

A CONCEPTUAL AND LEGAL FRAMEWORK FOR INCLUSIVE EDUCATION

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ARCH Disability Law Centre, Toronto Canada is a non-profit specialty legal clinic dedicated to defending and advancing the equality rights of persons with disabilities.

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I. Introduction

There has been significant evolution in Canadian jurisprudence, policy, and society at large in regard to education service delivery since the Supreme Court of Canada's (SCC) 1996 decision in ***Eaton v. Brant County Board of Education***² ruled a student with disabilities could be removed from the regular classroom despite the wishes of her parents. Diversity and inclusion of all students in regular classrooms has become the general approach in many jurisdictions. Policy directives, training in inclusive practices including Universal Design for Learning and differentiated instruction, research and understanding on the benefits of inclusion and the harms of isolation; along with the *United Nations Convention on the Rights of Persons with Disabilities (CRPD)* - article 24³, the SCC's decision in ***Moore v. British Columbia (Education)***⁴ and recent *Canadian Charter of Rights and Freedoms*⁵ and statutory human rights jurisprudence have pointed to a compelling need to review provincial education legislation and related regulations, policies and practices and align them with these rulings and human rights instruments.

Despite the advancements in inclusion domestically and internationally, far too many children continue to be isolated from their peers in segregated schools and segregated classrooms across Canada; "more than 40% of students with intellectual disabilities remain in segregated educational environments".⁶ Children are not provided equal access to dignity and services of quality regular classroom instruction or community schools. Classroom teachers are not provided the support, resources and clarity of policies and practices to support fully diverse learning, which often leads to segregation within mainstream schools and classrooms as well.

² *Eaton v. Brant County Board of Education*, [1997] 1 SCR 241 [*Eaton*].

³ UN GAOR, 61st Sess., 76th Mtg., UN Doc. GA/10554 (2006), online: United Nations Enable <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf> [*CRPD*].

⁴ 2012 SCC 61 [*Moore*].

⁵ Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c11 [*Charter*].

⁶ Joëlle Pastora Sala, "How the UN Convention on the Rights of Persons with Disabilities (*CRPD*) Might Be Used in Canadian Litigation" (2012) Council of Canadians with Disabilities, online: <http://www.ccdonline.ca/en/socialpolicy/poverty-citizenship/legal-protections/crpd-in-canadian-litigation> citing Ravi Malhotra & Robin F Hansen, "The United Nations Convention on the Rights of Persons with Disabilities and its Implications for the Equality Rights of Canadians with Disabilities: The Case of Education" (2011) 29 Windsor YB Access Just 73 at 92.

This paper reviews the legal obligations, through international, domestic and jurisprudential sources, in the context of identifying key components of a fully inclusive legislative structure and collaborative implementation requirements. Key Supreme Court of Canada decisions, and lower court and administrative tribunal decisions will be considered, as well as the *United Nations Convention on the Rights of Persons with Disabilities*. The paper will also consider two specific provincial jurisdictions and outline considerations for restructuring legislative frameworks to facilitate the delivery of fully inclusive public education services. Governments and school districts in Canada are compelled to make further advancement so that every child and society as a whole can benefit from the richness in diversity that fully includes students with disabilities in regular education.

II. Inclusive Education: Implementing a Rights Based Framework in Canada.

Transformation to inclusive education should be understood as providing additional support for teachers and students. It is about respecting human rights, international and legal obligations, but also about improving the quality of education, based on sound 21st century research and best practices. A framework for implementing inclusive education must be developed and sustained. The following suggestions will guide the implementation regardless of where the jurisdiction is starting from.

1. Collaborative partnerships with teachers' associations, academic experts in inclusive education and partnerships with family organizations are essential in the planning, implementing and sustaining inclusive education.
2. Undertake a comprehensive review of current policy and education practice (particularly those that are based on distinct "special education" models of education). The human rights based framework for inclusive education requires a comprehensive understanding of inclusive education and a review in each jurisdiction of policy and practice to create common understanding of inclusive education and identify current gaps and deficiencies.
3. Develop a plan to shift from segregated to inclusive models of education over a 3 to 5 year timeframe. This plan will include district and school implementation plans developed collaboratively with educators and parent organizations. It could involve "turning off the tap" of

new placements in segregated environments while students in existing segregated environments are shifted to a new system (or graduate from the school system). In some areas, this will involve planning the transition or repurposing special schools (including the closure of them while transferring resources, staff and budgets to the inclusive system).

4. Develop and implement a plan to shift education support funding from a “special education model” to an inclusive “education support model”. Within this model, implementation of supports and accommodations that underpin human rights based inclusive education need to be well understood and promoted. It is important that existing resources are spent effectively and that new resources are obtained where needed.

5. Ensure systemic and sustained professional development on inclusive practices. This will include timely consultative technical support to Principals and educators of inclusive policies and practices. Creating a collaborative network and time to share challenges and solutions is helpful. It will also include professional development on legal obligations that create a common understanding of the duty to accommodate. Provincial Human Rights Commissions (or similar bodies) can provide important guidelines and support to this process.

6. Implement district/school models of education support teams for school and education leaders.

7. Share knowledge and best practices locally, provincially and nationally. Within Canada currently there are excellent examples of educators, school, and broader school systems that have developed policies, strategies, support models and professional learning that have supported the implementation of a rights based framework on inclusive education. These should be shared and promoted systematically.

In the absence of a Canadian national strategy on implementing inclusive education, the framework above underscores the need for sharing and learning from jurisdictions that have achieved greater success in delivering inclusive education services. The following will explore and highlight developments in law that support and underpin this framework, and provide a more detailed framework for legislative and policy reforms.

III. Substantive Equality in Education

Human rights legislation, international treaties and the *Charter* have all been important elements in the advancement of diversity, human dignity and equality in Canada.

In a seminal decision by the Supreme Court of Canada, Cory J. discussed the importance of substantive equality in Canadian society:

The rights enshrined in s. 15(1) of the Charter are fundamental to Canada. [...] They reflect the fondest dreams, the highest hopes and finest aspirations of Canadian society. [...] In order to achieve equality, the intrinsic worthiness and importance of every individual must be recognized regardless of the age, sex, colour, origins, or other characteristics of the person. This in turn should lead to a sense of dignity and worthiness for every Canadian and the greatest possible pride and appreciation in being a part of a great nation.⁷

The Supreme Court of Canada has said the *Charter* was originally entrenched in the Constitution because of the collective belief that Canadian society is to be free and democratic.⁸ Enhancing the participation of individuals and groups in society through faith in social and political institutions is but one value and principle essential to a free and democratic society.⁹ The *Charter* and Human Rights laws aim to remedy and prevent the discrimination and exclusion from mainstream society of groups and individuals suffering social, political and legal disadvantage in Canadian society.¹⁰

The UN Human Rights Office of the High Commissioner has declared that persons with disabilities continue to be perceived as passive recipients of assistance rather than rights holders and have historically faced numerous patterns of exclusion.¹¹

In *Eldridge* the Supreme Court stated:

It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been

⁷ *Vriend v Alberta*, [1998] 1 SCR 493 (SCC) at para 67.

⁸ *R v Oakes*, [1986] 1 SCR 103 at para 67 [*Oakes*].

⁹ *Ibid.*

¹⁰ *Moore*, *supra* note 4 at para 31.

¹¹ *The Convention on the Rights of Persons with Disabilities Training Guide*, Professional Training Series No. 19, 2014 UN Human Rights Office of the High Commissioner page 22, online: http://www.ohchr.org/Documents/Publications/Disabilities_training_17EN.pdf [2014 UN Guide].

excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions.¹²

Children with disabilities have been excluded from education and considered uneducable. Some have argued that people with certain disabilities (mental, learning and even physical) cannot be educated in mainstream schools. Often these decisions are taken without investing in experts or teachers able to support or ensure peer learning between children with and without disabilities. The result is that children with disabilities are put in segregated schools and classrooms, isolated from their peers, where expectations for excellence are unsatisfactory and detrimentally lower.¹³

i. How does the community school contribute to rights and freedoms?

The education system has long been recognized as the garden that cultivates a free and democratic society. The Supreme Court of Canada in *Ross v. New Brunswick School District No. 15* recognized that a school defines the values that transcend society through the educational medium. It is a communication centre for a whole range of values and aspirations of a society and must be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate.¹⁴

The importance of ensuring an equal and discrimination free educational environment and the perception of fairness and tolerance in the classroom are paramount in the education of young children.¹⁵

The Court concluded that Human Rights Legislation guarantees individuals' freedom from discrimination in educational services available to the public. Education services are required to be available to all students without discrimination on the basis of "religion and ancestry, amongst

¹² *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 56 [*Eldridge*].

¹³ *2014 UN Guide*, *supra* note 11, page 89.

¹⁴ [1996] 1 SCR 825 at para 42 [*Ross*].

¹⁵ *Ibid* at para 82.

other grounds.”¹⁶ Every child has the right “to be educated in a school system that is free from bias, prejudice and intolerance, a right entrenched in s. 15 of the *Charter*.”¹⁷

In keeping with a broad purposive approach to interpreting human rights legislation, education of students includes not only the formal curriculum but the more informal aspects of education that come through interchange and participation in the whole school environment.¹⁸

To ensure these rights and values are reflected, the Supreme Court of Canada ruled a school board has a duty to maintain a ‘**positive school environment**’ by all persons served by it and be ever vigilant of anything that might interfere with this duty.¹⁹ Lamer C.J.C, was “in complete agreement” that there is an obligation of the school community “to work towards the creation of an environment in which students of all backgrounds will feel welcomed and equal.”²⁰

In order to ensure a discrimination-free educational environment, the school environment must be one where all are treated equally and all are encouraged to fully participate. Teachers must ensure that their conduct transmits this message of equality to the community at large, and are expected to maintain these high standards both in and out of the classroom.²¹

No rights are absolute

In the context of public education, the guaranteed right to the service, practice and environment that persons with disabilities have is equal access to the benefits of the regular classroom and school learning experiences that are available to all other children. People with disabilities must have their unique individual needs accommodated in the regular classroom and school to the greatest extent possible. When their unique needs are not able to be met in the regular classroom the removal from the classroom must be based on objective individual assessment and justified as being to the point of causing ‘undue hardship’ to the service provider. Services provided outside the classroom should be individually based and not in congregations based on

¹⁶ *Ibid* at para 35.

¹⁷ *Ibid* at para 83.

¹⁸ *Ibid* at para 35.

¹⁹ *Ibid* at paras 42, 50.

²⁰ *Ibid* at para 50.

