

**THE MOORE DECISION
MEANINGFUL ACCESS INCLUDING RANGE OF PLACEMENTS - AN INTEGRAL PART OF
THE RIGHT TO EQUAL ACCESS IN EDUCATION**

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THE MOORE DECISION: MEANINGFUL ACCESS INCLUDING A RANGE OF PLACEMENTS - AN INTEGRAL PART OF THE RIGHT TO EQUAL ACCESS IN EDUCATION

Introduction

- Albert Einstein once stated that those who have the privilege to know have the duty to act. We know that it is our duty to act in the child's best interests. The critical question is what must be done to truly meet the child's best interests.
- The Supreme Court of Canada in a series of decisions defined "best interests" as effectively meeting the student's:
 - Intellectual and academic needs;
 - Communication needs;
 - Emotional, mental and social needs;
 - Physical and personal safety needs;
 - Views, preferences and stage of development.

In order for the education system to act in the child's best interests, there are fundamental questions to be addressed.

I. Fundamental Questions

1. How do we enable all school systems to appropriately meet the identified needs of all students and in a timely manner? This includes necessary teacher training, upgrading and continuing education; adequacy and availability of specialists providing the most enabling environment.
2. How do we make the school system a place where these students want to be and to stop the high drop-out rate?
3. How do we ensure that governments provide equitable funding that enables all school systems, public and private, to provide equality of opportunity for all students to achieve their potential?
4. How do we ensure that decision-making with regard to placement is not directed by the stereotypical presumption that what's good for one group of students with particular disabilities is good for all students with disabilities and that it is guided by the right to meaningful access?

In addressing the foregoing questions, what must be guaranteed for all students is equality of opportunity. Equality of opportunity for every child means receiving the fullest benefit of those educational services required of a school system to be provided to all its students in the most enabling environment. That is what education equality is all about.

As stated by the Supreme Court of Canada in its recent decision in *Moore*¹, equality of opportunity means the right to meaningful programming that genuinely addresses the student's identified needs in a timely fashion in the most enabling environment.

Your particular role as part of a child-service system is to ensure meaningful access to what that system must legally offer. Half measures are not enough. You must address the whole child – not half the child. The Supreme Court of Canada in *Moore* has established the right to meaningful access as a legal right. It is therefore an enforceable right, not an option. If the education system disregards what the Court has ordered, it offends the rule of law and seriously undermines our democratic system. It will also bring a flood of legal actions to its doorsteps.

If you are to effectively act in the child's best interests, then you must have the prerequisite knowledge or acquire that knowledge. If you don't know what's best to do and don't intend to find out, in your mind it doesn't exist and you don't have to care. Such a person doesn't belong in the educational system or any other child-service system.

