SUPREME COURT OF CANADA

CITATION: Moore *v.* British Columbia (Education), 2012 SCC 61

DATE: 20121109
DOCKETS: 34040, 34041

BETWEEN:

Frederick Moore on behalf of Jeffrey P. Moore
Appellant
and
Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Ministry of Education, and Board of Education of School District No. 44 (North Vancouver), formerly known as The Board of School Trustees of School District No. 44 (North Vancouver)
Respondents
- and -
Attorney General of Ontario, Justice for Children and Youth, British Columbia Teachers' Federation, Council of Canadians with Disabilities, Ontario Human Rights Commission, Saskatchewan Human Rights Commission, Alberta Human Rights Commission, International Dyslexia Association, Ontario Branch, Canadian Human Rights Commission, Learning Disabilities Association of Canada, Canadian Constitution Foundation, Manitoba Human Rights Commission, West Coast Women's Legal Education and Action Fund, Canadian Association for Community Living, Commission des droits de la personne et des droits de la jeunesse, British Columbia Human Rights Tribunal, First Nations Child and Family Caring Society of Canada
Interveners

CORAM: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

REASONS FOR JUDGMENT: (paras. 1 to 71)

Abella J. (McLachlin C.J. and LeBel, Deschamps, Fish, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. concurring)

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Frederick Moore on behalf of Jeffrey P. Moore *Appellant*

v.

Her Majesty The Queen in Right of the Province of British Columbia, as represented by the Ministry of Education, and Board of Education of School District No. 44 (North Vancouver), formerly known as The Board of School Trustees of School District No. 44 (North Vancouver) *Respondents*

and

Attorney General of Ontario, Justice for Children and Youth, British Columbia Teachers' Federation, Council of Canadians with Disabilities, Ontario Human Rights Commission, Saskatchewan Human Rights Commission, Alberta Human Rights Commission, International Dyslexia Association, Ontario Branch, Canadian Human Rights Commission, Learning Disabilities Association of Canada, Canadian Constitution Foundation, Manitoba Human Rights Commission, West Coast Women's Legal Education and Action Fund, Canadian Association for Community Living, Commission des droits de la personne et des droits de la jeunesse, British Columbia Human Rights Tribunal and First Nations Child and Family Caring Society of Canada *Interveners*

Indexed as: Moore *v.* British Columbia (Education)

2012 SCC 61

File Nos.: 34040, 34041.

2012: March 22; 2012: November 9.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Human rights — Discrimination — Prohibited grounds — Mental or physical disability — Education — Student with dyslexia attending public school — School district cancelling special education program requiring student to enrol in specialized private school — Whether school district discriminating against student by failing to provide necessary remediation — Human Rights Code, R.S.B.C. 1996, c. 210, s. 8.

Education law — School regulation and administration — Curriculum and education programs — Obligations of school authorities — What constitutes meaningful access to education for students with learning disabilities — School Act, S.B.C. 1989, c. 61.

J suffered from severe dyslexia for which he received special education at his public school. In Grade 2, a psychologist employed by the school District recommended that since he could not get the remedial help he needed at his school, he should attend the local Diagnostic Centre to receive the necessary remediation. When the Diagnostic Centre was closed by the school District, J transferred to a

private school to get the instruction he needed. His father filed a complaint with the B.C. Human Rights Tribunal on J's behalf against the school District and the Province on the grounds that J had been denied a "service customarily available to the public" under s. 8 of the B.C. *Human Rights Code*. The Tribunal concluded that there was discrimination against J by the District and the Province and ordered a wide range of sweeping systemic remedies against both. It also ordered that the family be reimbursed for the tuition costs of J's private school. The reviewing judge set aside the Tribunal's decision, finding that there was no discrimination. A majority of the Court of Appeal dismissed the appeal.

Held: The appeal is substantially allowed.

The purpose of the *School Act* in British Columbia is to ensure that "all learners. . . develop their individual potential and. . . acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society and a prosperous and sustainable economy." This is an acknowledgment by the government that the reason children are entitled to an education is that a healthy democracy and economy require their educated contribution. Adequate special education, therefore, is not a dispensable luxury. For those with severe learning disabilities, it is the ramp that provides access to the statutory commitment to education made to *all* children in British Columbia.

The "service" to which J is entitled under s. 8 of the B.C. *Human Rights Code* is education generally. To define special education as the service at issue risks

descending into a kind of "separate but equal" approach. Comparing J only with other special needs students would mean that the District could cut *all* special needs programs and yet be immune from a claim of discrimination. If J is compared only to other special needs students, full consideration cannot be given to whether he had meaningful access to the education to which *all* students in British Columbia are entitled. This risks perpetuating the very disadvantage and exclusion the *Code* is intended to remedy.

To demonstrate *prima facie* discrimination under s. 8, complainants must show that they have a characteristic protected from discrimination; that they have experienced an adverse impact with respect to a service customarily available to the public; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice. If it cannot be justified, discrimination will be found to occur.

There is no dispute that J's dyslexia is a disability. There is equally no question that any adverse impact he suffered is related to his disability. The question then is whether J has, without reasonable justification, been denied meaningful access to the general education available to all children in British Columbia based on his disability.

Prima facie discrimination was made out based on the insufficiently intensive remediation provided by the District for J's learning disability in order for

him to get access to the education he was entitled to. J received some special education assistance until Grade 3, but the Tribunal's conclusion that the remediation was far from adequate to give J the education to which he was entitled, was fully supported by the evidence. The Tribunal found that the family was told by District employees that J required intensive remediation. As a result of the closing of the Diagnostic Centre, a private school was the only alternative that would provide the intense remediation that J required.