²¹ *Ibid* at para 100.

label, stereotype, and bias and that the removal from the classroom be duration specific and documented as part of an individual learning plan.

IV. The International UN Convention of the Rights of Persons with Disabilities

The United Nations *Convention on the Rights of Persons with Disabilities (CRPD)*²² is the first international human rights treaty of the twenty-first century that United Nations Secretary-General Kofi Annan declared represented the "dawn of a new era" for people around the world living with disabilities. The *CRPD* (with 50 articles) was the most rapidly negotiated treaty in the history of international law. Upon adoption of the *CRPD* by the UN General Assembly in 2006 Annan urged "all governments to start by ratifying, and then implementing it, without delay."²³

Marking the 10th anniversary of the *CRPD* in June 2016 the UN stated that much more is to be done to fully implement the *CRPD* and make rights a reality for the more than one billion persons with disabilities around the world.²⁴

By ratifying a convention, and after the treaty comes into force, a country accepts its legal obligations under the treaty. Canada ratified the Convention in 2010 with the agreement and support of all provinces and territories. In ratifying the Convention, Federal and provincial governments declared that legal domestic recognition did not require new implementing legislation as the guaranteed rights in the *CRPD* were already enacted and consistent with the guaranteed rights in the *Charter* and Human Rights Codes. Because the *Charter* is part of Canada's Constitution and that human rights legislation has been recognized as having a quasi-constitutional nature, it is therefore up to the Federal and provincial governments to review all other legislation to ensure they comply with the *CRPD*, *Charter* and human rights legislation.

The purpose of the *CRPD* is to promote, protect and ensure the full and equal enjoyment of all human rights by persons with disabilities. The Convention marks a shift in thinking about

²² *CRPD*, *supra* note 3.

²³ UN Press Release 13 December 2006, online:

<http://www.un.org/apps/news/story.asp?NewsID=20975&Cr=disab&Cr1=#.V2FKN4cUXIU>

²⁴ UN Press Release June 14, 2016, online: <http://www.un.org/apps/news/story.asp?NewsID=54225#.V2FL3YcUXIU>

disability from a social welfare concern, to a human rights based issue, which acknowledges that societal barriers and prejudices are themselves disabling.

A rights-based approach to disability is not driven by compassion, but by dignity and freedom. It seeks ways to respect, support and celebrate human diversity by creating the conditions that allow meaningful participation by a wide range of persons, including persons with disabilities. Instead of focusing on persons with disabilities as passive objects of charitable acts, it seeks to assist people to help themselves so that they can participate in society, in education, at the workplace, in political and cultural life, and defend their rights through accessing justice.²⁵

Article 4 of the *CRPD* requires provinces and territories to adopt legislative and administrative measures to implement the *CRPD*, and to take into account the human rights of persons with disabilities in all policies and programs. The provinces and territories are also obligated to modify or repeal laws, regulations, and practices that discriminate against persons with disabilities and to ensure that public authorities, including educational institutions, comply with the treaty.²⁶

A rights-based approach establishes that all policies and laws should be designed with the involvement of persons with disability, mainstreaming disability in all aspects of political action.

Article 24 guarantees students with disabilities the right to an inclusive education system at all levels with others in the communities in which they live without discrimination and on the basis of equal opportunity. In realizing this right, State Parties (including provinces and territories in Canada) shall ensure that students with disabilities receive reasonable accommodation and support required for effective academic and social development consistent with the goal of full inclusion in regular classrooms and regular schools.²⁷

UNESCO says the Convention seeks to incorporate difference into the education system so that persons with disabilities learn the skills to participate effectively in a free society while enabling learners without disabilities to benefit from the experiences of students from diverse

²⁵ 2014 *UN Guide*, *supra* note 11 at 10.

²⁶ UN Division on Social Policy and Development, online: <http://www.un.org/esa/socdev/enable/disabout.htm>.

²⁷ *CRPD supra* note 3, article 24.2(e).

backgrounds. Individual differences should therefore become opportunities to enrich learning rather than problems to be fixed.²⁸

Following this model, no “special” policies should be designed for persons with disabilities, notwithstanding the particularities needed to comply with the principle of full participation.²⁹

The UN High Commission on Human Rights says the term “special” often arises in connection with persons with disabilities: children with special needs, special schools, special services, special institutions. The Commission further says that:

...‘specialty’ is exactly what the Convention distances itself from. Being special in the context of disability is not necessarily rewarding; it may lead to marginalization.

Take special schools for example: special schools enable persons with disabilities to interact only with other persons with disabilities or with certain “professionals”. This forces them to live a situation which is not realistic since it does not reflect the diversity of society. Whom does this benefit then? Persons with disabilities? Persons without disabilities? It is difficult to see the benefits of actions/decisions aimed at keeping human beings separate. Human beings are social beings, and children have the right to study and play together. Diversity and inclusion must be the norm.³⁰

i. What is the weight of international treaties?

By ratifying international human rights treaties, Canada and all of the provinces and territories agree to ensure that domestic law conforms to international human rights guarantees.

As noted above, the Federal and provincial position at the time of Canada’s ratification is that the *CRPD* conforms to guaranteed rights in the *Charter* and current human rights law and does not require additional legislation to become domestic law.

The Supreme Court of Canada (SCC) has increasingly given substantial weight to Canada's commitment to international human rights law and conventions such as the *CRPD*.³¹ The values reflected in international human rights law help inform the contextual approach to statutory

²⁸ *Overview of Measures Supporting the Right to Education for Persons with Disabilities, Monitoring of the Implementation of the Convention and Recommendation against Discrimination in Education*, United Nations Educational, Scientific and Cultural Organization (UNESCO), (8th Consultation, 2015), at p. 3, online: <http://unesdoc.unesco.org/images/0023/002325/232592E.pdf> [UNESCO].

²⁹ *2014 UN Guide*, *supra* note 11 at 11.

³⁰ *Ibid.*

³¹ *Canada v Taylor*, [1990] 3 SCR 892 at para 44 [*Taylor*].

interpretation and judicial review. The legislatures are presumed to respect the values and principles contained in international law.³²

In *Taylor* and *Ross*, the SCC considered the stance taken by the international community in various conventions and the additional heightened importance attached to the objective of preventing harms caused by hate propaganda by reason of Canada being a party to these instruments.³³

The Supreme Court of Canada affirmed in *Slaight Communications v Davidson* that “the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.” In that case, the Court pointed to Canada’s ratification of the *International Covenant on Economic, Social and Cultural Rights* as evidence that the right to work must be considered a fundamental human right.³⁴

In *R v Ewanchuk* the SCC reiterated that the *Charter* is the primary vehicle through which international human rights achieve a domestic effect.³⁵ It cited the *International Convention on the Elimination of All Forms of Discrimination Against Women* and reproduced several articles of the convention in the decision highlighting definitions and recommendations from the UN.³⁶ The SCC further referred to and described the *UN Declaration on the Elimination of Violence Against Women* as a non-binding instrument that sets out a common international standard that UN member states are invited to follow.³⁷

V. Inclusive Education and Why it is Important.

“[T]he right to education is in fact the right to inclusive education.”

UN Human Rights Council 2013³⁸

³² *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 69-71 [*Baker*].

³³ *Taylor*, *supra* note 49 at paras 42-44, *Ross*, *supra* note 27 at para 97.

³⁴ *Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038.

³⁵ *R v Ewanchuk*, [1999] 1 SCR 330 at para 73 [*Ewanchuk*].

³⁶ *Ibid* at para 70.

³⁷ *Ibid* at para 72.

³⁸ *Thematic study on the right of persons with disabilities to education*, Human Rights Council, 2013 Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, Doc A/HRC/25/29 (2013) at page 4 online:

http://www.ohchr.org/Documents/Issues/Disability/StudyEducation/A_HRC_25_29_ENG.doc [*UN Study 2013*]

The United Nations Special Rapporteur on the Right to Education defined 'inclusive education' as follows:

Inclusive education is based on the principle that all children should learn together, wherever possible, regardless of difference. Inclusive education acknowledges that every child has unique characteristics, interests, abilities and learning needs and that those learners with special education needs must have access to and be accommodated in the general education system through a child-centered pedagogy. Inclusive education, by taking into account the diversity among learners, seeks to combat discriminatory attitudes, create welcoming communities, achieve education for all as well as improve the quality and effectiveness of education of mainstream learners. In this way, educational systems should no longer view persons with disabilities as problems to be fixed; instead, they should respond positively to pupil diversity and approach individual differences as opportunities to enrich learning for all.³⁹

Inclusive education is a pedagogical and philosophical approach to high quality learning that benefits and accommodates diverse learning of all students in reaching their fullest potential in regular classrooms.

Inclusive education is promoted by UNESCO as a human rights based approach to education in order to ensure equal educational opportunities for all without discrimination or exclusion.⁴⁰

The right to education is a universal right recognized by international human rights law. The UN Human Rights Council says the *CRPD* recognizes that, “for persons with disabilities to exercise the right to education, inclusive education systems must be in place and, consequently, the right to education is a right to inclusive education.”⁴¹ Inclusive education is acknowledged as “the most appropriate modality for States to guarantee universality and non-discrimination in the right to education.”

³⁹ *The right to education of persons with disabilities: Report of the Special Rapporteur on the right to education*, UN Human Rights Council, Special Rapporteur on the rights to education, Vernore Munoz (2007), UN Doc A/HRC/4/29 at para 9 online: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/108/92/PDF/G0710892.pdf?OpenElement> citing Salamanca Statement on Principles, Policy and Practice in Special Needs Education, para. 3 and UNESCO, *Guidelines for Inclusion: Ensuring access to education for all*, United Nations Educational, Scientific and Cultural Organization, France, 2005, p.9.

⁴⁰ UNESCO, *supra* note 28 at 5-6.

⁴¹ UN Study 2013, *supra* note 38 at 3.

