



IN THE MATTER OF the Education Act, R.S.O., 1990, E2, as amended, 57(3)
IN THE MATTER OF Ontario Regulation 181/98;
AND IN THE MATTER OF the minor child, born 1995.

E and S C Appellants

and

The Dufferin –Peel Catholic District School Board Respondent

Tribunal Members:

Paula Barber, Chair
Dawn Roper, Member
Marilyn Thain, Member

Advocate for the Appellant:

L. Moir

Counsel for the Respondent:

R. Keel
N. Tymochenko

Secretary for the Tribunal:

J. Van Alstyne

The Preliminary Hearing was held by audio conference on July 23, 2003.

Introduction

At the opening of the Hearing, the Chair stated that this Tribunal would be guided by the *Education Act* R.S.O. 1990 as amended, section 57 and the regulations made thereunder and the *Statutory Power Procedures Act*.

The Tribunal scheduled this hearing to determine the matter of jurisdiction.

The appellant's child is a student in the Dufferin-Peel Catholic District School Board (DPCDSB). The student is eight years old and is presently in a regular classroom with support. In September 1999 the child was diagnosed with Autistic Spectrum Disorder. The appellant delayed her child's entry into Junior Kindergarten until September 2000.

The parents initiated an appeal process regarding the placement decision of the IPRC, April 22, 2002.

The Appeal Board met on January 14, 2003 and April 15, 2003 and upheld the IPRC decision of April 22, 2002, denying the appellant's request that her child be placed in an integrated placement that would provide IBI therapy services to her child in a regular class setting. The majority decision of the Special Education Appeal Board [there was a minority report] was upheld by the Board of Trustees of the Dufferin-Peel Catholic District School Board (DPCDSB) on May 22, 2003.

The appellant family then further appealed to the Special Education (English) Tribunal. The Special Education Tribunal was convened on July 23, 2003 via audio teleconference to hear the arguments regarding the Tribunal's jurisdiction in this matter.

Legal Framework

Statutes

Statutory Powers Procedure Act R.S.O. 1990, c.S.22

Charter of Rights and Freedoms, Part 1, Constitution Act, 1982. S,15 (1)

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

Education Act

Subsection 1 (1) Definitions

1.1 Defines "exceptional pupil", "special education program" and "special education services".

'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, established under subparagraph iii of paragraph 5 of subsection 11 (1), of the board.

- (a) of which a pupil is a resident pupil*
- (b) that admits or enrolls the pupil other than pursuant to an agreement with another board for the provision of education, or*
- (c) to which the cost of education in respect of the pupil is payable by the Minister.*

'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 evaluations 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) Powers of the Minister of Education

"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."*

Section 57 (3)

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.

Section 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.*

Section 57 (5) Decision Final

The decision of the Special Education Tribunal is final and binding on the parties to the decision.

Regulations

Regulation 181/98: Identification and Placement of Exceptional Pupils

This Regulation governs the identification and placement of exceptional pupils, IPRC reviews, appeal procedures, and the role of parent(s)/guardian(s) in these processes.

At least 10 days in advance of a meeting of a committee or special education appeal board, the chair of the committee or board shall give written notice of the time and place of the meeting to a parent of the pupil and, where the pupil is 16 years of age or older, the pupil. O. Reg. 181/98, s. 5 (5).

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.*

Documents Cited

Program Policy Memorandum No. 81 from Ministry of Education, *Special Education: A Guide for Educators*.(2001)

Memorandum No. 81 outlines the respective responsibilities of the school boards and Ministries of Health and Long Term Care and of Family, Community and Social Services for ensuring that students with special needs receive the health services they require in order to benefit from an educational program. Community Care Access Centres (CCAC) funded by the Ministry of Health and Long Term Care, provide a single point of access for home care and school health support services:

To children in the school setting, including nursing, physiotherapy, occupational therapy, speech therapy, and dietetic services to enable children with special needs to attend publicly funded schools.

Ministry of Education, Student Focused Funding, *Intensive Support Amount*,[2002-03]

Case Law

L v Le Conseil Scolaire de District Catholique du Centre-Est de l'Ontario (November 2, 2001) (unreported)

O v. Wentworth (County) Board of Education (June 5, 1987) (unreported)
L v. York Region Board of Education (September 10, 1985) (unreported)
D v. Toronto District School Board (December 24, 2001) (unreported)
B v. North York Board of Education (June 27, 1984) (unreported)
A v. Halton District School Board (March 28, 2002) (unreported)
C v. Simcoe County District School Board (September 15, 2003) (unreported)

Other Sources Cited

Auton (Guardian ad litem of) v. British Columbia (Minister of Health.) 2000, B.C.S.C. 1142; [2002] 8 W.W.R. 227; 78 B.C.L.R. (3d) 55

Auton (Guardian ad litem of) v. British Columbia (Minister of Health.) 2002 BCCA 538; (2002), 6B, C, L.R. (4th) 201; 220 D, L.R. (4th) 411 (BCCA)

The Respondent's Position

The Dufferin-Peel Catholic District School Board (DPCDSB) submits that the issue under appeal to the Special Education Tribunal by the Appellants on behalf of their child, is not the identification as "Communication-PDD-Autism" or the decision to place their child in an integrated regular class placement. Instead they submit that the Appellants are appealing the lack of provision of Intensive Behavior Intervention (IBI) therapy, a service. The Board maintains that the decision to not provide IBI to their child in the child's placement cannot be appealed because it is beyond the jurisdiction of the Tribunal. The Board submits that the *Education Act* and Regulation 181 restrict the issues under the Tribunal's jurisdiction to issues of identification and placement.