The Tribunal found that when the decision to close the Diagnostic Centre was made, the District did so without knowing how the needs of students like J would be addressed, and without undertaking a needs-based analysis to consider what might replace the Diagnostic Centre, or assessing the effect of the closure on Severe Learning Disabilities students. It was the combination of the clear recognition by the District, its employees and the experts that J required intensive remediation in order to have meaningful access to education, the closing of the Diagnostic Centre, and the fact that the family was told that these services could not otherwise be provided by the District, that justified the Tribunal's conclusion that the failure of the District to meet J's educational needs constituted *prima facie* discrimination.

The next question is whether the District's conduct was justified. The District's justification centred on the budgetary crisis it faced during the relevant period, which led to the closure of the Diagnostic Centre and other related cuts. The Tribunal's findings that the District had other options available for addressing its

budgetary crisis should not be disturbed. The Tribunal accepted that the District faced financial difficulties during the relevant period. Yet it also found that cuts were disproportionably made to special needs programs. Despite their similar cost, the District retained some discretionary programs, such as the Outdoor School — an outdoor campus where students learned about community and the environment — while eliminating the Diagnostic Centre.

More significantly, the Tribunal found that the District undertook *no* assessment, financial or otherwise, of what alternatives were or could be reasonably available to accommodate special needs students if the Diagnostic Centre were closed. The failure to consider financial alternatives completely undermined the District's argument that it was justified in providing *no* meaningful access to an education for J because it had no choice. In order to decide that it had no other choice, it had at least to consider what those other choices were.

The finding of discrimination against the District is therefore restored.

Cases Cited

Referred to: *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *Quebec (Commission des droits de la personne et des droits de*

la jeunesse) v. Montréal (City), 2000 SCC 27, [2000] 1 S.C.R. 665; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3; *Ontario Human Rights Commission v. Borough of Etobicoke*, [1982] 1 S.C.R. 202; *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970; *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489; *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Canadian National Railway Co. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868.

Statutes and Regulations Cited

Administrative Tribunals Act, S.B.C. 2004, c. 45, s. 59.

Human Rights Code, R.S.B.C. 1996, c. 210, s. 8.

School Act, S.B.C. 1989, c. 61, preamble.

School Amendment Act, S.B.C. 1993, c. 6.

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Brodsky, Gwen, Shelagh Day and Yvonne Peters. *Accommodation in the 21st Century*. Canadian Human Rights Commission, 2012 (online: http://www.chrc-ccdp.ca/pdf/accommodation_eng.pdf).

MacKay, A. Wayne. "Connecting Care and Challenge: Tapping Our Human Potential" (2008), 17 *E.L.J.* 37.

APPEAL from a judgment of the British Columbia Court of Appeal (Rowles, Saunders and Low JJ.A.), 2010 BCCA 478, 12 B.C.L.R. (5th) 246, 326 D.L.R. (4th) 77, 294 B.C.A.C. 185, 498 W.A.C. 185, 71 C.H.R.R. D/238, [2011] 3 W.W.R. 383, [2010] B.C.J. No. 2097 (QL), 2010 CarswellBC 3446, affirming a decision of Dillon J., 2008 BCSC 264, 81 B.C.L.R. (4th) 107, 62 C.H.R.R. D/289, [2008] 10 W.W.R. 518, [2008] B.C.J. No. 348 (QL), 2008 CarswellBC 388, reversing a decision of the British Columbia Human Rights Tribunal, 2005 BCHRT 580, 54 C.H.R.R. D/245. Appeal substantially allowed.

Frances M. Kelly and *Devyn Cousineau*, for the appellant.

Leah Greathead and *E.W. (Heidi) Hughes*, for the respondent Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Ministry of Education.

Laura N. Bakan, Q.C., *David J. Bell* and *Kristal M. Low*, for the respondent the Board of Education of School District No. 44 (North Vancouver), formerly known as The Board of School Trustees of School District No. 44 (North Vancouver).

Robert E. Charney and *Sarah Kraicer*, for the intervener the Attorney General of Ontario.

Andrea Luey, for the intervener Justice for Children and Youth.

Diane MacDonald and *Robyn Trask*, for the intervener the British Columbia Teachers' Federation.

Written submissions only by *Gwen Brodsky*, *Yvonne Peters* and *Melina Buckley*, for the intervener the Council of Canadians with Disabilities.

Anthony D. Griffin, for the interveners the Ontario Human Rights Commission, the Saskatchewan Human Rights Commission and the Alberta Human Rights Commission.

Rahool P. Agarwal, *Christopher W. Cummins* and *Rowan E. Weaver*, for the intervener the International Dyslexia Association, Ontario Branch.

Brian Smith and *Philippe Dufresne*, for the intervener the Canadian Human Rights Commission.

Yude M. Henteleff, Q.C., and *Darla L. Rettie*, for the intervener the Learning Disabilities Association of Canada.

Ranjan K. Agarwal and *Daniel Holden*, for the intervener the Canadian Constitution Foundation.

Written submissions only by *Isha Khan*, for the intervener the Manitoba Human Rights Commission.

Alison Dewar, for the intervener the West Coast Women's Legal Education and Action Fund.

Roberto Lattanzio and *Laurie Letheren*, for the intervener the Canadian Association for Community Living.

Athanassia Bitzakidis, for the intervener Commission des droits de la personne et des droits de la jeunesse.

Denise E. Paluck, for the intervener the British Columbia Human Rights Tribunal.

Nicholas McHaffie and *Sarah Clarke*, for the intervener the First Nations Child and Family Caring Society of Canada.

