



ONTARIO SPECIAL EDUCATION (ENGLISH) TRIBUNAL File# 4

IN THE MATTER OF the *Education Act*, R.S.O. 1980 Chapter 129, as amended;
AND IN THE MATTER OF an appeal pursuant to Section 36 of The *Education Act*, from a decision of
an Appeal Board appointed by The Waterloo County Board of Education to the Central Region
(English) Special Education Tribunal, leave for such appeal granted by the Ontario Special Education
(English) Tribunal, February 18, 1985.

BETWEEN

W. K. AND B. K.,
parents of the student, and the student
in the student's personal capacity.

Appellants

- and -

THE WATERLOO COUNTY BOARD OF EDUCATION

Respondent

Tribunal Members:

David H. Peirce	Chairman
Orville McDowell	Member
J. Stobo Prichard	Member

Tribunal Secretary:

Keith Whittaker

For the Appellants:

Izaak de Rijcke
de Rijcke, Snowie
Barristers & Solicitors
173 Woolwick Street
Guelph, Ontario N1H 3V4

For the Respondent:

Joseph Kelly, Q.C.
Kathleen Sellers
Kelly & Marby
Barristers & Solicitors
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P.O. Box 2277, Station B.,
Kitchener, Ontario N2H 6M2

Hearing was held in Kitchener April 24, 25 and May 8, 1985.

THE APPELLANT'S REQUEST

The Appellants request that the student be recognized as "exceptional", that is, that the student has "a specific learning disability-communication exceptionality, with attention deficit disorder and slow processing". They also wish the Respondent to acknowledge that it has "no appropriate or effective educational placement and program", or alternatively that the Respondent "provide an appropriate educational placement, and an effective program (in conjunction with the resources of the Toronto Learning Centre) to meet the special needs of [the student]". The Appellants also request consideration as to costs.

BASIS OF TRIBUNAL FINDING

The *Education Act*, R.S.O. 1980, c. 129 (hereinafter called "The Act") defines the term "exceptional pupil" as "...a pupil whose behavioural communicational, intellectual, physical or multiple exceptionalities are such that he is considered to need placement in a special education program by a committee,...". The Special Education Information Handbook 1984 (hereinafter called "The Handbook") is published by the Minister under the directive of section 8(2)(b) of The Act and defines "learning disability". The Handbook states that, both in academic and social situations it has to be apparent that the pupil has deficiencies involving the proper use of spoken language or symbols of communication. As a consequence of the deficiencies, there must be "a significant discrepancy between academic achievement and assessed intellectual ability".

The Handbook delineates that these deficits can occur in one or more of the following educationally defined areas:

- (a) Receptive language - (listening, reading)
- (b) Language processing - (thinking, conceptualizing, integrating)
- (c) Expressive language - (talking, spelling, writing)
- (d) Mathematical computations

The Handbook additionally states that an educational deficit may (emphasis added by Tribunal) be associated with one or any of the following conditions:

- (i) a perceptual handicap
- (ii) a brain injury
- (iii) minimal brain dysfunction
- (iv) dyslexia
- (v) developmental aphasia

In essence, irrespective of the cause and irrespective of the treatment, it is the Tribunal's opinion that the exceptional pupil must exhibit an educational deficit as defined in the Handbook.

Although learning disability is not defined with greater specificity, the Handbook provides the framework within which one must determine whether a pupil has a learning disability and, in the event a learning disability exists, whether the severity of that learning disability is such that the pupil should be labelled "exceptional".

The Tribunal, when examining the evidence, should consider the student's academic achievement and the means by which it was assessed, the student's intellectual ability and the means by which it was measured and decide whether a significant discrepancy exists between the two.

In addition, the Tribunal's decision must fall within the general context and purpose of the Act. No two pupils are alike. Differences exist, for example, in intellectual skills, ability to learn, physical characteristics and social background. Philosophically, because of such differences, every pupil could be regarded as "exceptional". At present, the educational system has most pupils grouped in regular classrooms. Within this milieu some modifications of each pupil's program are frequently made. Some pupils may be withdrawn from class for various periods of remediation, or some pupils may be withdrawn for specific programs. The intent of the Act is not to replace this classroom system. It is designed to help with extraordinary measures the pupil with a specific disability of such severity and so out of context with the rest of his intellectual capacity that it interferes greatly with his ability to learn. The Act sets standards and procedures for local boards of education to apply to help determine the point at which special education programs should be provided. Of course, irrespective of whether a pupil is declared exceptional or not, the Act requires a school board to provide an adequate and appropriate educational program.