The *Universal Declaration of Human Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *Convention on the Rights of the Child*, affirm the core principles of universality and non-discrimination in the enjoyment of the right to education.⁴²

Key values of inclusive education are equality, participation, non-discrimination, celebrating diversity and sharing good practices. The inclusive approach values students as persons, respects their inherent dignity and acknowledges their needs and their ability to make a contribution to society.⁴³

Inclusion also acknowledges diversity as an opportunity for learning. Not only for all students but for teachers and parents as well, it recognizes the relationship between the school and the wider community as grounds for creating inclusive societies with a sense of belonging.⁴⁴

Inclusive education involves transforming the school system and ensuring interpersonal interactions which allow for the full learning potential of every person to emerge. It enables effective participation, personalized instruction and inclusive pedagogies and classroom instructional strategies.⁴⁵

Inclusive education is a whole system approach to learning that dismantles the traditional 'mainstream' education system and the traditional 'special' education system and transforms them both into a single, holistic, inclusive education system. It recognizes the need to change culture, policy and practice of mainstream schools to accommodate all students, including students with all forms of disabilities, to reach their fullest potential.⁴⁶

The UN Committee on the Rights of the Child has endorsed the concept of inclusive education as "a set of values, principles and practices that seeks meaningful, effective and quality education

⁴² *Ibid.*

⁴³ *Ibid* at 5, para 7.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

for all students, and that does justice to the diversity of learning conditions and requirements not only of children with disabilities, but for all students.”⁴⁷

An inclusive education system is fundamentally grounded on providing necessary education support services structured in the school and district to support the regular classroom teacher in meeting the diverse needs of students in the common learning environment. Ongoing professional support and training must be assured and available to the classroom teacher by providing additional staff, such as co-teaching and educational assistants, additional training and planning time and one on one intervention support to individual students. Additional staff that may be required can be repurposed from the former special education system.

Effective communication between teachers and support services as well as with parents and community agencies is paramount. A collaborative relationship and understanding is necessary to ensure success in the classroom. A mechanism to resolve disagreements through informal means, and as a last resort formal means, that is fair and respectful to all parties is required.

The right to full participation in education requires no ‘special’ schools or ‘special’ classrooms based on disability. The UN Committee of the Rights of the Child says the quality of special schools is often more inferior to the standards necessary for children with disabilities and that residential institutions are also a particular setting “where children with disabilities are more vulnerable to mental, physical, sexual and other forms of abuse as well as neglect and negligent treatment.”⁴⁸ Instead, arrangements for educational support are unique, responsive and focused on the individual student, within his or her personal circumstance.

In an inclusive education system, demonstrated accountability mechanisms ensure that any variation or removal from the common learning environment is not arbitrary, is part of a documented personalized plan and invoked only after all reasonable efforts to remain in the

⁴⁷ *Ibid* at 7, para 17. See also Committee on the Rights of the Child, general comment No. 1 (2001) on the aims of education at para 67.

⁴⁸ UN Committee on the Rights of the Child, General Comment No. 9 (2006) para 47, online: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsqkirKQZLK2M58RF%2f5F0vHrn2YtDgO4ZjHSiu4mMCNKxeV7PxOOmQZL5v2lpgSjyXYy3ETTtUI65KMAgOvcRYyPXQKola4QIaTvSVKFUBCO>

common learning environment have been exhausted. Variation from the common learning environment is for personalized learning or specialized intervention not available in the common learning environment and is usually temporary and duration specific and provided at the neighbourhood school.

Inclusive education involves ensuring a positive school environment and combating school bullying. School bullying is a particular form of violence and according to the UN Committee on the Rights of the Child “more often than not, this form of abuse targets children with disabilities.”⁴⁹ The Committee recommends when schools combat bullying to “pay particular attention to children with disabilities providing them with the necessary protection while maintaining their inclusion into the mainstream education system.”⁵⁰

There has been significant research, professional development for differentiated instruction and Universal Design for Learning and awareness and understanding over the last 30 years around the vast benefits to all students within inclusive educational settings. Every province and territory in Canada has implemented inclusive education to varying degrees by implementing a combination of new legislation, policies, regulations and guidelines.

Dr. Rosemary Tannock, University of Toronto, stated in a review of research of educational best practices that school-based interventions where teachers have modified their classroom instructional practices and used behavioural management techniques, have been found to improve both behavioural and literacy outcomes in students with Attention Deficit Hyperactivity

⁴⁹ *Ibid* at para 42.

⁵⁰ *Ibid* para 43(e).

Disorder (ADHD).⁵¹ She further stated that these same instructional practices could be considered best practices for all students in regular classrooms.⁵²

Professor Catherine Cornford of the University of Ottawa says that multilevel texts allow students at all ability levels to engage in reading together. The use of multilevel texts accompanied by the differentiation of instruction and assessment promotes higher-level thinking through focused, whole-class discussions in which all students can participate.⁵³

The New Brunswick government describes inclusive education in the internationally recognized Policy 322 (2013) as the pairing of philosophy and pedagogical practices that allows each student to feel respected, confident and safe so he or she can participate with peers in the common learning environment and learn and develop to his or her full potential. Public education is universal with the provincial curriculum provided equitably through Universal Design to all students and this is provided in an inclusive, common learning environment shared among age-appropriate, neighbourhood peers. (2013 policy 322, 5.1)⁵⁴

New Brunswick amended the Education Act in 2014 to conform to the *CRPD* by repealing the definition of ‘special education program’ and replaced it with defining the inclusive ‘common

⁵¹ Dr. Rosemary Tannock, OISE/University of Toronto, “What Works? Research into Practice, The Educational Implications of Attention Deficit Hyperactivity Disorder” (April 2007), Research Monograph # 3, The Literacy and Numeracy Secretariat and the Ontario Association of Deans of Education, online: <http://www.edu.gov.on.ca/eng/literacynumeracy/inspire/research/Tannock.pdf> citing DuPaul, G.J., Weyandt, L.L. (2006). School-based intervention for children with attention-deficit/hyperactivity disorder: Effects on academic, social, and behavioral functioning. *Int J Disability, Development and Education*, 53(2), 161–176, Rowe, K., Pollard, J., & Rowe, K. (2005). Literacy, behavior, and auditory processing: Does teacher professional development make a difference? Australian Council for Educational Research, online: <http://www.acer.edu.au/news/latestnews.html>, Miranda, A., Presentation, M.J., & Soriano, M. (2002). Effectiveness of a school-based multicomponent program for the treatment of ADHD. *Journal of Learning Disabilities*, 35, 546–562.

⁵² *Ibid* citing Martinussen R, Tannock R, with McInnes A, Chaban P (2006). Teach ADHD: Teacher’s Resource Manual, online: www.teachADHD.ca. TVOntario, Toronto, Canada, online: www.tvontario.org/sales/teachadhd.

⁵³ Catherine Cornford, University of Ottawa, “What Works? Research into Practice, Using Multilevel Texts Supporting Literacy in the Inclusive Classroom” (June 2012), Research Monograph # 40, The Literacy and Numeracy Secretariat and the Ontario Association of Deans of Education, online: http://www.edu.gov.on.ca/eng/literacynumeracy/inspire/research/WW_Multilevel_Texts.pdf

⁵⁴ New Brunswick Department of Education (2013) Policy 322, Inclusive Education, s. 5.1 online: <http://www2.gnb.ca/content/dam/gnb/Departments/ed/pdf/K12/policies-politiques/e/322A.pdf> [NB Policy 322]

learning environment’, ‘personalized learning plan’, and ‘positive working and learning environment’.

1 In this Act “**common learning environment**” means an inclusive learning environment where instruction is designed to be delivered to students of the same age and of mixed ability in their neighbourhood school and used for the majority of the students’ regular instruction hours and that is responsive to the student’s individual needs as a learner; 2014, c. 37, s.1

12(3) The superintendent concerned shall place a pupil requiring a personalized learning plan such that he or she receives the programs and services within the common learning environment to the fullest extent considered practicable having regard for the rights and needs of that pupil and the needs of other pupils. 2014, c. 37, s.1

In 2012, the Ontario government in legislation expanded the role of school boards to promote student achievement and well-being of students within inclusive schools that are accepting of all students.

169.1 (1) (a.1) promote a positive school climate that is inclusive and accepting of all pupils, including pupils of any race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability; 2012, c. 5, s. 3 (1).

The Ontario government’s 2014 Equity and Inclusive Education Guideline defines inclusive education as:

Education that is based on the principles of acceptance and inclusion of all students. Students see themselves reflected in their curriculum, their physical surroundings, and the broader environment, in which diversity is honoured and all individuals are respected.⁵⁵

The guideline states a “**positive school climate**” exists when all members of the school community feel “safe, included, and accepted.” Principles of “equity and inclusive education are embedded in the learning environment to support a positive school climate and a culture of mutual respect.”⁵⁶

⁵⁵ Ontario Department of Education (2014). Guidelines for inclusive education policy development, page 87 online: <http://www.edu.gov.on.ca/eng/policyfunding/inclusiveguide.pdf>.

⁵⁶ *Ibid* page 89.

The guideline further states that everyone in the publicly funded education system – regardless of background or personal circumstances – must feel engaged and included.⁵⁷ Students, teachers, and staff learn and work in an environment that is caring, safe, inclusive, and accepting of all.⁵⁸ The Ontario Regulations and guidelines allow for Individual Education Plans to be used as an equity tool: it is designed to help ensure that appropriate educational accommodations or modifications are provided to students in order that they may “attend school, achieve their full potential, and have every opportunity to access the curriculum and participate along with all other students in the life of the school.”

The Toronto District School Board recently stated in ***Inclusion: Creating School and Classroom Communities Where Everyone Belongs*** - a resource guide for educators and administrators, that in order to implement inclusive education educators will provide support within the classroom:

*Instead of removing students from the classroom, educators who opt to adapt their classroom structures, routines, instructional styles and teaching praxis to accommodate in-class delivery of support are more likely to create responsive and effective spaces for learning. In addition, all students, not only students identified as having a disability, will benefit from learning within a reflexive and responsive setting where differentiated teaching strategies are employed.*⁵⁹

There are many benefits to inclusive education not only for students with disabilities, but all students, educational staff and the education system itself.

Fiscal - It is less expensive to integrate children with disabilities into the general educational system because a single integrated system lowers administrative and transportation expenses.⁶⁰ Moreover, the resources invested benefit the community in general as inclusive education promotes independent living and a more equal and inclusive society. Children who

⁵⁷ *Ibid* page 6, para 3.

⁵⁸ *Ibid* page 7, para 3.