The judgment of the Court was delivered by

ABELLA J. —

[1] This case is about the education of Jeffrey Moore, a child with a severe learning disability who claims that he was discriminated against because the intense remedial instruction he needed in his early school years for his dyslexia was not available in the public school system. Based on the recommendation of a school psychologist, Jeffrey's parents enrolled him in specialized private schools in Grade 4 and paid the necessary tuition. The remedial instruction he received was successful and his reading ability improved significantly.

[2] Jeffrey's father, Frederick Moore, filed a human rights complaint against the School District and the British Columbia Ministry of Education alleging that Jeffrey had been discriminated against because of his disability and had been denied "a service . . . customarily available to the public", contrary to s. 8 of the *Human Rights Code*, R.S.B.C. 1996, c. 210 .

[3] The Human Rights Tribunal held 43 days of hearings, receiving evidence about the funding and administration of special education in the District and Province, the District's budgetary constraints at the relevant time, dyslexia generally, and Jeffrey's circumstances in particular.

[4] The Tribunal concluded that the failure of the public school system to give Jeffrey the support he needed to have meaningful access to the educational

opportunities offered by the Board, amounted to discrimination under the *Code*. I agree.

[5] The preamble to the *School Act*,[1] the operative legislation when Jeffrey was in school, stated that "the purpose of the British Columbia school system is to enable all learners to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society and a prosperous and sustainable economy". This declaration of purpose is an acknowledgment by the government that the reason all children are entitled to an education, is because a healthy democracy and economy require their educated contribution. Adequate special education, therefore, is not a dispensable luxury. For those with severe learning disabilities, it is the ramp that provides access to the statutory commitment to education made to *all* children in British Columbia.

Background

[6] At the relevant time, public school funding in British Columbia was approved annually by the Province but administered by districts under the *School Act*. As of the 1990/91 school year, the Province instituted a block funding system, whereby an overall amount of money was made available for education and then allocated among the various districts by the Minister. The block amount, as determined in the base year, was adjusted annually to allow for changes in enrolment, mandated services, and economic indicators such as changes in the cost of resources.

[1] S.B.C. 1989, c. 61, as amended in 1993 (*School Amendment Act*, 1993, c. 6).

For a short period, the Province provided equalization grants to ease the transition for districts which had historically earned significant supplementary funds through local taxation.

[7] For the purposes of funding special education, the Province classified students into various groups, including what it referred to as "high incidence/low cost" and "low incidence/high cost" programs. Severe learning disabilities like dyslexia were always treated as a high incidence/low cost disability. From 1987/88, the Province capped the specific funding that was available for high incidence/low cost students to a percentage of a district's student population in order to control the increasing number of students qualifying for this supplementary funding. Notably, as of 1991, the *School Act* set out minimum spending levels for high incidence/low cost and low incidence/high cost students. That meant that once a child was identified as having a severe learning disability, additional support was mandatory. As a result, districts were required to draw on the general provincial allocation to fund any high incidence/low cost students above the high incidence/low cost cap.

[8] When Jeffrey entered kindergarten in 1991, students with special needs in the District were supported in several ways: they received assistance in and out of the classroom from special education Aides; they were referred to the school-based Learning Assistance Centre where they would work with learning assistance teachers or tutors; and a small number of them were placed in the Diagnostic Centre for more intensive assistance.

[9] Following the implementation of the block funding model, there were significant financial pressures on Jeffrey's home District, School District No. 44. From 1991/92 to 1994/95, the District consistently faced budgetary shortfalls. It had relied on supplementary funds in the past and received declining equalization grants until 1992/93. Despite requests, it did not get additional funding from the Province but got permission to run temporary deficits. Consistent deficits during this period led to wide-scale budget cuts in the District between 1991/92 and 1994/95, including a reduction of almost $1.5 million in spending for high incidence/low cost students with learning disabilities.

[10] In the 1994/95 budgetary process, possible solutions to the financial difficulties included restricting the availability of Aides or closing the District Diagnostic Centre, a program which provided intensive services and individualized assistance to students with severe learning disabilities. The District limited its cuts to Aide allocation because of the terms of its Collective Agreement with the teachers' association, which required a minimum of two hours a week of Aide time once a student was designated as being in a high incidence/low cost category. Other proposed cuts were implemented, including the closing of the Diagnostic Centre in 1994. In February 1996, the Province fired the Board of the District and replaced it with an Official Trustee.

[11] Jeffrey Moore started kindergarten in September 1991 at Braemar Elementary School, his North Vancouver neighbourhood school in the District.

While he was happy and energetic in nursery school, it quickly became apparent in kindergarten that Jeffrey needed extra support to learn to read. After scoring low on a screening test, Jeffrey was referred to the Elementary Learning Resource Team, a group of specialists who provided support and assistance to students in the District who had severe learning disabilities, including dyslexia.

[12] After his first assessment in kindergarten, Jeffrey was observed in the classroom and given 15 minutes of individual help from an Aide three times a week. He was assessed twice by the Elementary Learning Resource Team in Grade 1 because he continued to fall behind in literacy skills. He started attending the Learning Assistance Centre three times a week, for half-hour individual sessions with Barbara Waigh, a learning assistance teacher. He also had two 40-minute sessions in the Learning Assistance Centre with a volunteer tutor. Because he still made poor progress, Jeffrey's parents, at the school's recommendation, hired a private tutor to work with Jeffrey.