The Act is also designed to help the pupil with special difficulties, when those difficulties are so great that unless they are addressed, they will greatly interfere with the academic achievement of that pupil. The intent of the Act is not to replace the present classroom system; however it is designed to allow identification of the pupil with a specific disability, which causes the pupil's performance to be so severely out of context with the rest of his intellectual capacity that special education placement is required. The Act delineates standards and procedures for local Boards of Education to apply and determine the point at which special education programs will be provided for exceptional pupils. Whether a pupil is declared exceptional or not, the Act requires a school board to provide an adequate and appropriate educational program.

APPELLANT PRESENTATION

The witnesses called by the Appellant spoke to either academic achievement or intellectual ability of the student. It is noted that the home room teacher and resource withdrawal teacher of the student did not support the Appellant submission that the student is not progressing academically. It is noted that the student encountered problems in grade one, and received assistance to improve academic success since that time, and presently is receiving substantial assistance by withdrawal from certain subject programs to receive remediation. However, the student is achieving academically although this

involves greater time and effort on the student's part than for some other pupils. Academic achievement and progress is confirmed in the assessment by Dr. Morgan in April 1985, compared to Dr. Morgan's February 1984 psycho-educational assessment.

The psycho-educational assessment of February 1984, conducted by Dr. Morgan, indicates that although the student has several weaknesses as well as several areas of competency, the student is of average intelligence. In mathematical computations, the student has significant underachievement, according to Dr. Morgan, but Dr. Morgan does not state that the student has significant difficulty. The conclusion of Dr. Morgan in his February report is that the student requires remedial programs and assistance in specific areas of learning, greater than what the student is receiving at that time. Dr. Morgan reevaluated the student in April 1985 and his summary at that time supplements the conclusions in the February report.

On examination, Dr. Morgan states that the student is exceptional in that "[the student] needs more than regular help, [the student] needs special help". He further qualifies his statement, "In seeing [the student] again, [the student] has made improvements, but I still feel that [the student] has special needs and is exceptional in that sense." (at pages 151-152. Volume One, Transcript of Proceedings).

It is noted that one of the Appellants on examination, makes reference to what she expects of the student academically, and as well makes frequent reference to the student's "high average intelligence".

The other witnesses called by the Appellants are not in a position to give direct evidence as to academic achievement, or intellectual ability of the student.

RESPONDENT PRESENTATION

The Respondent presents witnesses able to give direct evidence as to the academic achievement of the student, namely the teachers and principals of the student, both presently and of the 1983-84 school year. These witnesses concur with the teachers called by the Appellant, in that, although the student has some academic problems or weaknesses, the student is progressing academically and improving academically in some areas in which the student previously has had problems.

Dr. Robert Seim was not able to comment directly on the exceptionality or otherwise of the student because he has never seen the student. He discussed the nature of a proper educational assessment and reviewed the proper approach that should be used in interpreting formal psychological tests.

Although the Respondent presents a number of additional witnesses who address a variety of collateral issues, only a purported Educational Assessment bears directly on the matter before the Tribunal. At page 11, the Tribunal comments further on this assessment but in essence the Educational Assessment does not support the Appellant position that the student is exceptional.

TRIBUNAL DECISION

The Tribunal finds that the student's academic achievement is not consistent in all subject areas or areas of learning but is not at great variance in most areas taking into account age, number of years in school, and current performance.

Further, the Tribunal finds, on the evidence presented in relation to the student's intellectual ability, that a significant discrepancy does not exist between the student's overall academic achievement and intellectual ability.

The Tribunal further finds that while a discrepancy between the academic achievement and intellectual ability of the student does exist in some learning areas, such discrepancies are not significant to the extent that the student should be declared exceptional.