II. Social Contract

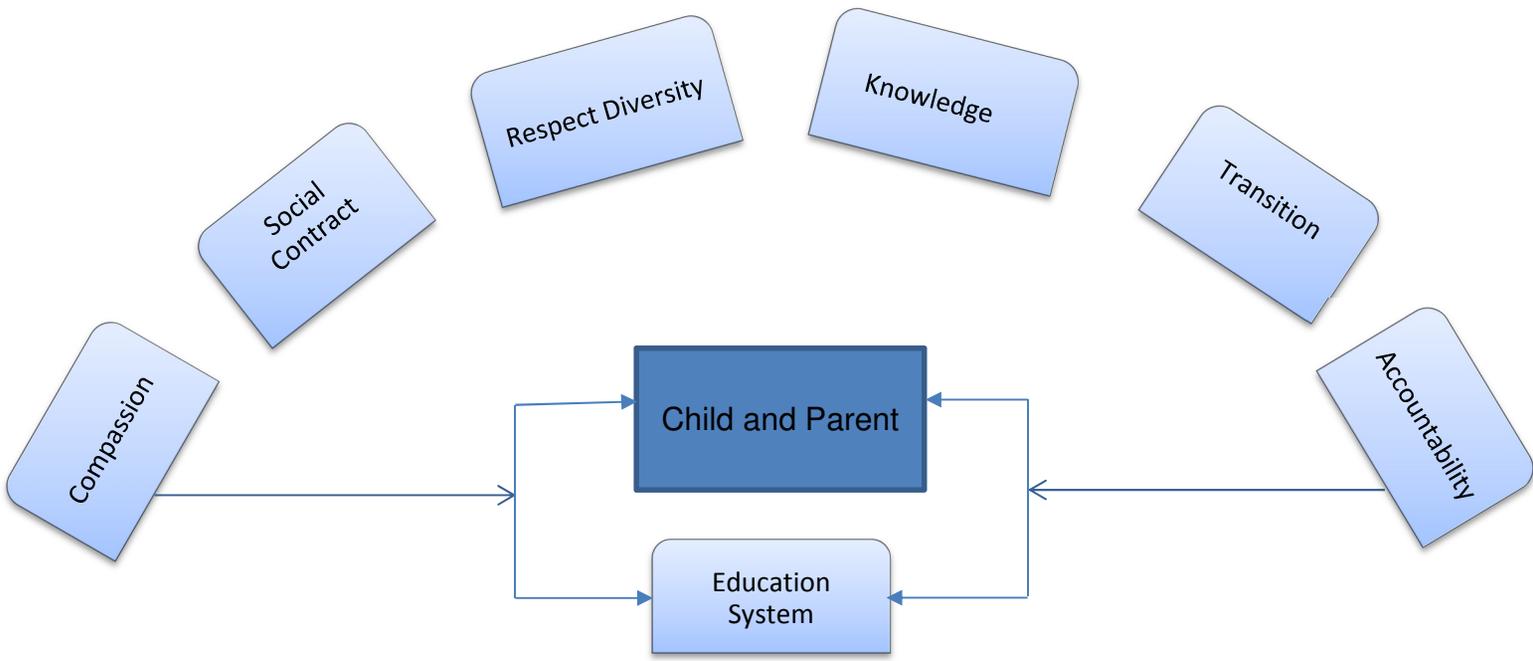
Meeting a child's social, emotional and educational needs as well as their behavioural concerns and the like are all part of the shared relationship and obligation between the child and his family and the school system. Entering a social contract between the child and his parents and the educational system to accomplish the foregoing would be most useful. This should be done by entering into a Memorandum of Understanding that sets out the objectives, how they are to be met, by whom and within what expected time, and regularly revisited and updated.

Achieving equal opportunity must become a social priority and guided by what I describe as a collaborative arch. That collaborative arch is made up of:

- Need for Compassion;
- Social contract between all of the players;
- Respect for diversity;
- Having the required knowledge and sharing it;
- Dealing with transition and
- Mutual accountability between all the players.

¹ *Moore v. British Columbia (Education)*, 2012 SCC 61 (CanLII) ("*Moore*")

The Collaboration Arch



III. Legal Decisions Building Blocks: Weaving a Tapestry of Rights

There have been a series of decisions by the Supreme Court of Canada (SCC), each a building block towards the recent SCC decision in *Moore*². You must be aware of each decision as a statement of binding principle.

Moore was heard by the SCC in March of 2012 and the decision was rendered on November 9, 2012. I represented the Learning Disabilities Association of Canada as an intervenor at all the hearings including by the SCC.

Before I deal with the extremely important legal and practical implications of *Moore*, I want to share with you an analysis of those earlier decisions and the particular issues each dealt with, so that you will fully comprehend the collective import of these binding decisions and the tapestry of rights that have been woven.

- **Equality of Opportunity**

Equal access to appropriate public education has been affirmed by the 1997 Supreme Court of Canada decision in *Eaton*, as the right to an equal opportunity. The SCC stated:

In some cases, special education is a necessary adaptation of the mainstream world which enables some disabled pupils access to the learning environment they need in order to have an equal opportunity in education.³ (My emphasis)

The SCC also stated in this decision that the determination of appropriate education must be from a subjective child-centred perspective; one which the Court stated, "attempts to make equality meaningful".

- **Best Efforts**

The SCC in its 2007 decision in *Via Rail*⁴ affirmed the obligation of service providers to use their best efforts in accommodating the needs of individuals with special needs by requiring such provider to have made "every possible accommodation" in order to achieve access to the same comfort, dignity, safety and security. In other words, the scope of the duty to accommodate in *Via Rail* was determined by what was required to give meaningful access to patrons with disabilities. The only limiting factor to this obligation was undue hardship. More of that later,

- **Meaningfulness**

The SCC in the 1993 decision in *Berg* stated the purpose of human rights legislation is frustrated where students are admitted and then denied access to the accommodation, services and facilities required to make their admission meaningful.⁵

² *Ibid*

³ *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 ["*Eaton*"] at para. 69.