[13] In January 1994, while Jeffrey was in Grade 2, his parents, concerned about his worsening headaches, took him to a neurologist. They were told that Jeffrey was under significant stress which could be improved by addressing his learning difficulties. The next month, Jeffrey was again referred to the Elementary Learning Resource Team, with his teachers reporting slow academic progress and immature behaviour. He received a full psycho-educational assessment on April 1, 1994, a prerequisite to his designation as a Severe Learning Disabilities student.

Following the assessment, Mary Tennant, a psychologist employed by the District, concluded that Jeffrey needed more intensive remediation than he had been receiving and suggested that he attend the Diagnostic Centre.

[14] Ms. Tennant, Ms. Waigh, and Bryn Roberts, Braemar's principal, met with the Moores soon after this assessment. Ms. Tennant and Ms. Waigh told the Moores that because the Diagnostic Centre was being closed, Jeffrey could not obtain the intensive remediation he needed in the District's public schools. The necessary instruction was available only at Kenneth Gordon School, a private school specializing in teaching children who had learning disabilities.

[15] Jeffrey could not enrol in Kenneth Gordon School until Grade 4. His pre-referral form to that school confirmed a serious lack of progress in reading and spelling as well as his poor self-esteem. Every week during Grade 3 at Braemar, he received two 30-minute sessions of individual assistance in the Learning Assistance Centre, two 40-minute periods of individual assistance with a tutor in the Learning Assistance Centre, and four 40-minute sessions with an Aide, primarily in the classroom.

[16] Jeffrey attended Kenneth Gordon School from Grade 4 to Grade 7. When he left, he was reading at a Grade 5 level and was at Grade 7 level in math. He began Grade 8 in September 1999 at Fraser Academy, another private school specializing in children with learning disabilities. He remained there until the time of the hearing and eventually completed high school there.

Prior Proceedings

[17] The Tribunal chair, Heather MacNaughton, found that there was general agreement among the experts about the significant, negative long-term consequences for students with unremediated learning disabilities. The experts also agreed that children with reading disabilities should be identified early and provided with intensive supports.

[18] Based on this evidence, the Tribunal concluded that a range of services was necessary for these students, from a modified program within the classroom to full-time placement in a special program for Severe Learning Disabilities students.

[19] The Tribunal accepted the evidence of experts and of District employees like Ms. Tennant that Jeffrey could not get sufficient services within the District after the closure of the Diagnostic Centre in 1994. Only one expert, who was called by the District, said that Jeffrey had received the services he needed at his public school and that the interventions had been of appropriate intensity.

[20] The Tribunal concluded that there was both individual discrimination against Jeffrey and systemic discrimination against Severe Learning Disabilities students in general. It grounded its finding of discrimination against Jeffrey in the District's failure to assess Jeffrey's learning disability early, and to provide appropriately intensive instruction following the closing of the Diagnostic Centre. It

ordered that the Moores be reimbursed for the costs related to Jeffrey's attendance at private schools, as well as $10,000 in damages for pain and suffering.

[21] The finding of systemic discrimination against the District was based on the underfunding of Severe Learning Disabilities programs and the closing of the Diagnostic Centre. While accepting that the District's financial circumstances were compelling, the Tribunal found that there was no evidence that the District had considered any reasonable alternatives for meeting the needs of Severe Learning Disabilities students before cutting available services such as the Diagnostic Centre.

[22] The Tribunal's finding of systemic discrimination against the Province was based on what it identified as four problems in the provincial administration of special education: the high incidence/low cost cap; the underfunding of the District; the failure to ensure that necessary services, including early intervention, were mandatory; and the failure to monitor the activities of the districts. It ordered a wide range of sweeping systemic remedies against both the District and the Province.

[23] In the Supreme Court of British Columbia, Dillon J. allowed the application for judicial review ([2008] 10 W.W.R. 518). She found that Jeffrey's situation should be compared to other special needs students, not to the general student population as the Tribunal had done. There was no evidence about this comparison, nor was there evidence about how students with special needs were affected by funding mechanisms such as the high incidence/low cost cap or the closing of the Diagnostic Centre. The failure to identify and compare Jeffrey with the

appropriate comparator group tainted the entire discrimination analysis. As a result, she set aside the Tribunal's decision.

[24] A majority in the Court of Appeal dismissed the appeal, agreeing that Jeffrey ought to be compared to other special needs students ([2011] 3 W.W.R. 383). To compare him with the general student population was to invite an inquiry into general education policy and its application, which it concluded could not be the purpose of a human rights complaint.

[25] In dissent, Rowles J.A. would have allowed the appeal. In her view, special education was the means by which "meaningful access" to educational services was achievable by students with learning disabilities. She found that a comparator analysis was both unnecessary and inappropriate. The Tribunal's detailed evidentiary analysis showing that Jeffrey had not received sufficiently intensive remediation after the closing of the Diagnostic Centre, justified the findings of discrimination.

Analysis

[26] Section 8 of British Columbia's *Human Rights Code* states that it is discriminatory if "[a] person . . . without a bona fide and reasonable justification . . . den[ies] to a person or class of persons any accommodation, service or facility customarily available to the public" on the basis of a prohibited ground. That means that if a service is ordinarily provided to the public, it must be available in a way that

does not arbitrarily — or unjustifiably — exclude individuals by virtue of their membership in a protected group.

[27] A central issue throughout these proceedings was what the relevant "service . . . customarily available to the public" was. While the Tribunal and the dissenting judge in the Court of Appeal defined it as "general" education, the reviewing judge and the majority defined it as "special" education.