⁵⁹ Parekh, G., & Underwood, K. (2015) *Inclusion: Creating school and classroom communities where everyone belongs. Research, tips, and tools for educators and administrators.* (Research Report No. 15/16-09). Toronto, Ontario, Canada: Toronto District School Board, page 7 online:

http://www.tdsb.on.ca/Portals/research/docs/reports/Inclusion_Creating%20Classroom%20and%20School%20Communities.pdf

⁶⁰ Toronto District School Board (Feb 2013). *A CASE FOR INCLUSIVE EDUCATION.* Organizational Development/Research & Information Services, Toronto District School Board, page 16 online:

<https://inclusiveeducationcanada.files.wordpress.com/2014/02/a-case-for-inclusive-education.pdf> [TDSB]

grow up in school together are more accepting of diversity and less likely to hold stereotypical views about persons with disabilities.⁶¹

Educational - A review of the research by Dr. Sheila Bennett of Brock University St. Catherine's, Ontario, conducted on behalf of the Ontario Literacy and Numeracy Secretariat and Ontario Association of Deans of Education in 2009, suggests that including students with exceptionalities in the regular classroom does not have a negative impact on the academic achievement of the other students.⁶² Overall, students in inclusive settings are shown to perform better on academic measures as well as on measures of social competence.⁶³ Positive results have been found in terms of an increase in advocacy and more tolerant attitudes on the part of regular students in inclusive settings.⁶⁴

In a 2013 review of research, the Toronto District School Board concluded that adopting an inclusive model of education not only brings education systems in line with international rights conventions, but has also demonstrated to maintain or improve academic outcomes for exceptional students.⁶⁵

The same review included research from the Organisation for Economic Co-operation and Development (OECD) stating that school systems that commit themselves, both in resources and in policies, to ensuring that all students succeed, perform better in academic results than systems that tend to separate out poor performers or students with behavioural problems or

⁶¹ Carole J. Petersen, University of Hawaii, INCLUSIVE EDUCATION AND CONFLICT RESOLUTION: Building A Model to Implement Article 24 of the Convention on the Rights of Persons with Disabilities in the Asia Pacific, (2010) HKLJ 481-512 at 485 online: http://hl-128-171-57-22.library.manoa.hawaii.edu/bitstream/10125/35229/1/Petersen_40HongKongLJ481.pdf

⁶² Dr. Sheila Bennett, Brock University, "WHAT WORKS? Research into Practice: Including Students with Exceptionalities" (January 2009) Research Monograph # 16, The Literacy and Numeracy Secretariat and the Ontario Association of Deans of Education Research, online:

<http://www.edu.gov.on.ca/eng/literacynumeracy/inspire/research/Bennett.pdf> citing Kalamouka, A. Farrell, P. Dyson, A. & Kaplan, I. (2007). The impact of placing students with special education needs in mainstream schools on the achievement of their peers. *Educational Researcher*, 49(4), 365–382. [Bennett]

⁶³ Bennett, *supra* note 62 citing Freeman, S. (2000). Academic and social attainments of children with mental retardation in general and special education. *Remedial and Special Education*, 21(1), 3–26.

⁶⁴ *Ibid* citing Brahm, N., & Kelly, N. (2004). Pupils' views on inclusion: Moderate learning difficulties and bullying in mainstream schools. *British Educational Research Journal*, 30(1), 43–64 and Farrell, P., Dyson, A., Polat, F., Hutchenson, G., & Gallannaugh, F. (2007). The relationship between inclusion and academic achievement in English mainstream schools. *School Effectiveness and School Improvement*, 18(3), 333–352.

⁶⁵ TDSB, *supra* note 60 page 3.

disabilities.⁶⁶ Teachers and school systems in countries successful in PISA academic results “do not allow struggling students to fail; they do not make them repeat a grade, they do not transfer them to other schools, nor do they group students into different classes based on ability.”⁶⁷

Social - Inclusive education is socially important because it provides a sound platform for countering stigmatization and discrimination. A mixed learning environment that includes persons with disabilities allows their contributions to be valued, as well as progressively challenging and dismantling prejudices and misconceptions.

The realization of the right to education is a precondition for social and economic inclusion, and full participation in society. The negative impact of the unemployment of persons with disabilities on gross domestic product could be reduced by guaranteeing access to inclusive education systems.⁶⁸

i. Stakeholder Perspectives

Education International

Education International (EI) represents educators around the world. Concepts which are central to Education International’s philosophy and which represent the core values and demands of the education union movement include: quality education as a human right, education provided by public authorities and available freely to all, inclusive education and equality in education and society and high professional status for teachers.⁶⁹ EI believes quality education promotes peace, democracy, creativity, solidarity, inclusion, a commitment to a sustainable environment, and international and intercultural understanding. They believe education is a human right and public good, as stated in the Universal Declaration of Human Rights and the Convention on the Rights of the Child.

⁶⁶ *Ibid* citing OECD, 2012, p. 4.

⁶⁷ *Ibid*.

⁶⁸ *UN Study 2013, supra* note 38 at page 5.

⁶⁹ Education International, Education for All summary, online: https://www.ei-ie.org/en/websections/content_detail/3273

EI believes that teachers at all levels of education must be appropriately trained and qualified. National policies and action plans to achieve education for all must be developed and implemented in partnership with civil society, including NGOs and education unions.

The post-2015 education goal must include concrete steps to overcome all forms of discrimination, including those based on disability, gender, ethnicity, religion, sexuality and/or socio-economic status. Every student must be taught by a qualified and well-supported teacher, and learn in safe, inclusive educational institutions with adequate resources and infrastructure, and accessible facilities. Governments have the responsibility to provide sufficient funding for free, quality education for all through fair and progressive taxation.⁷⁰

Canadian Teachers Federation

The professional association representing teachers in Canada is firmly committed to social justice and inclusion of all students in a public education system.⁷¹ There are several references in support of equity, human rights and inclusion of students with disabilities, along with proper support, in the Canadian Teachers Federation (CTF) Handbook.⁷²

6.6.4 All children have the rights, privileges and benefits offered and obligations identified by the Canadian Charter of Rights and Freedoms, subject only to such reasonable limits as can be demonstrably justified in a free and democratic society.

Teachers believe “...a strong publicly funded public education system, rooted in the principles of universality, equity, responsiveness and accountability, is essential to sustaining and promoting our democratic society working for the good of all” and that education is “...a right for all citizens and that programs developed should be universal, accessible and adequately funded.”⁷³

Teachers believe in “ensuring equity and inclusiveness for all individuals in the workplace” and placement of children with disabilities in “the most enabling environment possible” with the “provision of the necessary resources.”⁷⁴ Teachers have a policy position against “elitism,

⁷⁰ Education International (2015). An Education Goal Beyond 2015 – Education International’s call for Quality Education, online: https://download.ei-ie.org/Docs/WebDepot/post2015_final_eng_web.pdf

⁷¹ Calvin Fraser, Secretary General of the Canadian Teachers’ Federation (June 2014). Speaking Up for Human Rights in a Democracy, Perspectives Issue # 14, online: <http://perspectives.ctf-fce.ca/en/article/3035/>

⁷² Canadian Teachers Federation Policy Handbook online: http://www.ctf-fce.ca/Documents/Handbook/CTF-Handbook_2015-2016.pdf#page=48 [CTF Handbook].

⁷³ *Ibid* at 1.2.4.1 and 1.2.5.13.

⁷⁴ *Ibid* at 5.2.10.1, 3.20.1.4.10 and 3.20.1.4.11.

segregation, favoritism, and the promotion of unequal opportunities for children to achieve educational success” in reference to privatization.⁷⁵ Teachers endorse anti-racism education that promotes equity through “practising the principles of inclusion, seeking the elimination of racism in all its forms.”⁷⁶ Teachers seek curriculum that “promote, support, enhance and model equity and respect for diversity”, buildings that are accessible and revision of classroom practices and all curriculum materials to eliminate discrimination based on disability and other analogous grounds.⁷⁷ Teachers call for “teaching strategies which promote equity and the dignity and worth of the individual” and have called for “fully inclusive physical and health education programs.”⁷⁸ Teachers endorse the role of “school based teams consisting of administrators and teachers being responsible for facilitating successful and appropriate inclusive education”.⁷⁹

Teachers also state it is the representatives of CTF at local, provincial, national and international meetings that have “the responsibility to put forth the concept of equality in educational systems, and to model the principles of equity in their practices.”⁸⁰ And to take “opposition to any educational program, material or instruction which promotes or condones stereotyping, prejudice, discrimination, intergroup hatred or racism.”⁸¹ A role of school based teams supporting inclusive education that consists of administrators and teachers is a role “which requires advocacy on behalf of students, parents and teachers.”⁸²

While there is a demonstrable willingness on the part of classroom teachers to include students with diverse learning needs in their classrooms, real concerns from teachers remain over lack of training, clear policy directives, classroom management issues, collaboration and support from specialists, as well as a perceived lack of support and resources.⁸³

⁷⁵ *Ibid* at 3.11.5.1.

⁷⁶ *Ibid* at 5.2.1.

⁷⁷ *Ibid* at 3.8.3, 3.11.4.1 and 3.8.17.1.

⁷⁸ *Ibid* at 5.2.3.2 and 3.8.15.4.

⁷⁹ *Ibid* at 3.17.10.

⁸⁰ *Ibid* at 1.3.5.

⁸¹ *Ibid* at 5.2.3.4.

⁸² *Ibid* at 3.17.10.

⁸³ *Bennett, supra* note 62 citing Silverman J.C. (2007). Epistemological beliefs and attitudes toward inclusion in pre-service teachers. *Teacher Education and Special Education*, 30(1), 42–51, Slee, R. (2006) Inclusive education: Is this horse a Trojan? *Exceptionality Education Canada*, 16(3), 223–242, Waldron, N.L., McLeskey, J., & Pacchiano, D. (1999). Giving teachers a voice: Teachers’ perspectives regarding elementary inclusive school programs. *Teacher*

A recent consultation on a 10-year education plan in New Brunswick calls for “the supports, expertise and time needed to properly implement inclusion.”⁸⁴ Educators, school leaders and support staff must be “well supported with the necessary staffing and professional learning.”⁸⁵

Flexibility, collaboration, understanding, training, clarity of roles and access to specialists are all fundamental to a successful inclusive education system.

ii. SCC Seminal Decisions

The Eaton Decision

The SCC ruled in *Eaton v Brant (County) Board of Education*, that the Ontario *Education Act* makes a clear distinction on prohibited grounds between students with disabilities and all others. This distinction met part 1 of a prima facie discrimination determination.⁸⁶

The Court further ruled that the segregated setting, after three years of attempting a regular classroom setting, did not impose a net burden or disadvantage to the student and therefore did not violate part 2 of the s. 15 analysis. The Supreme Court did not consider the need for a reasonable justification defence by the government under section 1.

The Supreme Court ruled the approach the Tribunal took to balance the needs of a student and determine a placement in the “best interest” of the student was authorized by the Education Act and conformed with s. 15(1) of the *Charter*.⁸⁷

Education and Special Education, 22(3), 141–153, Weiner, H.M. (2003). Effective inclusion: Professional development in the context of the classroom. *Teaching Exceptional Children*, 35(6), 12–18, Woloshyn, V., Bennett, S., & Berrill, D. (2003). Working with students who have learning disabilities: Teacher candidates speak out. *Issues and concerns in pre-service education and professional development*. Exceptionality Education Canada, 13 (1), 7–29.