The Tribunal considers, that even if it errs in not considering any such discrepancy significant, it is not in the best interests of the student to declare the student exceptional. The Tribunal considers the student's age and the many comments of the educators involved in teaching the student in the current placement and program, together with the written recommendations of Dr. G. Morgan, and conclude that a regular program with continued remedial assistance is best for the student's educational development.

The Tribunal therefore dismisses this appeal.

TRIBUNAL COMMENTS AND COLLATERAL DECISIONS

The Tribunal notes that the developmental "milestones" cited by the Appellant do not support any exceptionality of the student in the meaning of that term under the Act. The veracity of the Appellant's observations of actions by the student, or comments of others about the student, is not doubted; but the perceived reasons and thereby conclusions drawn, particularly as to adjustments of marks or scores of the student's academic achievements, in the opinion of the Tribunal, are incorrect and unfounded. The comments, recommendations, and scores reported by Dr. G. Morgan at the behest of the Appellants, coincide with the academic achievements of the student as reported by the student's teachers. The Tribunal is of the opinion that there is a misinterpretation by the Appellant parents as to the student's intellectual potential which leads them to have undue expectations as to the student's academic achievements and progress.

It is of concern to, and creates some difficulties for the Tribunal, although an Identification Placement and Review Committee (hereinafter referred to as I.P.R.C.) request is made over a year previous to this Tribunal, the only evidence presented as to intellectual ability of the student is provided and paid for by the Appellants.

The Respondent not only is silent as to intellectual ability of the student, but presents an Educational Assessment of the student which in the opinion of the Tribunal is a general chronological listing of placements; does not include a synopsis of pertinent materials available in the pupil's Ontario School Record (hereinafter referred to as O.S.R.) as to teaching strategies, assessments or observations; and is not only inadequate for purposes of this Tribunal but is not current.

All the proffered current assessments of the student, properly educational in nature, are verbal. It is the opinion of the Tribunal that an Educational Assessment, aside from being a professional document reflecting the professional abilities of the author(s), is to relay to the reader an explanation of current pupil programs; current assessments of strengths and weaknesses of the pupil in those programs; particular strategies utilized by a teacher; comments on successful and unsuccessful strategies, the current status of the pupil utilizing formal and informal tests, indications of diagnostic testing and results on a regular basis, and observations by the pupil's teacher.

The usual requirements of an Educational Assessment are listed in The Handbook (at 49-50) and as well Policy/Program Memorandum No. 11, 1982 "Early Identification of Children's Learning Needs" requires school boards to identify all pupils' strengths and weaknesses when they are first enrolled and on a regular basis thereafter (emphasis added by Tribunal). From the evidence available to the Tribunal, the Respondent school board fails to meet the criteria or standards required in this regard.

It is noted with some concern by the Tribunal, that the student was to be tested in grade one and commencement of some testing occurred. It is admitted by the Respondent school board verbally that a problem became evident as to the student in grade one and some testing commenced, but it is not noted in the O.S.R.; it cannot be recalled why or who initiated the request for some testing; and no written or concluding report exists.

Reference to Regulation 271 and The Act does not rationalize why such information is not referenced in the student's O.S.R., and no request of a parent or principal to remove such a record or reference is noted.

In the opinion of the Tribunal, the Respondent school board fails to properly investigate the situation of the student; fails on its own volition to obtain or acquire the necessary assessments for the proper conduct of an I.P.R.C.; in failing to implement Policy/Program Memoranda No.s 8, 11, 59 and 81 in any substantive manner evidenced in this hearing, fails to meet the intent and purpose of The Act in relation to an I.P.R.C.

The I.P.R.C. report on the student dated 06 03 84 (Exhibit 9) does not follow the existing guidelines of the Respondent school board as published and confirmed by Respondent witnesses except in a cursory fashion. The Respondent school board's Special Education Programmes and Services 1984-1985 (Exhibit 23) at page 54 states the report of an I.P.R.C. should be understandable not only to the

committee, but to the public (meaning parents or lay persons) and such is not the case.