⁴ *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15 (CanLII), [2007] 1 S.C.R. 650 ["*Via Rail*"].

⁵ *University of British Columbia v. Berg* [1993] 2 S.C.R. 353.

Similarly in *Howard v. University of British Columbia*, 1993, it was held that the university was obliged to provide a deaf student with a sign language interpreter for his classes, as its refusal to provide accommodation that was required to make a student's admission to the university "meaningful" could not be maintained⁶, since it would not impose undue hardship on the university being required to do so.

The SCC in *Via Rail* (2007) stated that the scope of the duty to accommodate was informed by what was required in order to enable meaningful access by disabled persons to the same benefit, namely by providing sufficient resources to meet their actual need.⁷

The decision by the SCC in *Eldridge* in 1997 determined that the base line to assure that persons entitled to accommodation are dealt with fairly and equally is by meaningful and timely accommodation and that it must be context specific. In other words, that it was the actual characteristics that were to be accommodated so that such person could have meaningful access to the benefit available to the public in general.⁸

- **Duty of take positive action**

In *Eldridge*, the SCC stated that the duty to take positive action to ensure that members of disadvantaged groups are given the means to fully benefit from services offered to the general public is a "cornerstone of human rights jurisprudence"⁹. It is the determinative decision on this issue in Canada.

- **Best interests of the child**

There have been a number of decisions that have reaffirmed and followed the decision in *Eaton*¹⁰, and which support the principle of the best interests of the student as being the placement of that student in an environment that best meets those interests. This must include placements other than the general classroom, as was made clear in *Eaton*.

The SCC in *A.C. v. Manitoba (Director of Child and Family Services)* SCC 2009¹¹, referred to the judgment of L'Heureux-Dubé J. in *Young v. Young*, [1993] 4 S.C.R. 3 and stated "courts must be directed to create or support the conditions which are most conducive to the flourishing of the child" (p. 65). In para. 89 of *A.C.*, the SCC noted that the approach to best interests "delineates a number of considerations to be included in making such a determination. These considerations include the mental, emotional and physical needs of the child; his or her mental, emotional and physical stage of development; the child's views and preferences...."

In other words, the most enabling environment is one that meets all these diverse needs and in a timely fashion (positive action).

⁶ *Howard v. University of British Columbia* (1993), [1993] B.C.C.H.R.D. No. 8.

⁷ *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 SCR 650 ["**Via Rail**"]

⁸ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 29.

⁹ *Ibid*, at para. 79.

¹⁰ *Eaton*, *supra*, note 3.

¹¹ *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, para. 88 and 89.

IV. The Duty to Accommodate Exists Up the Point of Undue Hardship

In *Via Rail*, the SCC emphasized that every possible accommodation short of undue hardship must be made. Abella, J. referring to *Eldridge*¹² stated,

This Court noted that it is "a cornerstone of human rights jurisprudence...that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation", which means "to the point of 'undue hardship'...The employer or service provider has made every possible accommodation short of undue hardship."¹³ (My emphasis)

In order for a provider of service to demonstrate that providing substantive accommodation will cause them undue hardship, the SCC has also made it clear that the use of the term "undue" implies that some hardship is acceptable¹⁴.

The SCC in its decision in *Via Rail*¹⁵ noted that "undue" means having a disproportionate, improper, inordinate, excessive or oppressive impact and expresses a notion of seriousness or significance.

The SCC in 1999 in *Meiorin*¹⁶ determined a series of additional factors for determining the possible grounds on which undue hardship may be established. As a result of the decision in *Meiorin* and *Via Rail*, it is extremely difficult for a service provider to prove that undue hardship was suffered by it, by being obliged to provide the necessary accommodation.