Mr. Keel, counsel for the Respondent argued that IBI is a therapeutic service, not an educational service. He submits that IBI therapy was held by the British Columbia Superior Court in *Auton v. British Columbia* (2000) to be a medical service. He further contends that this appeal is a social service issue as described in *Auton*, and it is presently playing out in another proceeding. Mr. Keel further argued that it would be impossible for a school board to administer a program or service when the Board would have no control over the people delivering that service or the legislation relevant to that service.

The Respondent requests that the Tribunal decline to hear the appeal and dismiss the appeal of the Appellants.

The Appellant's Position

Mr. Moir, the parent's advocate, spoke on behalf of the appellant family. He read a written submission from the parents into the record. Mr. Moir stated that the child needs a program consistent with the child's learning style, which is ABA [Applied Behavior Analysis] or IBI [Intensive Behaviour Intervention]. The Appellants stated that the DPCDSB has repeatedly refused to accept clear statements of need related to their child and without agreement on the child's needs the Board has not been able to determine an appropriate placement to meet the child's needs. The Appellants maintain their child

is capable of meeting all or almost all of the expectations of typical pupils in Ontario if the child is provided with the appropriate behavioral and communication program supports. They believe that permitting their child to attend school in a typical classroom with an educational resource worker does not constitute a **placement** unless there are behavioral and communication supports in place to support the child's learning style, which is ABA or IBI. The parents maintain that the DPCDSB failed to create a program plan to meet the child's needs, and have lowered expectations for the child to [the child's] long-term detriment. The Appellant pointed to the child's report card on which every grade is "N/A" to illustrate their view that DPCDSB consistently lowers expectations of their child in order to maximize ISA (Intensive Support Amount) – [the Ministry of Education funding formula for student with very high needs] funding rather than support the child's appropriately to develop the child's skills and abilities.

The Appellants maintain that IBI has become a classroom technique that is being used by many boards. They see other boards incorporate other external therapies such as occupational therapy, physiotherapy and behavior therapy into classroom programming and that the incorporation of IBI principles is necessary for their child's program in order to meet their child's needs.

The Appellants' position is that their appeal is not about the physical "placement" but about providing the best education possible for their child; and that the failure of the DPCDSB to meet the unique needs of their child as an exceptional student, within a classroom setting, is undermining the integrity of the placement, and thus an issue for appeal before the Tribunal.

The parents stated that the DPCDSB has repeatedly refused to accept a clear statement of needs related to their child and that without agreement on needs, they have not been able to determine an appropriate placement to meet their child's needs. The parents claim that the Board has used generic input by staff members who have had little or no direct contact with their child. *"With no agreement on needs, no incorporation of relevant community professional input and a proposed program which is both generic and counterproductive, the parents cannot agree to the proposed placement"* (Transcript p.21) Without that input into the child's needs, the parents state that they are unable to discern if the placement offered by the Board can adequately address their child's needs.

The parents request that the Tribunal find that it has the jurisdiction to hear the appeal using the broader view of placement, which has emerged from previous Tribunals.

Decision

The appeal is dismissed.

Reasons for the Decision

1. The Tribunal accepted the arguments by the counsel for the DPCDSB that IBI is a therapy and therefore it is a service that is outside the jurisdiction of the Tribunal. The Tribunal based its decision on the arguments put forward by counsel for the Respondent and its reasoning is consistent with the decision of the Tribunal in *C v. Simcoe County District School Board* (2003) in which the Tribunal dismissed that appeal after hearing

the details of IBI and deciding that it was not a substitute for an educational program in a school setting.

The Tribunal is aware that IBI is an intensive one-on-one therapy delivered by a trained therapist, working under the direction of a psychologist. The program is delivered in a separate room for long hours and according to research it is effective for young children ages three -six.

Ms. Tymochenko argued that the School Board has never stated that it would not use applied behavioral analysis [the more generic term to describe the application of behavioural learning techniques] with the child or any other student with autism. She continued, saying that using behavioral techniques is common for all students not only those with autism. The Tribunal agrees with M. Tymchenko that behavioural techniques are part of the repertoire of a teacher's skills. As the counsel for the Board pointed out, IBI is a program that is not developed by a teacher but rather by a therapist who would have no involvement into the content of the child's learning program. This therapist would be supervised by a psychologist from outside the school system and the Board would have no control of the persons planning and delivering the program because they would not be employees of the School Board.

The Tribunal is of the opinion that a teacher who knows not only behavioral techniques but also other learning theories and teaching approaches and who understands child development and group processes is in the best position to develop an educational program for the child when the child is in the classroom. If the child learns best through behavioural techniques, then those techniques can be used in the classroom, without IBI therapy.

