication Needs

The principal said that the pupil is highly verbal and the pupil does not need the Picture Exchange Communication System (PECS) to communicate.

The appellant testified that the pupil has many communication needs. She said that the pupil’s difficulties in communication have a negative affect in the pupil’s overall achievement. She indicated that the pupil will fixate on a topic. Her example was a time when the pupil was working on a project involving robots, and “the pupil would just keep talking about the same thing”. The appellant also provided examples of incidences that

happened when the pupil was in daycare, which would have been prior to entering the Public School in Grade 1 in 2003-04.

The principal stated that the appellant made a direct request that the pupil have an updated speech and language pathology report completed by the Board. He reported that he received a letter from the appellant dated January 23, 2005 in which she requested that the updated speech and language assessment be postponed until the pupil was moved to another classroom. The appellant stated that she also asked for the assessment to be delayed because of the pupil's anxiety and "a recent increase in negative behaviours". The appellant said that the pupil would need to be withdrawn from class to have the test and therefore she did not want the test administered. The principal indicated that he did not see any of the negative behaviours and emotions that she referred to in her letter.

The principal was asked about the SEAB report. He indicated that the recommendation to have the family and its supporters meet with appropriate personnel from the TDSB to discuss and reach agreement on a revised profile of the pupil's strengths and needs in the area of language had been difficult to implement. He said that attempts were made to set up a meeting in June 2005, but the dates were not suitable for the parents. A meeting date of September 13, 2005 was then arranged. The appellant arrived at the meeting but said that she did not want to proceed with the meeting as an emergency of some kind had taken place. A subsequent meeting was arranged for September 16, 2005. The evening before the meeting, the appellant indicated that she would be attending. The morning of the meeting the principal received a phone call from her then lawyer, who said that the meeting was not going to take place as he had been called to court. A new date was set for September 27, 2005 and the appellant, her lawyer and the TDSB support personnel met. The meeting resulted in further agreement about the pupil's placement. Subsequent to the September 27, 2005 meeting, the only other meetings that took place were parent/teacher interviews in December 2005 and in March 2006. In each case the appellant came with her advocate, but she herself did not speak with the teacher.

The principal also stated that the school personnel have tried several times to have the appellant sign a Consent to Release form which would permit the private speech pathologist to talk to the Board's speech pathologist and give a better understanding of the pupil's needs in the area of functional communication. As of the final date of the hearing before the Tribunal, the release has not been signed.

Safety Needs

On January 27, 2005 the appellant wrote to the principal. This letter indicated that the pupil had specific needs to be met, which included the need for a safety plan. This plan would identify procedures that would be put in place to prevent the pupil from being hurt at school.

The principal said that the pupil is not at risk to run. He said that the pupil knows the boundaries of the schoolyard and he has never ever observed the pupil wandering off in the three years the pupil has been at the Public School. The advocate asked specific questions about the pupil's safety and the pupil's father indicated that he was unaware of the issues that the advocate had presented.

The appellant said that the pupil did occasionally get hurt at the school. The appellant said these injuries result from the pupil's communication needs and the pupil's social interaction skills, as the pupil doesn't understand social cues, and the pupil lacks insight into social situations. The appellant said that the pupil was also injured at school as a result of lack of supervision and support. The principal reported that a couple of times the pupil had reported that [the pupil] was hurt. The principal said that on one occasion the skipping rope hit the pupil's eye and on the other occasion the pupil had said that the pupil was hurt on the playground; other students indicated that a rock had hit the pupil. The principal explained that there are stones in the playground area that could have easily bounced up, but that the pupil seemed totally fine.

The principal said that the safety plan was put in place in response the appellant's request. This safety plan was prepared and shared with the appellant but she did not provide any feedback. The appellant said that she received the safety plan after October 18, 2005, which was after she had appealed to the SEAB.

Transitions Needs

Ms. Bowlby questioned the appellant about the March 7, 2005 meeting where she had met with the principal in the presence of her advocates. The appellant agreed that the main issue was that she didn't like the Regular Class that the pupil was in because of the change of teachers; therefore she wanted the pupil to be moved into another class and she wanted one-to-one assistance for the pupil. The appellant had asked that the pupil be placed with one teacher for the 2005-06 school year. The principal testified that such an arrangement had been made for the pupil, but that later in the year the teacher left on maternity leave. The principal acknowledged that over the three years that the pupil has been in the Public School the pupil has had a number of changes of staff. He observed that the pupil had managed these changes quite well in Grades 1 and 2.

The principal said that when the pupil entered Grade 1 at the Public School, the pupil was withdrawn from class from time to time. The appellant later questioned why the pupil had been withdrawn and at that time indicated that the pupil was not to be withdrawn from the classroom. He also stated that it has been more than two years since the pupil was withdrawn. The appellant said that the pupil had been withdrawn for the Diagnostic Reading Assessment DRA. She stated that there had been other times as well. The principal refuted this. He said that, given past practice, if it had happened, the parent would have written him a letter, but no letter was received. Ms. Bowlby stated that it has been almost two years since the pupil was withdrawn from class; instead the pupil receives all special education services in the classroom.