For example, the I.P.R.C. report states that the request for the I.P.R.C. is by a solicitor for the parents of the student, which statement may well prejudice proper and objective consideration of a pupil's best interest, and flies in the face of Ontario Regulation 554/81 which directs that all referrals to an I.P.R.C. are to be made by the pupil's principal. Additionally, although certain documents are cited as presented to the I.P.R.C., consideration of, or reports on such documents by the I.P.R.C. are not recorded; all documents required or requested for the I.P.R.C. are not available nor considered; the I.P.R.C. does not substantively support its decision adequately nor in a manner which allows proper reconsideration by an appeal board, the school board itself, or this Tribunal.

The Respondent school board publication on its Special Education Programmes and Services (at pages 99 to 103) deals with Assessment and defines Materials with an oblique reference to formal tests. In defining The Assessment Process no mention is made of Materials whatsoever. The Tribunal is not of the opinion that parents wishing an assessment of the ability of their pupil (current or potential) should be required to purchase that assessment outside of the school board services, or privately.

There is a great lack of exactitude evident in all evidence presented by the Respondent in that no teacher or school board employee can state that a grade seven pupil at a particular school is reading at a grade seven level; only a statement as to how a pupil compares to other pupils in his class is available.

The Tribunal establishes a ban on publication during the hearing at the request and on consent of Counsel for both parties. It is noted that the Tribunal is created by statute and regulation and is thereby a public body. As the powers granted by the Lieutenant Governor-in-Council do not address this matter, the Tribunal does not make any further order, the original order going only to the point of the Tribunal decision.

The Tribunal requests the Secretary to advise the Minister that in the opinion of the Tribunal an Order from the appropriate authority should issue recognizing the following concerns of the Tribunal:

- (a) It is of benefit to the general public and school boards to be appraised of the considerations, opinions and decisions of Committees and Tribunals.
- (b) Severe detriment to a pupil or pupil's educational progress can be occasioned by identification of that pupil publicly as a result of identification and placement reviews.
- (c) Much of the material presented to a Committee or Tribunal is privileged and confidential, requiring consent of a pupil (or the pupil's parent, guardian or next friend) for divulgence of such materials, even to a Committee or Tribunal.
- (d) A ban on publication need not be considered if, by the appropriate authority, it is forbidden and enforceable that a pupil or child, and his parent(s), guardian(s) or next friend(s) be identified in any manner publicly in any process commenced under

sections 34, 35, or 36, of the Act, or attendant Regulations and Orders-in-Council.

Two matters arise during presentations to the Tribunal upon which rulings are made.

Counsel for the Appellant issued a number of subpoenas, not only to compel the attendance of witnesses, but to have witnesses attend with documents and records. The Tribunal rules that subpoenas are not properly utilized if only for purposes of a “fishing expedition” to obtain proof of a party’s contention particularly at the Tribunal; further the rule as to compellable evidence and standards necessary to make notes or records referred to by a witness is applicable.

The Tribunal also affirms the rule as to “opinion evidence” being allowed from those witnesses properly qualified as experts and only in the area on which they propose to give expert testimony.

Under Order-in-Council 1755-83 (June 24, 1983) this Tribunal is seized with jurisdiction to fix the maximum costs assessable against a party in respect of various items against one or other or both parties without regard to success of the appeal. It is noted that Order-in-Council 1939 - 84 (July 26, 1984) removes the authority of this Tribunal to assess costs. It is further noted that the request by the Appellant for Leave to Appeal is made July 23, 1984, at which time this Tribunal is seized with jurisdiction to assess Costs.

The Tribunal is of the opinion that had the Respondent school board adequately carried out its own stated services and requirements as well as its responsibilities under The Act, and had the I.P.R.C. of March 1984 been carried out in an adequate fashion, the Appellant need not necessarily have proceeded to this Tribunal.

As a consequence, the Tribunal orders the Respondent school board to pay within thirty (30) days next, the following costs:

(a)	To the Appellants for legal costs	\$ 3,300.00
(b)	To the Appellants for costs at Leave to Appeal and Tribunal Hearings	4,400.00
(c)	Witness conduct money	150.00
(d)	Expert fees (Dr. G. Morgan)	725.00
(e)	Disbursements of Appellants	<u>261 .50</u>
TOTAL		<u>\$ 8,836.50</u>

David H. Peirce - Chairman

Orville McDowell - Member

J. Stobo Prichard - Member

September 3, 1985