V. Discrimination Arising From Assumptions That Are Stereotypical In Consequence – Provision of Range of Placements

In order to carry out what the SCC described as a "reasonably necessary element" of the provision of services, as stated in *Meiorin*, the policy or standard must be designed and adopted in such a way as to accommodate individual differences, not on stereotypical assumptions¹⁷. For anyone to suggest that only one placement is suitable for all students with special needs is stereotyping at its worst.

The SCC also dealt with the issue of placement in the most enabling environment in the seminal judgment of *Eaton*¹⁸. It is the governing decision in Canada on this issue, recently reinforced by the *Moore* decision. Mr. Justice Sopinka, who gave the unanimous judgment of the SCC in *Eaton*, stated:

Disability, as a prohibited ground, differs from other enumerated grounds such as race or sex because there is no individual variation with respect to these

¹² *Eldridge*, *supra* note 8

¹³ *Via Rail*, *supra* note 7, at para. 122 and 127.

¹⁴ *Ibid*, at para. 62 and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 ["*Grismer*"], para. 18.

¹⁵ *Via Rail*, *supra* note 7, at paras. 140, 221, 225.

¹⁶ *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.C.U.* [1999] 3 S.C.R. at p. 3 ["*Meiorin*"]; at para. 66.

¹⁷ *Meiorin*, *supra* note 16; *Grismer*, *supra* note 14.

¹⁸ *Eaton*, *supra* note 3.

grounds. Disability means vastly different things, however, depending upon the individual and the context. This produces, among other things, the “difference dilemma” whereby segregation can be both protective of equality and violative of equality depending upon the person and the state of disability. (My emphasis)

Justice Sopinka made it clear that the accommodation of differences is the true essence of equality. He also made it very clear that we must eliminate discrimination resulting from stereotypical actions as follows:

In some cases, special education is a necessary adaptation of the mainstream world which enables some disabled pupils access to the learning environment they need in order to have an equal opportunity in education. ... Integration can be either a benefit or a burden, depending on whether the individual can profit from the advantages that integration provides. (My emphasis)

Of considerable importance is the decision of the SCC in 2000 in *Mercier*¹⁹, which concluded that:

The right to equality and protection against discrimination cannot be achieved unless we recognize that discriminatory acts may be based as much on perception, myths and stereotypes as on the existence of actual functional limitations. (My emphasis)

In its 1999 judgment in *Meiorin*²⁰, the SCC found that if it is to be justified under human rights legislation, a standard must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual up to the point of undue hardship.

The SCC in its decision in *R. v. Kapp*²¹ (2008) noted in regard to s. 15 (the equality section) of the Canadian Charter of Rights and Freedoms²², and being equally applicable to human rights codes, that in combatting discrimination, the focus is on preventing governments from imposing disadvantage on the basis of stereotyping.

By imposing one standard, namely that the fully inclusive classroom meets all needs, academically, physically, socially, emotionally, behaviourally and cognitively of all students with special needs, is the perception that one size fits all. That is not borne out by research or by case law. Such a standard is therefore discriminatory, as was made clear by the SCC in its decisions in *Kapp*²³ *Eaton*²⁴, *Meiorin*²⁵, *Grismer*²⁶, *Mercier*²⁷ and most recently *Moore*²⁸.

One of the more comprehensive studies on Inclusion in Canada was conducted by Professor A. Wayne MacKay, Professor of Law of Dalhousie University on behalf of the

¹⁹ *Mercier v. The City of Montreal* [2000] 1 S.C.R. 665.

²⁰ *Meiorin*, *supra* note 16.

²¹ 2008 SCC 41, [2008] 2 SCR 483.

²² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B of the *Canada Act* 1982 (UK), 1982, c 11 [“**Charter**”].

²³ *Kapp*, *supra*, note 21.

²⁴ *Eaton*, *supra* note 3.

²⁵ *Meiorin*, *supra* note 16.

²⁶ *Grismer*, *supra* note 14.

²⁷ *Mercier*, *supra* note 19.

²⁸ *Moore*, *supra* note 1.

Government of New Brunswick, titled "Inclusive Education: A Review of programming and Services in New Brunswick" publication date March 15, 2006²⁹. He makes it very clear that flexibility, not simply adherence to dogma, is important in dealing with this issue. He also makes it very clear that a one-size-fits-all approach does not belong in an inclusive education system and that a broad definition of inclusion is an important foundation to any initiative taken in that regard. At pp. 5, 6, 20, 22 and 39 of his report, he makes it clear that integration of every student with special needs in the mainstream classroom is not a universal remedy.