Toileting Needs

Ms. Bowlby asked the principal about the toileting issues that the appellant said the pupil has. The principal said that the pupil had not had any accidents in the school since the pupil entered Grade 1. However, a schedule was established as requested by the appellant.

Social Needs

Another recommendation of the SEAB was to help enhance the pupil's friendship group at school, while maintaining a core group of close friends. The principal said that the

pupil has many friends and that the pupil plays with both girls and boys on a regular basis. The pupil engages in the activities of an average student in Grade 3.

Family/School Communication

The SEAB recommended that it would be helpful to develop a strong home/school communication routine. Attempts had been made to use a communication book that the appellant had previously provided; for the school year 2005-06 an agenda book, provided by the school, was used instead of the communication book. The principal said he has tried to establish regular meeting times with the appellant but she has cancelled them.

The principal reported that from Grade 1 up to the time the Appeal to the Tribunal was filed on October 7, 2005, he met every second or third week for approximately one or two hours with the appellant to discuss the pupil. Since that time the appellant no longer has come to the school but instead has communicated only in writing.

The principal said that the appellant has not responded to the request for Individual Education Plan (IEP) input, nor did she respond to the amended IPRC decision form that was sent home. She didn't respond to the safety plan that was developed at her request. She also has not responded to a request from the school for updated residency information, which is used to maintain the Ontario School Record (OSR).

Professional Development for Staff

The SEAB recommended that professional development be provided in the area of autism for the appropriate staff who have routine contact with the pupil. The appellant testified that on March 7, 2005 she asked the principal about staff training. The appellant said that the principal told her that the staff has not had training about autism.

The principal testified that there was a professional development presentation on autism for the staff and that the resource teacher, who is directly involved with the pupil, has taken numerous courses on autism. The principal also told the advocate that the autism pervasive development disorder team (PDD) has come more than once and worked with the teacher or the assistants to find direct instructional accommodations for the pupil.

Classroom Support

The principal explained the "community based resource model". He said he has a special education teacher assigned to the class. This teacher goes into the class mainly to help the pupil with transitions. He explained that a special needs assistant (SNA) also went into the classroom to monitor the pupil to make sure that the pupil is on task and working appropriately.

The advocate asked the principal about teacher support as reported on the IEP, dated October 18, 2005. The principal clarified that Room 113 was the pupil's homeroom and that the resource teacher came into the pupil's classroom to provide support. The principal added that he followed the SNA's timetable and he reviewed the results of the pupil's achievement. He stated that he believes that the SNA complies with the timetable and is in the classroom 160 minutes a day.

The principal said he understood that there was an agreement between the parents and the TDSB following the SEAB. He said that a revised IPRC statement was written to amend the placement decision to Regular Class with Resource Assistance and it was sent to the appellant for signature. The statement also affirmed that all of the pupil's special education instruction was to be in the Regular Class and that the pupil would not be withdrawn for special education purposes. This IPRC statement reflected the agreement that was reached at the SEAB. T did not return it.

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 pupil's exceptionality identification or special education placement or both and that the parents are dissatisfied with the identification or placement decision or both.

The initial IPRC of March 7, 2005 placed the pupil in a Regular Class. The SEAB decision placed the pupil in a Regular Class with Resource Assistance and contained a number of recommendations that were agreed to by both parties. These recommendations lead to a further amended IPRC decision which included that the assistance that the pupil received would be directed in the classroom and that there would be no withdrawal for instructional purposes. The meeting held on September 27, 2005 resulted in further agreement by the appellant and the Board of the pupil's placement.

The recommendations made by the SEAB were practical and helpful to this case. The only obstacle that seems to be in the way of appropriate implementation is the lack of cooperation and collaboration of the parent, the appellant, with the Board. The evidence showed that the parent refused to sign the amended IPRC decision, which reflected the recommendations of the SEAB. The evidence also showed that the parent has refused to participate in meetings. This is not helpful to the pupil, and it also limits the information that the teachers have when planning the pupil's program.

Given the history of the previously strong positive relationship the appellant has had with the school the Tribunal can only encourage the appellant to re-establish regular communication with the school personnel and to share information that will be helpful to the staff in planning an appropriate program for the pupil.

The evidence demonstrates that the pupil is achieving at or above provincial standards and is continuing to make progress. The IEP outlines the programs and services that the pupil will receive. The evidence demonstrates that these services are in place.

There is no disagreement between the parties about the identification or placement. As a result of the amended IPRC decision, the parent has already received all the remedies that she had outlined in the Notice of Appeal.

DECISION

Without disagreement between the parties as to the identification or placement of the pupil, a statutory precondition for the assumption of jurisdiction, as identified in s. 57.3 of the *Education Act*, has not been met. The Appeal is therefore dismissed.

Marilyn Thain, Chair

Uma Madan, Member

James McCaughey, Member

October 30, 2006