[28] I agree with Rowles J.A. that for students with learning disabilities like Jeffrey's, special education is not the service, it is the *means* by which those students get meaningful access to the general education services available to all of British Columbia's students:

> It is accepted that students with disabilities require accommodation of their differences in order to benefit from educational services. Jeffrey is seeking accommodation, in the form of special education through intensive remediation, to enable him equal access to the "mainstream" benefit of education available to all. . . . *In Jeffrey's case, the specific accommodation sought is analogous to the interpreters in* Eldridge: *it is not an extra "ancillary" service, but rather the manner by which meaningful access to the provided benefit can be achieved*. Without such special education, the disabled simply cannot receive equal benefit from the underlying service of public education. [Emphasis added; para. 103.]

[29] The answer, to me, is that the 'service' is education generally. Defining the service only as 'special education' would relieve the Province and District of their duty to ensure that no student is excluded from the benefit of the education system by virtue of their disability.

[30] To define 'special education' as the service at issue also risks descending into the kind of "separate but equal" approach which was majestically discarded in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). Comparing Jeffrey only with other special needs students would mean that the District could cut *all* special needs programs and yet be immune from a claim of discrimination. It is not a question of who else is or is not experiencing similar barriers. This formalism was one of the potential dangers of comparator groups identified in *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396.

[31] If Jeffrey is compared only to other special needs students, full consideration cannot be given to whether he had *genuine* access to the education that all students in British Columbia are entitled to. This, as Rowles J.A. noted, "risks perpetuating the very disadvantage and exclusion from mainstream society the *Code* is intended to remedy" (see *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, at p. 1237; Gwen Brodsky, Shelagh Day and Yvonne Peters, *Accommodation in the 21st Century* (2012) (online), at p. 41).

[32] A majority of students do not require intensive remediation in order to learn to read. Jeffrey does. He was unable to get it in the public school. Was that an unjustified denial of meaningful access to the general education to which students in British Columbia are entitled and, as a result, discrimination?

[33] As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic

protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

[34] There is no dispute that Jeffrey's dyslexia is a disability. There is equally no question that any adverse impact he suffered is related to his membership in this group. The question then is whether Jeffrey has, without reasonable justification, been denied access to the general education available to the public in British Columbia based on his disability, access that must be "meaningful": *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 71; *University of British Columbia v. Berg*, [1993] 3 S.C.R. 353, at pp. 381-82. (See also *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, [2000] 1 S.C.R. 665, at para. 80; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650, at paras. 121 and 162; A. Wayne MacKay, "Connecting Care and Challenge: Tapping Our Human Potential" (2008), 17 *E.L.J.* 37, at pp. 38 and 47.)

[35] The answer is informed by the mandate and objectives of public education in British Columbia during the relevant period. As with many public services, educational policies often contemplate that students will achieve certain

results. But the fact that a particular student has not achieved a given result does not end the inquiry. In some cases, the government may well have done what was necessary to give the student access to the service, yet the hoped-for results did not follow. Moreover, policy documents tend to be aspirational in nature, and may not reflect realistic objectives. A margin of deference is, as a result, owed to governments and administrators in implementing these broad, aspirational policies.

[36] But 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.

[37] As previously noted, the mandate and objectives for public education during the relevant period were set out in the *School Act*, which stated in its preamble that "the purpose of the British Columbia school system is to enable all learners to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society and a prosperous and sustainable economy". A related policy document, the 1989 *Mandate for the School System*, O.I.C. 1280/89, said that the government was "responsible for ensuring that all of our youth have the opportunity to obtain high quality schooling that will assist in the development of an educated society" (p. 96). The *Mandate* said that schools should develop students who are, among other things, "thoughtful, able to learn and to think critically … can communicate information from a broad

knowledge base … [are] creative, flexible, self-motivated … have a positive self image … [are] capable of making independent decisions … [are] skilled and can contribute to society generally, including the world of work" (p. 96).

[38] There were divergent views when Jeffrey was in school about how 'special needs' students could best be educated. The Province's "Special Programs: A Manual of Policies, Procedures and Guidelines" (the "1985 Manual") contemplated a "cascade" model of service delivery, where a "range" of placements would be available, including a "very highly specialized" education environment for a small number of students (ss. 4.1 and 4.2). The predominant policy in the 1985 Manual, however, was the integration of special needs students into the general classroom whenever possible.

[39] Notably, however, the 1985 Manual said that "[s]pecial education *shares the basic purpose of all education*: the optimal development of individuals as skilful, free, and purposeful persons, able to plan and manage life and to realize highest potential as individuals and as members of society" (s. 3.1 (emphasis added)). It added that "*[a]ll* children should be afforded opportunities to develop their full potential" (s. 3.1 (emphasis in original)).

[40] These education goals in British Columbia informed the Tribunal's conclusion that the District did not take the necessary steps to give Jeffrey the education to which he was entitled. *Prima facie* discrimination was made out based, in essence, on two factors: the failure by the District to assess Jeffrey at an earlier

stage; and the insufficiently intensive remediation provided by the District for Jeffrey's learning disability in order for him to get access to the education he was entitled to. Only the second is in issue before us, since the conclusions about early assessment which were quashed by the reviewing court, were not appealed to this Court. That leaves only the issue of the sufficiency of the services given to Jeffrey by the District.

[41] There is no doubt that Jeffrey received some special education assistance until Grade 3, but in my view the Tribunal's conclusion that the remediation was far from adequate to give Jeffrey the education to which he was entitled, was fully supported by the evidence. To start, the Tribunal found that the Moores were told by District employees that Jeffrey required intensive remediation which, as a result of the closing of Diagnostic Centre, would only be available outside of the public school system. After Jeffrey's psycho-educational assessment in April 1994, Ms. Tennant concluded that he "needed more intensive remediation than he had been receiving", and recommended that he be considered for the Diagnostic Centre program. The Tribunal accepted the Moores' evidence that at a meeting with Ms. Tennant after this assessment, they were advised that since the Diagnostic Centre was not an option as a result of its pending closing, Kenneth Gordon School "was the only alternative that would provide the intense remediation that Jeffrey required".