On March 18, 2009, the Canadian Council on Learning produced its report: "Does Placement Matter Comparing the Academic Performance of Students with Special Needs in an Inclusive and Separate Settings"³⁰. The Council reviewed 30 relevant studies in the United States, United Kingdom and Canada, which examined students with learning disabilities, intellectual disabilities, language impairments and mixed disabilities and the issue of inclusion.

This report noted that:

- the academic consequences of educating students with special needs in inclusive settings rather than in separate settings remain contested and particularly with respect to the learning disabled whose placement only tentatively favours inclusion.
- factors/issues other than classroom settings, such as instructional quality being the most immediately obvious factor, were more important determinants of the academic success of special education needs students.
- the mixed results and modest advantages provided by inclusion suggest that mere inclusive placement is no guarantee of success. There had to be adequate support above and beyond that available to the students without special needs including team teaching and extensive ongoing instruction by a qualified special education teacher. Of critical importance the report notes that where there are students with special needs in the class, they must be a manageable number in order for teachers to provide effective and individualized instruction.
- educators and decision-makers will have to proceed carefully since inclusion without all of the necessary requirements in place will "overwhelm" them.

In conclusion, it was noted that "boards and schools may do well to ensure a range of services are available to support students with differing needs."

All the conditions must be in place to make inclusion successful. However, even then, inclusion is the appropriate enabling environment for some – not all.

Professor Gabrielle Young³¹ who is Associate Professor, Faculty of Education, Memorial University of Newfoundland and who has written widely on the issue of Inclusion, recently provided me with details of her research on what she considers are the strategies that must first to be in place in order to achieve inclusion to some extent. Some of the proposed strategies are as follows:

²⁹ wayne.mackay@dal.ca

³⁰ <http://www.ccl-cca.ca/pdfs/LessonsInLearning/03_18_09E.pdf>

³¹ Gabrielle Young (gabrielle.young@mun.ca).

...

The optimal knowledge and skill sets for teachers and other school personnel include: cooperation, collaboration, flexibility, adaptability, creativity, broad knowledge of child development, knowledge and use of various pedagogy and evaluation methods, reflective practice, and knowledge of the assets and opportunities within their communities (MacKay, 2006). Often this assumed knowledge and skill is not present in the educational staff, and the opportunities to acquire these skills and knowledge are limited.

1. Pre-service instruction should provide future teachers with the skills and experience to operate effectively in inclusive settings.
2. Current teachers need to be equipped and empowered with the competence and confidence required to teach students with exceptionalities in the classroom.

...

Teachers should also be sensitive to external stimuli (hearing, sight), physical space (mobility) and general layout of their classrooms.

Technology can help to facilitate inclusion as the content of the work performed on a computer can be individualized for any student.

Major obstacles identified in the use of technology include the insufficient number of computers, lack of teacher preparation time, lack of teacher computer skills, and lack of training opportunities for teachers (Canadian Education Statistics Council, 2000).

(My emphasis)

VI. The SCC Moore Decision

I noted earlier that the recent decision by the SCC in *Moore* affirmed that the best interests of a student with special needs can only be met when such student has equality of opportunity to meaningfully access what is required to be provided to all students. *Moore* affirms that meaningful access is a legal enforceable right and early identification and placement in the most enabling environment are critical aspects of that right. *Moore* is the ultimate judgment by the SCC in that regard and dealt with a number of important collateral issues.

The following questions and answers detail the core issues and how the Supreme Court dealt with each in *Moore*.

QUESTION: What was the nature of the complaint?

ANSWER: The complaint by the Moores under the B.C. Human Rights Code made approximately 15 years ago, was against School Division #44 (North Vancouver) and the Province of British Columbia, asserting that their dyslexic son, Jeffrey, had been subjected to discrimination by being deprived of meaningful access to required services. The Human Rights Tribunal agreed.

That judgment was appealed to three different courts: Superior Court of British Columbia; Court of Appeal of British Columbia and, ultimately, the Supreme Court of Canada. The LDAC received intervenor status in each Court.

QUESTION: Could you give us a summary of the relevant facts in this case?