⁸⁴ Karen Power, Co-chair (2016). Expecting the best from everyone Recommendations for a 10-year education plan (Anglophone sector) Final Report, p. 35 online:

<http://www2.gnb.ca/content/dam/gnb/Departments/ed/pdf/Publications/ExpectingTheBest-Anglo.pdf>

⁸⁵ *Ibid* at 30.

⁸⁶ *Eaton*, *supra* note 2 at para 71.

⁸⁷ *Ibid* at paras 15, 73, 76, 80.

While the Court did not declare the regular classroom as an official presumption, the Court did rule favourably that the regular classroom for all children was “preferred” as the “norm of general application because of the benefits it generally provides.”⁸⁸ The SCC acknowledged expert reports advancing the rights of people with disabilities and a change in attitude towards integration and de-institutionalization.⁸⁹

The Court also ruled in favour of the requirement for a school district to first provide reasonable adaptations to the regular classroom setting before considering alternative learning environments.

Justice Lamer stated at paragraph 77:

A decision-making body must determine whether the integrated setting can be adapted to meet the special needs of an exceptional child. Where this is not possible, that is, where aspects of the integrated setting which cannot reasonably be changed interfere with meeting the child’s special needs, the principle of accommodation will require a special education placement outside of this setting.

The Court concluded that where a school board has “already made extensive and significant effort to accommodate” a student by “attempting to meet that child’s needs in a regular class with appropriate modifications and supports and where empirical, objective evidence demonstrates that the child’s needs are not being met in the regular class” that a school board is not in violation of the *Charter* or the Ontario Human Rights Code where a school board recommends placement of a child with disabilities in a special class.⁹⁰

The 1996 SCC ruling in *Eaton* is based on a legislative framework from 36 years ago. There was still much debate around the benefits of inclusive regular classroom instruction and an acknowledgement by the SCC that integration had not yet been proven superior than segregated settings.⁹¹ Benefits of inclusive education were not fully understood and focused largely on the psychological benefits of the disabled student.⁹²

⁸⁸ *Ibid* at paras 68, 69.

⁸⁹ *Ibid* at para 58.

⁹⁰ *Ibid* at para 23.

⁹¹ *Ibid* at para 31.

⁹² *Ibid* at paras 22, 68, 72.

It must be noted, that before the Supreme Court ruling, Emily Eaton's parents transferred her to another school district and successfully continued her education in a fully inclusive regular classroom.⁹³

In the 20 years since the *Eaton* decision, many other options for accommodations in the classroom have been developed and practiced. With what is known today about inclusive education and the fact Emily was fully accommodated in her classroom in her new school, it is arguable that more could have been done to make Emily Eaton's former classroom work for her and the other children. Classroom practices like UDL have evolved, and Professional Development and research on the benefits of inclusion have evolved greatly. While the Supreme Court did not declare an official presumption for the regular classroom, they did endorse the regular classroom as the primary consideration. The Ontario Regulations also state that schools must consider the regular classroom first before placing a student into a special education program.⁹⁴

The Supreme Court ruled that the school system must consider and sincerely provide all reasonable adaptations in the regular classroom as the primary consideration. Many children don't get a chance to even try.

The Moore Decision

In *Moore v. British Columbia (Education)*, 2012 SCC 61, the SCC decided that a student was denied meaningful access to the general education available to all students in British Columbia because of his disability (dyslexia) when the school board cancelled an intensive remediation program for students with severe learning disabilities without reasonable justification or consideration of alternative accommodations within the public school.

The SCC provided in *Moore* the test for discrimination in education cases based on a "human rights" approach, moving away from a "best interest" of the student determination in *Eaton*.

⁹³ Ravi Malhotra (2012). Has the Charter Made a Difference for People with Disabilities? Reflections and Strategies for the 21st Century. SUPREME COURT LAW REVIEW (2012), 58 SCLR (2d) p. 281 citing M. David Lepofsky, "The Charter's Guarantee of Equality to People with Disabilities — How Well is It Working?" (1998) 16 Windsor Y.B. Access Just. 155, at 167-68.

⁹⁴ IPRC O. Reg s. 17

Moore requires that accommodations to education services be available to all students and further obligates school districts to legally demonstrate justification for not doing so.

The Court held that to demonstrate discrimination in an education context, applicants must show they have a disability; that they have experienced an adverse impact with respect to their education; and that the disability was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to demonstrably justify the conduct. If it cannot be justified, discrimination will be found to have occurred.⁹⁵

The test was further articulated by Justice Abella:

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.⁹⁶

In addition to legislation and regulation, the court and tribunals rely on government policy documents and guideline manuals, such as the “Mandate for the School System” document and “Special Programs: A Manual of Policies, Procedures and Guidelines” to inform their decisions.

The SCC declared that while an education system manual allowed for a cascade model of service delivery for students requiring education intervention, the primary policy in the manual, however, is the “integration of special needs students into the general classroom whenever possible.”⁹⁷ This position is consistent in **Eaton** where the SCC stated a decision making body must determine whether the integrated setting in a regular classroom can be adapted and where it is not possible to reasonably adapt the learning environment to meet individual needs then a placement outside of this setting can be considered.⁹⁸

If the government fails to deliver the mandate and objectives of public education such that a given student is denied 'meaningful' access to the service available to all others based on a protected ground, it will justify a finding of *prima facie* discrimination.⁹⁹

⁹⁵ *Moore, supra* note 4 at para 33.

⁹⁶ *Ibid* at para 60.

⁹⁷ *Ibid* at para 38.

⁹⁸ *Eaton, supra* note 2 at para 77.

⁹⁹ *Moore, supra* note 4 at paras 35, 36, 37, 38, 40.

The Supreme Court of Canada also clarified the educational service protected in the Human Rights Code is that of 'general education services' available to all students and not that of special education.¹⁰⁰

Comparing the applicant student to only those other students with disabilities, full consideration cannot be given to whether the student had genuine access to the education that all students in a province are entitled to. Doing so would “risk perpetuating the very disadvantage and exclusion from mainstream society the Human Rights Code is intended to remedy” and risk “descending into the kind of ‘separate but equal’ approach which was majestically discarded in **Brown v. Topeka Board of Education** (1954), 347 U.S. 483 (U.S. Kan. S.C. 1954).”¹⁰¹

Accommodation and Justification for not doing so

The SCC accepted that students with disabilities require accommodation of their differences in order to benefit from educational services available to all other students.¹⁰² The SCC has established that the regular classroom is the primary consideration.¹⁰³ When the school board provides accommodations beyond the point of “undue hardship”, it must then legally demonstrate the justification of choosing an alternative placement by showing that “it could not have done anything else reasonable or practical to avoid the negative impact on the individual.”¹⁰⁴

The decisions of the school board must not be arbitrarily based on personal characteristics. Education decisions must include understanding the consequences of programming and service decisions and that reasonable alternatives, financial or otherwise, were investigated to ensure the discriminatory conduct is "reasonably necessary" in order to accomplish a broader goal.¹⁰⁵

¹⁰⁰ *Ibid* at para 29.

¹⁰¹ *Ibid* at paras 30, 31.

¹⁰² *Ibid* at para 28.

¹⁰³ *Ibid* at para 38 and *Eaton, supra* note 2 at para 77.

¹⁰⁴ *Moore, supra* note 4 at paras 26, 49.

¹⁰⁵ *Ibid* at paras 43, 49, 50, 52.

The court relies on expert opinion and advice on accommodations and interventions required to meet individual needs of a student.¹⁰⁶ Held in *Eaton* and concurred with in *Moore* the SCC stated that individual needs of a student must be based on a subjective (individualized), empirical and evidenced based evaluation.

iii. Summary of key elements arising out of Moore and subsequent Tribunal decisions

Binding international conventions, Supreme Court of Canada rulings, and various human rights tribunal decisions in Ontario, Alberta and British Columbia all point towards a mandated inclusive education system where every student is welcomed in regular classrooms to learn together to the greatest extent possible.

Provinces and Territories are compelled to review their education acts, regulations, policy, guidelines and practices and align them with the Convention for the Rights of Persons with Disabilities, Universal Declaration of Human Rights, Convention against Discrimination in Education, International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Rights of the Child and evolving jurisprudence since *Moore*.

This requires an inclusive system at all levels and access to the general education system that includes regular classrooms and appropriate education support services.

Jurisprudence in education has evolved from a 'best interest' determination in *Eaton* to a 'human rights' based approach since *Moore*. Isolation in the regular classroom was deemed harmful in *Eaton* whereas in cases since *Moore* isolation in the regular classroom without reasonable accommodation is deemed discriminatory.

The legal threshold for providing 'reasonable accommodation' to all students in the regular classroom is high. An equally high threshold is the obligation to legally demonstrate justification for denying or varying equal access to the regular classroom to the point of undue hardship.

¹⁰⁶ *Ibid* at para 47.

Based on current human rights jurisprudence (see Appendix A) and considering the requirements set out in the UN Convention on the Rights of Persons with Disabilities, the following requirements of public education systems can arguably be established:

1. The regular common learning environment must be given primary consideration for all students in schools that respect human rights; no arbitrary 'placements' in segregated settings can occur.
2. Appropriate accommodation in the regular classroom (the "service" available to all other students) is a guaranteed right and necessary to the point of 'undue hardship'. There are a variety of accommodation strategies that must be given 'conscientious and reasonable' consideration and attempt to the point of imposing an undue hardship.
3. Access to the regular classroom can be varied, but it must be demonstrably justified. It must be shown that the classroom teacher and school district could not have done anything else reasonable or practical. Financial resources, lack of staff and turnover is not enough. Justification requires solid factual foundation and cannot rely on stereotypical assumptions.
4. Variation from the regular classroom must be as inclusive as possible (least drastic), based on an individual assessment and consideration of alternatives. For instance, children should not be sent home from school due to behavior outbursts until a safe place in the regular school, supervised with support staff and assessments and behaviour intervention plans are developed with a plan and support to return to the regular classroom.
5. Accommodations (services and support) and assessments (psycho-educational assessments, behavior management and transition plans) must be timely. Denying or substantially delaying access to these services is a breach of human rights legislation.
6. Department guidelines, standards manuals, description of available services are given weight and expected to be followed by schools.
7. Documentation such as report cards and email correspondence along with expert assessments and recommendations for support are given important weight.

8. Communication with parents is essential; difficult relationships do not in itself justify exclusion.
9. Previous school success of the individual student or success of practice in another school is given weight on the possibility of reasonable alternatives to accommodate.