[42] The Tribunal also put great reliance on the views of Ms. Tennant and Ms. Waigh, who had "worked most closely with" Jeffrey at Braemar, and whose

"professional judgment" it accepted. It found that Ms. Tennant had "recognized that Jeffrey needed intensive remediation in an alternate setting", and recommended that he look at the Diagnostic Centre. This recommendation was made "in addition to the Aide time to which Jeffrey was entitled under the provisions of the Collective Agreement". The Tribunal found that "Ms. Waigh agreed that Diagnostic Centre would have been beneficial to Jeffrey", and noted that

> Ms. Tennant described Jeffrey's case as one of the worst she had ever seen in her many years of experience. According to her, Jeffrey needed a high degree of intensive one-on-one instruction in a setting designed to minimize distractions. Her opinion was that Jeffrey needed intensive remediation which, in the District, was only offered by the Diagnostic Centre.

On the basis of this evidence, the Tribunal concluded that "[w]hile it is clear that the one-on-one attention he received was unusual, and that Ms. Waigh was a well-qualified specialist, the services were not intensive enough to meet his disability-related needs".

[43] The Tribunal found that when the decision to close the Diagnostic Centre was made, the District did so without knowing how the needs of students like Jeffrey would be addressed, and without "undertak[ing] a needs-based analysis, consider[ing] what might replace Diagnostic Centre, or assess[ing] the effect of the closure on [Severe Learning Disabilities] students". The Tribunal noted that at the Board meeting on April 26, 1994, when the budget closing the Diagnostic Centre was approved, the Minutes stated that "[a]ll Trustees indicated in this discussion that they were adopting the bylaw as it was required by legislation and not because they

believed it met the needs of the students". It concluded that Dr. Robin Brayne, the District's Superintendent of Schools, and the District in general "did not know how many students would be affected" by the closure. In fact, on the day of the Board vote, the District's Assistant Superintendent and the Coordinator of Student Services informed Dr. Brayne that it was "too early to know precisely how the needs of high incidence students will be addressed in the absence of the Diagnostic Centre".

[44] Nor did the District consult Ms. Waigh or Ms. Tennant, despite their role in providing services to Severe Learning Disabilities students and their opposition to the closure. It was only at the end of June 1994, more than two months after the decision to close the Diagnostic Centre, that Dr. Brayne requested the development of a policy document to set out the District's plan for addressing the needs of Severe Learning Disabilities students in the absence of the Diagnostic Centre. The policy document was to be discussed in August, with training planned for the fall and winter of 1994/95. As a result, the Tribunal concluded that "nothing was in place in September when schools opened, other than what the schools already provided".

[45] Moreover, the Tribunal rejected the District's argument that the educational philosophy of integration was "a consideration" in the closure of the Diagnostic Centre, since "[i]t was clear from the evidence of all of the District's witnesses that they thought the Diagnostic Centre provided a useful service". It noted that Dr. Brayne admitted in cross-examination that the closure was not motivated by educational policy, and acknowledged that "without [the] Diagnostic Centre, the

range of options available to [Severe Learning Disabilities] students was reduced … [and] according to the 1985 Manual, [the remaining resources] were not intended for [Severe Learning Disabilities] students". As a result, based on the "the evidence, the concurrent memoranda, and the speed at which the decision was made", the Tribunal concluded that "the *sole* reason for the closure was financial" (emphasis added).

[46] The Tribunal was cognizant of the deference it owed to the District in delivering educational services, and the fact that Jeffrey's needs could have been met by means other than the Diagnostic Centre. In brief, the Tribunal found that when the decision to close the Diagnostic Centre was made, the District's motivations were exclusively financial, and it had failed to consider the consequences or plan for alternate accommodations.

[47] This failure was crucial in light of the expert evidence that intensive supports were needed generally to remedy Jeffrey's learning disability, and that he had not received the support he needed in the public school system. The Tribunal acknowledged that it was impossible to compare Jeffrey's current abilities to what he might have achieved if he had received earlier and more intensive services. But while the failure to obtain a given result did not in itself constitute adverse treatment, the Tribunal accepted the evidence of two experts who, after examining Jeffrey, found that he "would have benefited from more intensive remediation earlier and from attending at the Diagnostic Centre".

[48] It was therefore the combination of the clear recognition by the District, its employees and the experts that Jeffrey required intensive remediation in order to have meaningful access to education, the closing of the Diagnostic Centre, and the fact that the Moores were told that these services could not otherwise be provided by the District, that justified the Tribunal's conclusion that the failure of the District to meet Jeffrey's educational needs constituted *prima facie* discrimination. In my view, this conclusion is amply supported by the record.

[49] The next question is whether the District's conduct was justified. At this stage in the analysis, it must be shown that alternative approaches were investigated (*British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*"), at para. 65). The *prima facie* discriminatory conduct must also be "reasonably necessary" in order to accomplish a broader goal (*Ontario Human Rights Commission v. Borough of Etobicoke*, [1982] 1 S.C.R. 202, at p. 208; *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, at p. 984). In other words, an employer or service provider must show "that it could not have done anything else reasonable or practical to avoid the negative impact on the individual" (*Meiorin*, at para. 38; *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, at pp. 518-19; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, at para. 130).