ANSWER: Jeffrey could barely read by the end of third grade. This resulted in his suffering from migraine headaches, vomiting, anxiety, loss of self-esteem and other negative consequences. Despite having received certain supports, he was still not making any progress. By the end of grade three, the school identified him as having a learning disability, specifically dyslexia.

Jeffrey needed intensive individualized remedial instruction that was not available in his local school. Therefore, the school psychologist referred him to a separate special off-campus diagnostic centre, DC1, operated under the aegis of the school system. As a result of fiscal constraints, the school district chose to close the special diagnostic centre that Jeffrey would have attended, while maintaining other non-core curriculum programs.

Subsequent to such closure, the School Division could not provide the specific remediation Jeffrey needed. The school psychologist recommended to Jeffrey's parents that he attend a private school that specialized in learning disabilities where he quickly made significant progress, and has achieved success in his life.

QUESTION: What was the basis for the Tribunal finding of discrimination and how did the SCC deal with it?

ANSWER: Finding of discrimination by the Human Rights Tribunal, which heard the Moore complaint, was grounded on the failure to assess Jeffrey's learning disability earlier and to provide appropriate intensive instruction.

The Tribunal also concluded that a range of services was necessary for such students from a modified program within the classroom to a fulltime placement in a special program. This finding of fact was accepted and supported by the SCC.

The Supreme Court agreed with Rowles, J.A. of the Court of Appeal of British Columbia who found that (1) special education was the means by which meaningful access to educational services was achieved by students with learning disabilities and (2) that the comparator analysis was both unnecessary and inappropriate.

QUESTION: What is the importance of this decision by the Supreme Court of Canada?

ANSWER: This decision has significant implications not only for such students in the school system but also for those in post-secondary institutions, for our governments, the educational system and for teacher and other professional training institutions.

One of the critical findings by the Court was the right of students with special needs to receive meaningful access to the education services that are provided to all students under the Public Schools Act so as to give these students, as the Court put it, a "genuine" opportunity to take the fullest advantage of such educational services. In other words, it must be context specific.

QUESTION: Could you expand upon what other important issues the Court dealt with?

ANSWER: What happened to Jeffrey is quite familiar to countless families with children with special needs across Canada who have battled for years and continue to do so with governments and school systems and now post-secondary institutions. The battle is to have the necessary resources provided to enable these students to meaningfully access the education services that are provided to all students. Remember, the legislated purpose of public schools acts is to enable all learners to develop their individual potential to benefit themselves and society generally. Despite this, too many are denied the necessary resources.

QUESTION: Although the complaint before the Tribunal was successful, it was overturned by the Superior Court of British Columbia and that judgment overturning it was upheld by majority of the Court of Appeal of British Columbia. Could you explain what their reasoning was and the basis of the SCC rejecting such reasoning?

ANSWER: Section 8 of the British Columbia Human Rights Code refers to the obligation of a service provider providing service to the public, to be done free of discrimination. The Tribunal found that Jeffrey was discriminated against by both the Province and the School Division by not being provided with the services effectively programmed for his dyslexia, resulting in his inability to optimize the education services being provided to all other children.

The Superior Court and the majority of the Court of Appeal found that in order to determine whether he was discriminated against, he should be compared to other children with special needs. They found that this comparison showed that he received no less services than such other children and therefore he was not discriminated against.

This is a critically important part of the judgment. Comparing Jeffrey with other special needs students and showing that he was treated no worse than those students, means that the district could cut all special needs programs and yet be immune from a claim of discrimination, no matter how badly special needs students had been treated.

Justice Abella went on to note that if Jeffrey was compared only to other special need students, full consideration could not be given to whether he had "genuine" access to the education that all students in British Columbia are entitled to. What "genuine" means in this context is that it must be "meaningful" for the individual in question. In order for it to be meaningful, the services to be provided must be specific to his identified special needs and in the most enabling environment. For Jeffrey, it meant receiving the intensive remediation that the DC-1 was designed for.

QUESTION: What then did the SCC state is the question to be addressed in order to determine if discrimination had occurred?