VI. An Evolving Human Rights Based Legislative Framework for Inclusive Education

Education policy is evolving at the provincial, territorial and district levels. To varying degrees, every province is recognizing the need and opportunity to transform educational practice and pedagogy based on human rights and high quality outcomes.

Many provinces and territories have identified the need to address positive school climate (including measures to address bullying) and have adopted positive language in legislation on inclusion.

At the same time, most provinces can reform their education laws and policies to better align with a human rights framework and legal requirements for adopting a truly inclusive, high quality model of education. Some provinces have outdated legislation and policies by 20-30 years.

Increase diversity of student needs and advocacy from parents, along with the number of children segregated from their peers in special schools and segregated classes, the inadequate support for classroom teachers and required flexibility in regular schools to accommodate students requires immediate action.

A new legislative framework and collaborative implementation process for the transformation in thought, culture and educational practice to meet these obligations are necessary to ensure a high quality 21st century education system that benefits all students and at the same time respects every student's fundamental and guaranteed human right to inclusive education.

Innovative Policies for persons with all types of disabilities

The UN CRPD defines access to inclusive and qualitative education for all, no matter what type of disability. The Inclusive Education Policy of New Brunswick, Canada, is outstanding in that regard.¹⁰⁷

New Brunswick Policy 322 has been recognized internationally by the Zero Project 2016 as one of the top 5 innovative inclusive education policies in the World.¹⁰⁸ Policy 322 supports New Brunswick's inclusive education obligations under the *CRPD* and came into force after an extensive collaborative review.¹⁰⁹ The Zero Project 2016 focused on the implementation of the *UN Convention on the Rights of Persons with Disabilities: Innovative Practices, Innovative Policies, and Social Indicators* from more than 150 countries.

The shortlisted policies were researched by the World Future Council. The WFC research team conducted written interviews with representatives from governments, academia, and/or organizations of persons with disabilities. In total, 49 experts with and without disabilities were involved in this process.

The research method is based on a unique, constantly growing network of more than 3,000 experts with and without disabilities from all sectors of society and more than 180 countries that contribute with their expertise. As a result of this process, 337 nominations from 98 countries were received. After a multistep selection process, engaging hundreds of experts of the Zero Project in commenting, evaluating, and voting, a final 12 Policies/Laws/Guidelines were selected as this years Award winners.¹¹⁰

The overall goal should be to avoid spelling out an unavoidably restrictive definition of disability and to implement steps relevant for “all, regardless of disability,” as stated, for example, by New Brunswick's Inclusive Education Policy.¹¹¹

¹⁰⁷ Zero Project Report 2016. International study on the implementation of the UN Convention on the Rights of Persons with Disabilities: Innovative Practices, Innovative Policies, and Social Indicators from more than 150 countries, page 13 online: http://zeroproject.org/wp-content/uploads/2016/02/ZeroProjectReport_2016_barrierfree.pdf [Zero Project]

¹⁰⁸ *Ibid* at 137.

¹⁰⁹ Dr. Gordon L. Porter and Dr. Angela Aucoin (2012) Strengthening Schools, Strengthening Inclusion. Online: <http://www2.gnb.ca/content/dam/gnb/Departments/ed/pdf/K12/Inclusion/Inclusion.pdf>

¹¹⁰ *Zero Project*, *supra* note 186 at 10.

¹¹¹ *Ibid* at 137.

In 2014, New Brunswick legislated a presumption for the common learning environment for all students, reasonable accommodations and designated responsibility to the Superintendent of the School District to ensure quality, inclusive education for all students in all schools respecting the guaranteed rights of students.

12(3) The superintendent concerned shall place a pupil requiring a personalized learning plan such that he or she receives the programs and services within the common learning environment to the fullest extent considered practicable having regard for the rights and needs of that pupil and the needs of other pupils.

Nearly all references in the Education Act to dual systems of special education and mainstream education were eliminated into one holistic, inclusive system, structure and terminology aligned with *CRPD*. The definition of 'special education program' was repealed and replaced with the inclusive 'common learning environment', 'personalized learning plan', and 'positive working and learning environment'.

Policy 322 clearly states that inclusive education practices are not only necessary for all students to develop and prosper, but also critical to building a society that is inclusive of all people and their basic legal, civil and human rights.¹¹²

Professional learning and support to educational staff is guaranteed:

5. 2 A key element of sustaining an inclusive education system consists of the removal of barriers to learning as well as ensuring access to learning opportunities for relevant school personnel. The Department of Education and Early Childhood Development (EECD) and districts must establish and maintain a professional learning program to ensure that educational staff have the knowledge and skills needed to provide effective instruction to a diverse student population.

The process for varying the common learning environment is defined. It must be clearly demonstrated that the school's capacity to meet the needs of the student, even when supported by the school district and Ministry, is not sufficient to achieve the learning outcomes of the student in a more inclusive environment despite all reasonable efforts to provide support and accommodation. The time away from the classroom is duration specific and must include a plan

¹¹² *NB Policy 322, supra* note 54 at 5.3.

on how the student will be included in the social life of the school and a plan to return to the common learning environment.

Foundational Principles For Reform

Law reform must include a new comprehensive framework and collaborative implementation that addresses both human rights and provides high quality pedagogical practices.

A set of key principles for reform that are aimed at aligning education legislation, regulation, policy and practice with an inclusive, quality human rights education framework is needed.

- **Laws and policies that govern public education are aligned with human rights obligations.** There is a need for all governments, education professional associations, and many school community partners to acknowledge that education policy and practice in some jurisdictions is not aligned with an obligated human rights, quality education framework for inclusive education. Provincial education systems, schools and partners need to recognize the value to society in including all students. There is still far too much segregation and congregation based on disability that is harmful to individuals and society as a whole.
- **Openness and collaboration is paramount to pursuing education reform.** All partners must be open to listen, learn and understand from each other in developing and implementing an inclusive education plan. It is imperative that teachers and others are involved in developing a new legislative framework and a collaborative implementation process actively involving teachers, parents, academics in both education and legal faculties and civil non-profit organizations. All partners must have a common understanding of the challenge and opportunity and work to face these together.
- **View inclusive education as a way to change the entire education system so that each learner is included in better quality education.** There is one, integrated, single public education system for all students that has built in, clear terminology and the legislative structure of support is merged into educational support services for all students and classroom teachers. Inclusion is inclusive of all students and diversity. The elements of an inclusive system require clarity in definition, guidelines and support. All school and education leaders at all levels have a responsibility to ensure that education services are inclusive and of high quality for all students.
- **Supports and accommodations are broadly available.** All partners must be assured that well developed structures and systems for providing support and accommodations are available as required. Adequate availability of specialists, educators and other educational support staff along with training is essential. Sufficient and accountable funding will be needed.

VII. Essential Elements of an Inclusive Education Legislative and Policy Framework

Based on case law, the *CRPD*, research and practice, the following essential elements are required to ensure an inclusive legislative framework. Examples of best practices in legislation and policy have been provided where available.

1. General statement
2. One system of education with definitions of common terminology that are inclusive
3. Responsibility for inclusive, quality education begins at the highest levels (superintendents, principals),
4. All students are presumptively placed in the common learning environment with reasonable accommodation
5. Personalized learning plans
6. Variation of the learning environment is justified and documented
7. No special schools or segregation based on (dis)ability
8. School based and district education support teams.
9. Assurance for training and support to educators
10. Communication with parents, Dispute Resolution and Appeal Process
11. Monitoring, oversight, accountability
12. Involvement by partners

1. **General statement** – This will clearly articulate support for rights based inclusive and quality education. Establishing quality education is at the core of an inclusive education system. Education legislation that acknowledges that all students regardless of characteristics have a right to a public education in a system that is inclusive and equitable.

Alberta WHEREAS the Government of Alberta recognizes the importance of an inclusive education system that provides each student with the relevant learning opportunities and supports necessary to achieve success;

Board responsibilities

33(1) (e) provide a continuum of specialized supports and services to students that is consistent with the principles of inclusive education,¹¹³

New Brunswick **5.3** Inclusive education practices are not only necessary for all students to develop and prosper, but also critical to building a society that is inclusive of all people and their basic legal, civil and human rights.¹¹⁴

¹¹³ *Education Act*, SA 2012, c E-0.3, Preamble, s. 33(1)(e).

¹¹⁴ *Policy 322*, *supra* note 54, s. 5.3.

2. One system of public education with definitions of common terminology that are inclusive.

The “special” education and “mainstream” structures, terminology and education support services are merged together into one, integrated, single education system. “Special needs” student, “special” class and “special education” terminology is replaced with “inclusive education”, “student”, “common learning environment” and “education support teacher and services”

New Brunswick 1 In this Act “**common learning environment**” means an inclusive learning environment where instruction is designed to be delivered to students of the same age and of mixed ability in their neighbourhood school and used for the majority of the students’ regular instruction hours and that is responsive to the student’s individual needs as a learner; 2014, c. 37, s.1

“**personalized learning plan**” means a personalized plan for a pupil that specifically and individually identifies practical strategies, goals, outcomes, targets and educational supports and designed to ensure the pupil experiences success in learning that is meaningful and appropriate, considering the pupil’s individual needs; 2014, c. 37, s.1

“**positive learning and working environment**” means a safe, productive, orderly and respectable learning and working environment free from bullying, cyberbullying, harassment and other forms of disruptive or non-tolerated behaviour or misconduct, including behaviour or misconduct that occurs outside school hours and off the school grounds to the extent the behaviour or misconduct affects the school environment; 2014, c. 37, s.1¹¹⁵

3. Responsibility for inclusive, quality education begins at the highest levels. (superintendents and principals)

Inclusive education requires a whole system approach to supporting the diverse needs of all children in common learning environments. It is the collective responsibility of all school, district and Ministry personnel to serve, accommodate and evaluate all students. It is therefore imperative that leadership be provided at all levels, such as giving a clear mandate to the Superintendent for quality and inclusive education.

Ontario **169.1 (1)** Every board shall,
(a) promote student achievement and well-being;
(a.1) promote a positive school climate that is inclusive and accepting of all pupils, including pupils of any race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability; 2012, c. 5, s. 3 (1).¹¹⁶

¹¹⁵ *Education Act*, SNB 1997, c E-1.12, s. 1.

¹¹⁶ *Education Act*, RSO 1990, c E.2, s. 169.1.