[50] The District's justification centred on the budgetary crisis it faced during the relevant period, which led to the closure of the Diagnostic Centre and other

related cuts. There is no doubt that the District was facing serious financial constraints. Nor is there any doubt that this is a relevant consideration. It is undoubtedly difficult for administrators to implement education policy in the face of severe fiscal limitations, but accommodation is not a question of "mere efficiency", since "[i]t will always seem demonstrably cheaper to maintain the status quo and not eliminate a discriminatory barrier" (*VIA Rail*, at para. 125).

[51] In Jeffrey's case, the Tribunal accepted that the District faced financial difficulties during the relevant period. Yet it also found that cuts were disproportionably made to special needs programs. Despite their similar cost, the District retained some discretionary programs, such as the Outdoor School — an outdoor campus where students learned about community and the environment — while eliminating the Diagnostic Centre. As Rowles J.A. noted, "without undermining the educational value of the Outdoor School, such specialized and discretionary initiatives cannot be compared with the accommodations necessary in order to make the core curriculum accessible to severely learning disabled students" (para. 154).

[52] More significantly, the Tribunal found, as previously noted, that the District undertook *no* assessment, financial or otherwise, of what alternatives were or could be reasonably available to accommodate special needs students if the Diagnostic Centre were closed. This was cogently summarized by Rowles J.A. as follows:

> The Tribunal found that prior to making the decision to close [the] Diagnostic Centre, the District did not undertake a needs-based analysis, consider what might replace [the] Diagnostic Centre, or assess the effect of the closure on severely learning disabled students. The District had no specific plan in place to replace the services, and the eventual plan became learning assistance, which, by definition and purpose, was ill-suited for the task. The philosophy for the restructuring was not prepared until two months after the decision had been made (paras. 380-382, 387-401, 895-899). *These findings of fact of the Tribunal are entitled to deference, and undermine the District's submission that it discharged its obligations to investigate and consider alternative means of accommodating severely learning disabled students before cutting services for them*. Further, there is no evidence that the District considered cost-reducing alternatives for the continued operation of [the] Diagnostic Centre. [Emphasis added; para. 143.]

The failure to consider financial alternatives completely undermines what is, in essence, the District's argument, namely that it was justified in providing no meaningful access to an education for Jeffrey because it had no economic choice. In order to decide that it had *no* other choice, it had at least to consider what those other choices were.

[53] Given the Tribunal's findings that the District had other options for addressing its budgetary crisis, its conclusion that the District's conduct was not justified should not be disturbed. The finding of discrimination is thereby confirmed.

[54] This brings us to the Province's role. The District's budgetary crisis was created, at least in part, by the Province's funding shortfalls. But in light of the Tribunal's finding that it was the District which failed to properly consider the consequences of closing the Diagnostic Centre or how to accommodate the affected

students, it seems to me that the conclusion that the Province was liable for the District's discriminatory conduct towards Jeffrey cannot be sustained.

[55] This leads to considering the remedies imposed by the Tribunal which have been appealed to this Court. A remedial decision by the Tribunal is subject to a standard of patent unreasonableness according to s. 59 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45.

[56] The Tribunal awarded the Moores the amount of tuition paid for Jeffrey to attend Kenneth Gordon School and Fraser Academy, up to and including Grade 12, half of the costs incurred for his transportation to and from those schools, and $10,000 for "the injury to [Jeffrey's] dignity, feelings and self-respect". This order, it seems to me, is sustainable given the actual scope of the complaint.

[57] But the Tribunal's systemic remedies are so remote from the scope of the complaint, that in my view they reach the threshold set out in s. 59 of the *Administrative Tribunals Act*. Those problematic remedies are:

- That the Province allocate funding on the basis of actual incidence levels, establish mechanisms ensuring that accommodations for Severe Learning Disabilities students are appropriate and meet the stated goals in legislation and policies, and ensure that districts have a range of services to meet the needs of Severe Learning Disabilities students.

- That the District establish mechanisms to ensure that its delivery of services to Severe Learning Disabilities students meet the stated goals in legislation and policies, and ensure that it had a range of services to meet the needs of Severe Learning Disabilities students.

- The Tribunal remained seized of the matter to oversee the implementation of its remedial orders.

[58] Having first found that Jeffrey had suffered discrimination at the hands of the District, the Tribunal then considered whether the broader policies of the District and the Province constituted systemic discrimination. I think this flows from the fact that it approached discrimination in a binary way: individual and systemic. It was, however, neither necessary nor conceptually helpful to divide discrimination into these two discrete categories. A practice is discriminatory whether it has an unjustifiably adverse impact on a single individual or systemically on several: *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The only difference is quantitative, that is, the number of people disadvantaged by the practice.

[59] In *Canadian National Railway Co. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114, this Court first identified 'systemic discrimination' by name. It defined it as "practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual

characteristics" (p. 1138). Notably, however, the designation did not change the analysis. The considerations and evidence at play in a group complaint may undoubtedly differ from those in an individual complaint, but the focus is always on whether the complainant has suffered arbitrary adverse effects based on a prohibited ground.

[60] The inquiry is into whether there is discrimination, period. The question in every case is the same: does the practice result in the claimant suffering arbitrary — or unjustified — barriers on the basis of his or her membership in a protected group. Where it does, discrimination will be established.

