



Education Law eBulletin

A newsletter for educators

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SHIBLEY RIGHTON LLP
Barristers & Solicitors
www.shibleyrighton.com

Toronto Office:
2510 Ouellette Avenue
Suite 700
Toronto, ON M5H 3E5
Tel.: (416) 214-5200
Toll free: 1-877-214-5200

Windsor Office:
2510 Ouellette Avenue
Suite 301
Windsor, ON N8X 1L4
Tel.: (519) 969-9844
Toll free: 1-866-422-7988

Education and Public Law Group

John P. Bell
john.bell@shibleyrighton.com

Brian P. Nolan
brian.nolan@shibleyrighton.com

Sheila M. MacKinnon
sheila.mackinnon@shibleyrighton.com

J. Paul R. Howard
paul.howard@shibleyrighton.com

Thomas McRae
thomas.mcrae@shibleyrighton.com

Gaynor J. Roger
gaynor.roger@shibleyrighton.com

John De Vellis
john.devellis@shibleyrighton.com

Bryce Chandler
bryce.chander@shibleyrighton.com

Megan Marrie
megan.marrie@shibleyrighton.com

School board's budgetary crisis did not justify closing of special education program

On November 9, 2012, the Supreme Court of Canada released its decision in *Moore v. B.C.*, a case involving the education of Jeffrey Moore, a child with a severe learning disability (dyslexia) who claimed that he was discriminated against by the Board of Education of School District No. 44 (North Vancouver) (the "School District") and the B.C. Ministry of Education because the intensive remedial instruction he needed in his early school years for his dyslexia was not available in the public school system.

Jeffrey 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 Jeffrey 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 due to sustained budgetary deficits necessitating significant spending cuts, Jeffrey transferred to a private school to receive the intensive remediation he needed. His parent filed a complaint with the B.C. Human Rights Tribunal against the School District and the Province on the grounds that Jeffrey 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 Jeffrey by the School 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 Jeffrey's private school. On judicial review, the B.C. Supreme Court set aside the Tribunal's decision, finding that there was no discrimination. A majority of the B.C. Court of Appeal dismissed the appeal.

However, the Supreme Court of Canada substantially allowed Jeffrey's appeal and restored the Tribunal's finding of discrimination against the School District.

Writing for a unanimous Court, Madam Justice Abella acknowledged 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.

To demonstrate discrimination under the B.C. *Human Rights Code*, 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 service-provider to justify the conduct or practice. If it cannot be justified, discrimination will be found to occur.

There is no dispute that Jeffrey's dyslexia was a disability, nor that any adverse impact he suffered was related to his disability. The question was whether Jeffrey was, without reasonable justification, 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 School District for Jeffrey's learning disability in order for him to get access to the education to which he was entitled. The Tribunal's conclusion that the remediation provided to Jeffrey in his early school years was far from adequate was fully supported by the evidence. The Tribunal found that the family was told by a School District psychologist and teacher that Jeffrey 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 Jeffrey required.

The Tribunal found that when the decision to close the Diagnostic Centre was made, the School District did so without knowing how the needs of special needs students like Jeffrey 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 School District that Jeffrey 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 School District, that justified the Tribunal's conclusion that the failure of the School District to meet Jeffrey's educational needs constituted *prima facie* discrimination.

The next question was whether the School District's conduct was justified. The School 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 budget cuts. The Supreme Court held that the Tribunal's findings that the School District had other options available to it for addressing its budgetary crisis should not be disturbed. The Tribunal accepted that the School District faced financial difficulties during the relevant period. Yet it also found that cuts were disproportionately 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 School 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 Supreme Court held that the failure to consider financial alternatives completely undermined the School District's argument that it was justified in providing no meaningful access to an education for Jeffrey because it had no choice. In order to decide that it had no other choice, the School District had at least to consider what those other choices were.

The finding of discrimination against the School District was therefore restored by the Supreme Court. The School District was ordered to reimburse the family for the costs of the private school tuition and transportation thereto, as well as general damages in the amount of \$10,000 for injury to Jeffrey's dignity, feelings and self-respect. The finding of discrimination against the Province and all of the Tribunal's systemic remedies were set aside.

The Supreme Court's decision has already attracted some controversy in legal commentary and media circles. Some commentators regard the Court's decision as holding that financial hardship is not a justification for reduction in accommodation services. But that view is not fully consistent with or reflective of the actual provisions of the Ontario *Human Rights Code*, which expressly recognize that financial cost may constitute undue hardship in appropriate cases, thereby extinguishing the service-provider's duty to accommodate.

The *Moore* decision has distinct implications for school boards in Ontario. Among other things, the decision places primacy on school boards having an integrated decision-making structure. Budgetary decisions cannot be made in isolation from consideration of student and program needs. Business superintendents and superintendents responsible for special education, and all other board officials, must work together and share relevant information in order to ensure that budget decisions and program cuts are not decided in isolation from consideration of how those cuts will impact students with special needs.