New Brunswick 48(2) The duties of a superintendent, with respect to the school district for which the superintendent is appointed or reappointed, include
(a) providing leadership in the school district in promoting quality education, inclusive education, enhanced community involvement and the efficient delivery of services, 2014, c. 37, s.4¹¹⁷

- 4. All students are presumptively placed in the common learning environment with reasonable accommodation.** Inclusive education laws must be clear that every student has access to the common learning environment with reasonable accommodation. Reasonable Accommodation is guaranteed in the *CRPD* and human rights legislation. It includes not only access to curriculum but also ensuring universal access to buildings and extra-curricular activities as well.

Saskatchewan 178 (9) A board of education or the conseil scolaire, as the case may be, shall take steps to reasonably accommodate a pupil with intensive needs in the regular program of instruction.¹¹⁸

Nova Scotia 26 (1) It is the duty of a teacher in a public school to
(f) acknowledge and, to the extent reasonable, accommodate differences in learning styles¹¹⁹

New Brunswick 12(3) The superintendent concerned shall place a pupil requiring a personalized learning plan such that he or she receives the programs and services within the common learning environment to the fullest extent considered practicable having regard for the rights and needs of that pupil and the needs of other pupils.¹²⁰

6.1 Common Learning Environment

It is the responsibility of all school personnel to ensure that the common learning environment:

6.1.1 Is enabling each student to participate fully in a common environment that is designed for all students. It is appropriate for the student's age and grade, is shared with peers in their neighbourhood school, and respects learning styles, needs and strengths.

6.1.2 Is a common environment where student-centered learning principles are applied (e.g., Universal Design for Learning, learning outcomes, instruction, assessment, interventions, supports, accommodations, adaptations and resources).

6.1.3 Is giving consideration to accommodations and implements them in a timely manner.¹²¹

¹¹⁷ *Supra* note 115 at s. 48(2).

¹¹⁸ *The Education Act*, 1995, SS 1995, c E-0.2, s. 178(9).

¹¹⁹ *Education Act*, SNS 1995-96, c1, s. 26(1).

¹²⁰ *Supra* note 115, s. 12(3).

¹²¹ *Policy 322*, *supra* note 54, s. 6.1.

5. **Personalized learning plans.** An inclusive education system focuses less on ‘placement’ and more on educational support. The shift to “personalized” education plans supports the ‘one system for all students approach’ (instead of having parallel “regular” and “special education” systems). The concept of personalized learning can also be extended to students who do not have a diagnosed disability but who may benefit from a greater degree of personalization of learning (for example, students who are gifted or who struggle but who do not have an identified disability).

New Brunswick 12(1) A personalized learning plan shall be developed for a pupil if the superintendent concerned, after consulting with qualified persons, determines that the physical, sensorial, cognitive, social-emotional or other needs of the pupil requires that a personalized learning plan be developed.¹²²

6. **Variation of learning environment is justified and documented.** Inclusive education does not mean 100% of students are in the regular classroom 100% of the time. No human right is absolute. Students leave the classroom on a regular basis for a variety of interventions, support services or to pursue project based or independent learning. When contemplating the removal of a student from the common learning environment for reasons linked with disability the school system must demonstrate that it has tried and have exhausted all other means available. The process must be justified, documented, duration specific and include a plan for return to the common learning environment.

***see New Brunswick Policy 322 and Saskatchewan Legislation**

7. **No special schools or segregation based on disability.** It is advised that education laws explicitly forbid the denial of admission into mainstream schools and classrooms based on disability. Impairment based assessment to assign schools and classrooms should be discontinued.

New Brunswick 6.2.2 The following practices must not occur:

- 1) Segregated, self-contained programs or classes for students with learning or behavioural challenges, either in school or in community-based learning opportunities.
- 2) Alternative education programs for students enrolled in kindergarten to grade eight.¹²³

8. **School based and district education support teams.** This practice has emerged as a recognized best practice and should be a required element of a new legal framework on inclusive education.

¹²² *Supra* note 115, s. 12(1).

¹²³ *Policy 322, supra* note 54, 6.2.2.

New Brunswick Education support teacher: a certified teacher working in the public education system to support classroom teachers in developing, implementing and evaluating instructional strategies to ensure student success in learning, as well as providing direct instruction to individuals or small groups of students where appropriate.

School-based Education Support Services Team: a team led by the school principal that assists classroom teachers to develop and implement instructional and/or management strategies and to coordinate support resources for students with diverse needs. In addition to school administrators, the team is made up of Education Support teachers and other staff members whose primary role is to strengthen the school's capacity to ensure student learning.

District Education Support Services Team: the district level professionals, under the supervision of the Director of Education Support Services, who provide support to schools, teachers and school-based education support services (school-based ESS) teams in meeting the needs of students.¹²⁴

9. **Assurance for training and support to educators.** It is imperative that training and proper support be provided to educators and administrators when implementing and sustaining inclusive education. Providing this in Legislation or policy reassures educators and parents in the education system that support is mandated.

New Brunswick 6.2 Supports for Inclusion. EECD, as well as school districts, must establish and maintain systemic supports for public education that make inclusion of all students a practical reality. These supports include personnel, as well as policy, funding and capacity-building strategies. They need to be systemic and ongoing.

6.13.2 On-going professional development for administrators, teachers, educational assistants, and other professionals is essential to the implementation of inclusive education and is reflected in the school improvement plan and the district education plan.¹²⁵

10. **Communication with parents, Dispute Resolution and Appeal Process.** Assurance of communication with parents, adequate dispute resolution and formal appeal processes that are fair to all involved and easily navigable is essential.

Role of Parents

Alberta

11 (5) Before providing specialized supports and services to a student, a board shall

- (a)** consult with the parent of the student, and
- (b)** where appropriate, consult with the student.

¹²⁴ *Ibid*, s. 3.0.

¹²⁵ *Ibid*, s. 6.13.2 & 6.2.

Parent responsibilities

32 (d) ensure that the parent's conduct contributes to a welcoming, caring, respectful and safe learning environment,
 (e) co operate and collaborate with school staff to support the delivery of specialized supports and services to the child,
 (f) encourage, foster and advance collaborative, positive and respectful relationships with teachers, principals, other school staff and professionals providing supports and services in the school¹²⁶

New Brunswick 13(2) The parent of a pupil has a right to reasonable consultation with the pupil's teacher or the principal of the school the pupil attends with respect to the education of the pupil.

13(3) It is the responsibility of the parent of a pupil and of school personnel to conduct themselves in a respectful manner and to follow established procedures when involved in communications concerning the pupil. 2012, c.21, s.2¹²⁷

Saskatchewan 178 (7) If a pupil has been assessed in accordance with this section as being a pupil with intensive needs, the teacher or principal of the pupil shall confer with the parent or guardian of the pupil with respect to:
 (a) the assessment of the pupil; and
 (b) the educational services that may be required to meet the learning needs of the pupil.¹²⁸

Appeal Process

Virtually all provinces have legislated formal appeal mechanisms. It is recommended that educators and administrators have strong communication skills, including dispute resolution training. When utilized, these skills will resolve many disagreements and misunderstandings. Formal appeal mechanisms should be used as a last resort, but if utilized must be fair and objective to all parties involved and respect principles of procedural fairness, including timeliness and be easily navigable for parents and guardians with limited access to professional legal counsel.

Alberta School dispute resolution

41 A board shall establish a policy respecting the resolution of disputes or concerns at the school level between parents and school staff that supports a co-operative and collaborative learning environment for students.¹²⁹

¹²⁶ *Supra* note 113, ss. 11, 32.

¹²⁷ *Supra* note 115, s. 13.

¹²⁸ *Supra* note 118, s. 178(7).

¹²⁹ *Supra* note 113, s. 41.

Onerous processes for identification, placement and appeals have been recipients of growing criticism with the need to streamline or eliminate them. Not only are identification processes that are used to categorize students with disabilities not in-line with an inclusive education system, it can take much needed resources away from providing essential support to classroom educators. A 2005 analysis by the Ontario Auditor General of the Identification, Placement and Review Process stated that the Ministry should consider the greatest benefit to students when deciding the most effective use of resources, citing that the IPRC process is 'resource intensive'. (District identification committee, district special education appeal committee, provincial special education appeal tribunal.)¹³⁰

11. Monitoring, oversight, accountability. Inclusive Education depends upon effective monitoring by national and provincial authorities, in order to undertake sustainable, continuous improvement that otherwise prevents student success. Endorsing Human Rights Tribunal Guidelines on inclusive education in Ontario and New Brunswick for example can provide guidance. Also, school review processes that have clearly designed indicators on inclusive practice can be developed to support on-going review and positive support to school leaders and educators.

New Brunswick 6.13.1 The superintendent must monitor and evaluate the performance of each school based on appropriate performance indicators for inclusive education.¹³¹

12. Involvement by partners. Many provinces and territories have legislative provision to establish permanent provincial and/or district advisory/implementation committees made up of educational leaders, ministry officials, and community partners such as parent organizations, people with disabilities and other underrepresented individuals along with academia. Other partners to be engaged are Human Rights Tribunals, Child Ombudsman's offices and other government departments and agencies. A role of this mechanism is to assist in promoting awareness, support and sharing best practices for accommodating diversity in inclusive education settings.

APPENDIX A - Jurisprudence since Moore

RB v Keewatin-Patricia District School Board

The first decision of the Ontario Human Rights Tribunal (HRTO) within an education context since the legal framework regarding disability accommodation in public school was affirmed in Moore is *RB v Keewatin-Patricia District School Board*.¹³² The Tribunal found a student was discriminated against at school in grades 2 and 3 when his regular classroom EA support was cut in half, when he did not have an appropriate and timely behaviour management plan from Grade 2 onwards, when he was excluded from public school in October 2012 without appropriate educational

¹³⁰ *TDSB supra* note 60 at 9, 10.

¹³¹ *Policy 322, supra* note 54, s. 6.13.1.

¹³² *R.B. v Keewatin-Patricia District School Board*, 2013 HRTO 1436 [R.B.]

instruction, and when a communication ban denied his parent the opportunity to meet with teachers and EAs in order to ensure that his needs were met.

The HRTO found that the student was denied 'meaningful access to education' in the regular classroom, there was a prima facie case of discrimination and that the school board could not justify excluding the student as an undue hardship defence whose needs were unable to be met in the regular classroom.