ANSWER: The Supreme Court of Canada said that the question was not to determine whether Jeffrey was discriminated against by making comparison, but whether the school system without justification deprived Jeffrey of meaningful access to the education instruction provided to all children. Their only justification for not being obliged to do so, would be suffering undue hardship in order to remedy and there was no evidence of that.

Further in that regard, the Supreme Court of Canada agreed with the dissenting judgment by Rowles, J.A. of The Court of Appeal of British Columbia that for students with learning disabilities like Jeffrey, special education is not itself the service. Special education is simply the means by which those students gain meaningful access to the general education service available to all British Columbia students.

QUESTION: What was meant by the SCC when it noted that what Jeffrey sought was not an ancillary service?

ANSWER: Most importantly, as Justice Rowles noted and Justice Abella of the SCC agreed, the special accommodation in the form of intensive remediation to which Jeffrey was entitled is not an extra or ancillary service, but rather the means by which meaningful access could be achieved, namely optimum access to core educational services.

In other words, provision of such services is not special in that it is to be sparingly provided, but is to be provided as a matter of course when assessment of the student so determines.

As Justice Rowles further noted and approved by the SCC, without such special education, students with disabilities simply cannot receive equal benefit from the underlying service of public education. All school systems must recognize and take action in accordance with this critically important finding.

QUESTION: What would you consider to be one of the most impactful statements by the SCC in *Moore*, having in mind what you just stated?

ANSWER: The Supreme Court of Canada ruled that adequate special education for students with severe disabilities is not, and I quote "a dispensable luxury" but rather and I quote from the judgment: "it is a ramp that provides access to the statutory commitment to education made to all children in British Columbia".

The SCC (para. 36 of the judgment) stated that if the evidence demonstrates that the government failed to deliver the mandate and objectives of public education such that a given student was denied meaningful access to the service based on a protected ground, this will justify a finding of prima facie discrimination.

QUESTION: As a result of the foregoing consideration by the Supreme Court, what was the basis of their finding that Jeffrey suffered discrimination?

ANSWER: The Supreme Court of Canada found that by virtue of Jeffrey having been denied access to the special separate facility that the school division had established for students with learning disabilities requiring intensive remediation, the school division had deprived him of genuine (namely meaningful) access to the services he needed in order to provide him with equal access to core educational services being provided to all other children.

The Court also found that despite the fiscal difficulties the school division found itself in by virtue of cut backs by the province, when they closed this intensive remediation facility, they concurrently maintained, at significant cost, other non-core

curricular programs. Therefore, it could not argue that it would have suffered undue hardship if it had not closed the special facility.

QUESTION: What other issues did the SCC deal with in that regard?

ANSWER: First, the school division made no provision for alternative facilities that would have provided the same intensive remediation that Jeffrey required; second, they maintained other programs that bore no relationship whatsoever to access core curriculum services; therefore, their actions had a disproportionately negative impact upon students such as Jeffrey.

The issue of disproportionality as found by the Supreme Court of Canada is a critically important one. It makes it clear that systems providing services to children with special needs cannot take actions that negatively and disproportionately impact the services these children need as compared to services maintained for other children unless they can prove undue hardship.

QUESTION: What did the SCC find that the school system should have done?

ANSWER: The Supreme Court of Canada agreed with the decision of the British Columbia Human Rights Tribunal that providing a range of services and particular placements were necessary in the particular best interests of such students. Otherwise, meaningful access to the most enabling environment could not be achieved.

This finding is of importance because it reaffirmed the SCC *Eaton* decision previously referred to, namely that the right to meaningful access includes a variety of placements. To assure meaningful access, educational practices must include assessment that drives programs specifically designed to lessen the impact of the disability and enhance learning.

For example, long waiting lists for assessments fail in assuring timeliness as does required availability of support by specialists. The need for early identification and intervention and the provision of individualized attention in the most enabling environment is critical and in the best interests of students with special needs. Failure to do so will result in the denial of meaningful access and is therefore discriminatory.

QUESTION: The SCC made specific reference to the fact that Jeffrey was dyslexic. What are the ramifications of this?

ANSWER: There are still some educators who argue that either there is no such condition or that such labeling has a negative consequence. The SCC, in its judgment, has affirmed that dyslexia is a specific disability and entitled to receive remediation responsive to such a specific identified need. Identifying that need is of vital importance so that one can determine and provide the necessary accommodation.