[61] It is true that before *Meiorin* and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 ("*Grismer*"), different remedial approaches had been applied for direct versus adverse impact discrimination. But in *Meiorin*, McLachlin J. observed that since few rules are framed in directly discriminatory terms, the human rights issue will generally be whether the claimant has suffered adverse effects. Insightfully, she commented that upholding a remedial distinction between direct and adverse effect discrimination "may, in practice, serve to legitimize systemic discrimination" (para. 39). The *Meiorin*/*Grismer* approach imposed a unified remedial theory with two aspects: the removal of arbitrary barriers to participation by a group, and the requirement to take positive steps to remedy the adverse impact of neutral practices.

[62] *Meiorin* and *Grismer* also directed that practices that are neutral on their face but have an unjustifiable adverse impact based on prohibited grounds will be subject to a requirement to "accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them" (*Grismer*, at para. 19).

[63] In that sense, it is certainly true that a remedy for an individual claimant can have a 'systemic' impact. In *Grismer*, for example, the issue was a rule that excluded individuals with a medical condition affecting peripheral vision — homonymous hemianopia — from obtaining a drivers' licence. The Court concluded that this rule had a discriminatory impact on Mr. Grismer and upheld the Tribunal's order that the Superintendent test Mr. Grismer individually. Although the remedy was individual to Mr. Grismer, it clearly had remedial consequences for others in his circumstances. Similarly, a finding that Jeffrey suffered discrimination and was entitled to a consequential personal remedy, has clear broad remedial repercussions for how other students with severe learning disabilities are educated.

[64] But the remedy must flow from the claim. In this case, the claim was made on behalf of Jeffrey, and the evidence giving concrete support to the claim all centred on him. While the Tribunal was certainly entitled to consider systemic evidence in order to determine whether Jeffrey had suffered discrimination, it was unnecessary for it to hold an extensive inquiry into the precise format of the provincial funding mechanism or the entire provincial administration of special

education in order to determine whether *Jeffrey* was discriminated against. The Tribunal, with great respect, is an adjudicator of the particular claim that is before it, not a Royal Commission.

[65] The connection between the high incidence/low cost cap and the closure of the Diagnostic Centre is remote, given the range of factors that led to the District's budgetary crisis. There is no particular reason to think that these funding mechanisms could not be retained in some form while still ensuring that Severe Learning Disabilities students receive adequate support. It is entirely legitimate for the Province to choose a block funding mechanism in order to ensure that districts do not have an incentive to over-report Severe Learning Disabilities students, so long as it *also* complies with its human rights obligations. In other words, while systemic evidence can be instrumental in establishing a human rights complaint, the evidence about the provincial funding regime, and the high incidence/lost cost cap in particular, was too remote to demonstrate discrimination against *Jeffrey*. And the Tribunal's orders that the District establish mechanisms to ensure that accommodations for Severe Learning Disabilities students meet the stated goals in legislation and policies, and provide a range of services to meet their needs, in any event, essentially direct the District to comply with the *Human Rights Code*. They are, to that extent, redundant.

[66] Moreover, the Tribunal's order that it remain seized of the matter to oversee implementation is hardly suited to a claim brought on behalf of an individual student who has finished his high school education and will not re-enter the public

school system. It goes without saying that if the District is to avoid similar claims such as those Jeffrey brought, it will have to ensure that it provides a range of services for special needs students in accordance with the *School Act* and its related policies. There is no remaining need for the Tribunal to remain seized of the matter in order to satisfy *Jeffrey*'s claim.

[67] In fairness to the Tribunal, I think the fact that the scope of the inquiry and the resulting remedial orders were expanded beyond Jeffrey's actual complaints can be traced to the unusual procedural history of this case. Frederick Moore's initial complaints under s. 8 alleged that the District and the Province had failed to identify Jeffrey's disability early enough and failed to provide him with sufficient support to enable him to access public education. He also complained that the District and the Province had failed to properly fund, support and monitor special education throughout the Province.

[68] In a preliminary decision on the scope of the complaint and the required disclosure, a Tribunal member allowed the Moores to lead systemic evidence establishing the complaint. However, she properly noted that "[a]lthough systemic discrimination does not have to be specifically pleaded, it must relate to the complaint *as framed by the Complainant*" (emphasis added). This, I think, was a clear direction to the Tribunal hearing the merits of the case that while systemic *evidence* could be helpful, the *claim* should remain centred on Jeffrey.

[69] But the issue was complicated on judicial review where, in upholding this preliminary decision, Shaw J. said that the complaint "*includes* allegations of province-wide systemic discrimination by the Ministry against dyslexic students" (88 B.C.L.R. (3d) 343 (emphasis added)). This does not appear to have been challenged before the Tribunal, and I think it was on this basis that the Tribunal appears to have departed from the actual focus of the complaint — Jeffrey — and imposed systemic remedies based on its systemic conclusions.

[70] This does not in any way detract, however, from the cogency of the Tribunal's core analysis. Its finding of discrimination against Jeffrey Moore by the District should be upheld, as should the individual orders, which reimburse the Moores for the cost of private schooling and award them damages. These orders properly seek to compensate them for the harm that Jeffrey suffered and were well within the Tribunal's broad remedial authority. Given my earlier comments on the liability of the Province, however, the order for reimbursement and damages should apply only against the District. I would, however, set aside the remaining orders.

[71] The appeal is therefore substantially allowed as discussed, with costs to the Moores throughout since they were successful in upholding the central finding that there was discrimination.

Appeal substantially allowed with costs throughout.

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Solicitor for the intervener Justice for Children and Youth: Canadian Foundation for Children, Youth and the Law, Toronto.

Solicitor for the intervener the British Columbia Teachers' Federation: British Columbia Teachers' Federation, Vancouver.

Solicitors for the intervener the Council of Canadians with Disabilities: Camp Fiorante Matthews, Vancouver.

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