2. The parents have used the argument that they could not make a placement decision because the needs statement at the IPRC was not clear and that the IPRC did not consider the input from community professionals who worked with their child. The parents used the D example in which the Tribunal ruled that it did have jurisdiction to hear the appeal. In D, the IPRC statement of decision only contained the words, "See IEP" under the area to describe the child's needs. The Tribunal ruled that this statement was inadequate for the parents to make an informed decision about the IPRC placement. The IPRC April 2002 statement of decision included the following needs statement:

- Continued support for behavior*
- Continue to develop communication skills, social skills, initiating interaction opportunities without support*
- Continue with social stories*
- Continue communication from home to school*
- Schedule of reminders,*
- Pre-teaching vocabulary*

Under Further recommendations,

- Refer to IEP for specific programs and services (- ISA Profile 4.3)*
- Continue to consult with Board Autism Team*
- Continue to visual schedules/cues*
- Continue SLP support through consultation*
- Consultation with outside services as required*

The Tribunal is of the opinion that the IPRC statement of decision, April 2002, that placed the child, *“in a regular Grade 1 class with support [with support described in the Appeal Board decision as regular class teacher instruction, a full-time Educational Resource Worker support, and consultation to the classroom teacher through the Special Education Resource Teacher (SERT) at the school. Program goals have been supported by the PDD team, speech-language pathology support to the school through family of schools, and board-wide speech language pathology support through the board-wide SLP assigned for PDD/Autism.]*, indicates to the Tribunal that there was a discussion of the child’s needs and a discussion of the services that would be provided to the child within the placement offered at the IPRC meeting in April, 2002.

This is a very different discussion and statement of needs compared to the D IPRC statement of decision.

Therefore, the Tribunal believes that the parent wanted IBI to be part of the IPRC decision and part of the services to be provided. The fact that the decision did not reflect the parents’ request for IBI therapy or services does not warrant a Tribunal hearing.

The Tribunal believes that it does not have jurisdiction to hear the arguments of an appeal that is based on “a program which is consistent with the child’s acquired learning style.” In the opinion of the Tribunal “learning style” is not a placement decision that can be appealed.

Recommendations

Although the Tribunal has ruled that it does not have jurisdiction to hear the appeal, the Tribunal is making some recommendations that may help resolve the issue that it heard during the preliminary hearing.

1. The Tribunal recommends that the DPCDSB share all documents with the parents of as required, and that board personnel consult with the appellants on the development of the child’s IEP, as per Ministry requirements.
2. The Tribunal recommends that the DPCDSB prepare a report card for the child that illustrates the child’s progress and describes the manner in which curriculum accommodations are made to support the child to learn. In order for a placement to be meaningful, clear assessments of a child’s progress must be made available to the parents.
3. The Tribunal Recommends that DPCDSB staff be supported to gain knowledge on how to utilize classical behavioural strategies to support students to learn, and that a program that incorporates these principles be utilized to support the child to learn within the child’s current placement. A school board psychologist can be very helpful in assisting teachers in using behavioral principles in the classroom. The terms ABA [Applied Behavioral Analysis] and IBI (Intensive Behavior Intervention) may have been used interchangeably by the Appellants during this hearing. The School Board said that it never said that it would not used applied behavioral analysis techniques for the child or any other student with autism. Teachers learn behavioral principles and techniques in their teacher education programs. How children learn using behavioral principles is one of the classical learning theories and is not exclusive to ABA [the Lovas term] or IBI.

Consistent with C, IBI is a specific program developed by psychologists. The step-by-step program is delivered by a therapist trained to use “discrete trials” [specific, uniform processes with a child in a separate room for a significant portion of a child’s day.]

The Tribunal recommends that the School Board provide information to parents on the behavioral techniques that are used by the school personnel to assist children in learning, that some of the concerns of parents may be alleviated. It seemed to the Tribunal that the parents wanted the Board to have staff use behavioral principles to help their child learn all aspects of the curriculum. Classroom teachers have the expertise and knowledge to use the behavioural principles and techniques to help all children if those approaches work effectively to meet the needs and learning styles of particular children.

4. The child’s identification is “*Communication*”. A placement cannot be said to be meaningful without significant efforts to address the child’s communication needs. The Tribunal recommends that a communication program be developed to support the child to learn. The child’s parents have expressed concern that the CCAC is not providing service to their child because their child does not meet their criteria. The Tribunal believes that a communication program should be developed by Board personnel to assist the teacher in implementing a “Communication” program. Under Program Policy Memorandum No. 81, School Boards are responsible for “language” while CCACs are responsible for some aspects of “speech”. There are many components to a language program that are not the responsibility of a speech language pathologist. The school’s focus for the child’s communication needs should be on the development of language skills and competencies.

The Tribunal acknowledges that there is no obligation on the part of the parties to consider these recommendations. The Tribunal offers these suggestions in the hope that a discussion of these items can facilitate the development of a relationship where issues can be managed in a manner that will enhance the child’s learning and development.

Decision

The appeal is dismissed.

On behalf of the Tribunal

Paula Barber, Chair
September 18, 2003