Furthermore, the SCC in *Moore* found that reasonable accommodation of a student's specific needs is not determined by "mere efficiency" as the school division argued. The determinative factor is what is in the overall best interests of the student in question so as to assure that such best interests of the students are indeed being met.

QUESTION: What were the remedial orders granted by the Tribunal?

ANSWER: The B.C. Human Rights Tribunal found that indeed Jeffrey and other severely learning disabled students had been discriminated against by not being appropriately accommodated by the school system failing to provide them adequate remedial services.

The Tribunal then made a number of orders, including payment to Jeffrey's parents of all the costs of the private schools and a general award of \$10,000. The award was made against the Province of British Columbia and as against the Board of Education of School District No. 44 (North Vancouver).

QUESTION: What disposition did the Supreme Court of Canada make with respect to the award by the Tribunal against the Province?

ANSWER: The Supreme Court of Canada found the Province not liable for the discrimination that occurred. The Tribunal had ruled the Province liable for discrimination because of the various actions it took as set forth in its judgment. The basis upon which the Supreme Court dismissed the case against the Province was that the mechanism that it chose for funding dealt with their concern of over-reporting by the school system in respect to the incidence of the special needs students.

As noted by Shelagh Day, the editor of the Human Rights Digest, commenting on this in a recent issue, the effect of Judge Abella's judgment in treating this case as an individual one and the systemic remedies ordered by the Tribunal as against the Province not being legitimate is, in her view, a wrong decision. Her expressed concern was that there was adequate evidence to prove the complicity of the Province. The issue of the liability of a province as a result of its funding decisions will no doubt be dealt with another day.

QUESTION: Could you summarize the principles arising out of the *Moore* decision that must be adhered to in order to assure meaningful access?

ANSWER:

First, Equality of opportunity is enabling a student with disabilities to meaningfully access the same education opportunities provided to all students by providing necessary resources in a timely fashion in the most enabling environment.

Second, the stereotypical presumption that what is appropriate for one group of students with particular disabilities is good for another group of students with disabilities is wrong. Service providers must have made "every possible accommodation" short of undue hardship in order to achieve equal opportunity of access. The SCC decision in *Moore*, reaffirming the earlier decision in *Eaton*, does not support one placement, such as total inclusion as meeting the best interests of all special needs students. Indeed, the opposite is the case.

Third, special needs students are entitled to the most enabling environment, one which must be based on correctly identified needs that is implemented by appropriately trained persons in a timely fashion and is carried out in an environment best suited to the student's needs. This in turn requires a range of placements, each being particularly

suites to meet the individual's identified needs. The Court found that the separate facility that had provided the intensive remediation that Jeffrey required was denied him and not replaced with an equally suitable placement.

QUESTION: What is the overall impact of the emphasis placed by the SCC on meaningful access?

ANSWER: The Supreme Court of Canada decision in *Moore* is the latest and most important of a series of decisions that makes it clear that the best interests of all students with special needs, including those with learning disabilities, are met when they receive the resources to assure equal opportunity to benefit from educational services provided by school system to all students and that can only be assured by meaningful access and in the most enabling environment.

QUESTION: What do you think will happen following *Moore*?

ANSWER: I agree with what the Council of Canadians with Disabilities states about the *Moore* decision. It commented that it took the Moores 15 years to get a positive decision from the Supreme Court, and special needs students and their families should not now have to repeat that battle.

By virtue of its decision in *Moore*, the SCC has made it clear that meaningful access is a legally enforceable human right – not an option. Real collaboration between parents and their children and governments and school systems and other professional providers must occur so as to assure meaningful access; otherwise conflict will inevitably occur.

QUESTION: Could you share what you consider effective collaboration to be?

ANSWER:

Collaboration is achieved by:



Sharing Knowledge



Sharing understanding



Sharing objectives



Sharing actions



Sharing accountability

In a genuine and mutually respectful manner.

Conclusion

Shared advocacy is critical; otherwise destructive confrontation will occur. We can't afford to let that happen.

Thomas Edison viewed collaboration as "the beating heart" of his laboratories. We must now view meaningful access and collaboration as the beating heart of the educational system.

The right to dignity, equality and fairness demands no less.

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