The HRTO found that notwithstanding a difficult relationship between the school and the student's mother, it was insufficient to justify the discrimination experienced by the student.¹³³ The HRTO went further and held that the school board punished the student because of his mother's advocacy.¹³⁴

R.B was diagnosed with an Intellectual Disability (Mild), Attention Deficit Hyperactivity Disorder ("ADHD" and Pervasive Development Delay. He has challenges with fine motor skills, expressive language, gross motor, auditory and visual attention and memory skills.¹³⁵

Behaviour, Exclusion and Segregation

The student was excluded from school for a duration of four months by the Principal for inappropriate behaviour including swearing, using profanity, spitting, yelling, cutting a child's sweater, stomping on a child's leg, throwing material and being non-compliant with his teacher, educational assistant, Vice-Principal and Principal. The Notice of Exclusion stated the student's return to school was conditional upon the completion of a psychological assessment by the school psychologist and the school being confident the student's return would not compromise the physical and mental well-being of the student and his classmates.¹³⁶

The HRTO confirmed that when a student is excluded from school, he is denied an education. The HRTO further stated that providing a student three hours of instruction per week in a public library, regardless of the effectiveness of that instruction, is not an appropriate education.¹³⁷ The Tribunal also said there were "less drastic options" available to the school. It could have temporarily placed R.B. in a segregated setting at school pending an assessment as to why his behaviour was escalating so significantly. It could have set up a meeting with his parents, Dr. Sullivan and the educators to determine how to deal with R.B.'s behaviour pending the assessment. When the assessment was prepared by Dr. Stambrook after the exclusion, R.B. should have been transitioned back to the regular classroom on a gradual basis with a behaviour plan in place. Dr. Stambrook did not identify any risk in returning R.B. to school provided the appropriate supports were in place.¹³⁸

¹³³ *Ibid* at para 138.

¹³⁴ *Ibid* at para 261.

¹³⁵ *Ibid* at paras 11, 25.

¹³⁶ *Ibid* at para 98.

¹³⁷ *Ibid* at paras 99, 256.

¹³⁸ *Ibid* at para 260.

In its ruling, the Tribunal ordered that in the future event the student is required to be removed from the classroom because of his behaviour, he will be placed in a supervised location within the school and provided with the support of an Educational Assistant, a Resource Teacher or other qualified personnel. R.B. will only be removed from the classroom where it is not possible to accommodate him in the classroom and for no longer than is necessary.¹³⁹

Parental involvement

The Tribunal stated that communication is an integral part of education and that a school board has a high burden to prove it cannot educate or accommodate a student because of the conduct of a parent.¹⁴⁰ When making support service decisions the parents and experts should be involved and notified.¹⁴¹ The school boards negative and difficult relationship with the student's mother is not an appropriate basis to justify exclusion.¹⁴²

Documentation and expert opinion

Not only has this case shown that it is important for parents to document all interactions with the school while advocating for their children, the school system and Tribunals rely heavily on outside agencies and experts in diagnosis, classroom accommodation, intensive therapy and rehabilitation services and behavior management.¹⁴³

Accommodations and Support

Inclusion in the classroom is possible when support is provided adequately to the classroom teacher, with objective evidence based decision making and working collaboratively between the school, home and community agencies. Accommodations implemented or recommended for this student included indirect support, environmental accommodations such as strategic seating, structured and predictable classroom environments, assistance from Resource Teachers, shared and one on one Educational Assistant support, a customized, visual schedule, speech language service, temporary breaks to the library when needed.¹⁴⁴

The Tribunal determined that it was a significant decision to reduce classroom EA support by 50%. It was a decision regarding support services that lacked an evidenced based, objective assessment, lacked parental involvement and discussion, was contrary to professional recommendations for support and was without consideration of alternatives to replace the Education Assistant services in the classroom with a resource teacher, for example.

¹³⁹ *Ibid* at para 277.

¹⁴⁰ *Ibid* at paras 257, 259.

¹⁴¹ *Ibid* at para 231.

¹⁴² *Ibid* at para 266.

¹⁴³ *Ibid* at paras 228, 247, 256, 260, 278.

¹⁴⁴ *Ibid* at paras 19, 22, 27.

Justification Defense

The Tribunal stated that financial consideration does not justify a reduction in services to accommodate students in the classroom.¹⁴⁵

L.B v TDSB¹⁴⁶

Using the discrimination test in **Moore** the Ontario Human Rights Tribunal (HRTO) found that the Toronto District School Board discriminated against L.B. for not providing the appropriate accommodations in the regular classroom to meet his identified education needs.¹⁴⁷ L.B. was pulled from public school by his mother after seven months into his grade 9 year.¹⁴⁸ L.B. did not receive access to mandated educational accommodations and services offered by the School Board and one or more of his disabilities were a factor in this.

Where **Moore** and **RB/Keewatin** cases were deemed discrimination as a result of direct action of the school board, **L.B v TDSB** stated that the Code also protects from indirect adverse discrimination by omission.¹⁴⁹

L.B. was a 14-year-old boy with multiple disabilities which includes learning disabilities, attention deficit hyperactivity disorder (ADHD) and mental health disabilities which primarily manifest themselves as anxiety and depression.¹⁵⁰

The Tribunal, in defining the services that school boards are obligated to provide to their resident pupils, found that the school board did not accommodate L.B. to the point of undue hardship in accordance with the Human Rights Code and its obligations under the Education Act. The school board failed to provide services and supports to L.B. “that were or should have been reasonably available to accommodate his disabilities in the regular classroom.”¹⁵¹

The HRTO confirmed that the Human Rights Code has primacy over all other legislation in the Province meaning that it is expected and must be assumed that school boards implement the Education Act in accordance with their Code obligations.

The HRTO highlighted that section 169.1 of the Education Act sets out the criteria for creating an inclusive and accepting school environment in accordance with the Code for the purposes of assuring appropriate and meaningful access to education for all pupils.¹⁵²

¹⁴⁵ *Ibid* at paras 226, 227, 228, 231.

¹⁴⁶ *L.B v TDSB*, 2015 HRTO 1622 [*L.B.*]

¹⁴⁷ *Ibid* at para 154.

¹⁴⁸ *Ibid* at para 118.

¹⁴⁹ *Ibid* at para 120.

¹⁵⁰ *Ibid* at para 3.

¹⁵¹ *Ibid* at para 17.

¹⁵² *Ibid* at para 17.

SERVICE - Residential Schooling

The HRTO ruled that the school board was not responsible for paying for private schooling for L.B. after his mother pulled him out of the public school for not being adequately accommodated. Private schooling outside of the legislative mandate of the Education Act is not a service the school board is obligated to provide.¹⁵³ When L.B. was pulled from public school TDSB's obligations to accommodate him were truncated. That is why the period during which the TDSB discriminated against L.B. is only the first seven months of L.B.'s Grade 9 year.¹⁵⁴ The Tribunal ruled the situation was different from the situation in *Moore* because the school professionals in that school board initiated and recommended private schooling for Jeffrey.¹⁵⁵

The HRTO ruled that the service provided by school boards is a “regular daily school educational program” authorized by Regulation 298, Operation of Schools, that sets out the instructional day as five hours between the hours of 8am and 5pm, and does not include the purchase of services from private schools.¹⁵⁶

Service obligated under the Code

School boards are expected to modify their programs and services to meet the needs of their exceptional students and to accommodate the students' needs to the point of undue hardship.¹⁵⁷ This includes but is not limited to the provision of transportation, home instruction, social work, attendance counselling, psychology, peer tutoring, peer mentoring or referral to alternative educational settings.¹⁵⁸

During the disputed 7-month period, L.B. was not accommodated in the regular classroom to the point of undue hardship. He was not seen by any professional staff, he did not have access to all the supports included in his IEP and his mother was not informed of any alternatives to removing him from the school to meet his needs.¹⁵⁹

Delay in Assessments and Accommodations

The HRTO ruled that where services, supports and accommodations or discussion of alternative placements are delayed significantly or do not take place at all, the accommodations are clearly inadequate. These are services that are within the mandate of all school boards. Thus, denying or substantially delaying access to these services can amount to a substantive breach of the Code.¹⁶⁰

¹⁵³ *Ibid* at paras 110, 111, 113.

¹⁵⁴ *Ibid* at para 149.

¹⁵⁵ *Ibid* at para 145.

¹⁵⁶ *Ibid* at paras 100, 111.

¹⁵⁷ *Ibid* at para 111.

¹⁵⁸ *Ibid* at paras 113, 123.

¹⁵⁹ *Ibid* at para 152.

¹⁶⁰ *Ibid* at para 129.

Transition Planning, Lack of Staffing, staff turnover, service descriptions on website

The HRTO ruled it is discriminatory to delay accommodations in a new school and instead take a 'wait and see' approach to transitioning from one school to another.¹⁶¹ Identified exceptional students are entitled to a planned transition process between schools.¹⁶² Lack of staff and high turnover along with which lack of services are contradicted by the description of services available on the school board's website do not justify lack of accommodation.¹⁶³ Not reading assessments or previous accommodations provided in previous school years do not satisfy the school boards procedural and substantive accommodation obligations.¹⁶⁴

Previous school success

The HRTO ruled that the school board was not able to argue it was impossible to accommodate L.B. due to the fact he was clearly able to be accommodated in regular classrooms in his previous eight years of schooling at other schools.¹⁶⁵

Parental involvement

Similar to other rulings, the Tribunal stated that parental conduct or 'fierce advocacy' for their child or lack of parental authority "cannot and must not" be used as a justification for not meeting an exceptional student's needs to the point of undue hardship.¹⁶⁶ Even when a school's staff finds a parent 'difficult' and 'a demanding parent to work with', this does not justify the lack of proactive steps required by the school board to ensure students are accommodated to the point of undue hardship.¹⁶⁷ At the same time, the Tribunal ruled that parents have an obligation to cooperate and provide consent to the school board before certain services and accommodations are provided.¹⁶⁸

University of British Columbia v. Kelly¹⁶⁹

In 2015, the British Columbia Superior Court (BCSC) citing the decision of the SCC in Moore, found that Dr. Kelly was discriminated against by the University of British Columbia for denying him the opportunity to continue the Family Medicine Residency Program and failing to adequately accommodate his disabilities contrary to the BC Human Rights Code.¹⁷⁰

¹⁶¹ *Ibid* at para 132.

¹⁶² *Ibid* at para 133.

¹⁶³ *Ibid* at paras 135, 140, 142.

¹⁶⁴ *Ibid* at paras 136, 137.

¹⁶⁵ *Ibid* at para 138.

¹⁶⁶ *Ibid* at para 77.

¹⁶⁷ *Ibid* at paras 139, 152.

¹⁶⁸ *Ibid* at para 78.

¹⁶⁹ *University of British Columbia v. Kelly*, 2015 BCSC 1731 [*Kelly*].

¹⁷⁰ *Ibid* at paras 11, 12.

The onus of proving prima facie discrimination was on Dr. Kelly. Once established, the onus shifted to UBC to establish a bona fide and reasonable justification ("BFRJ") or bona fide occupational requirement ("BFOR") for the conduct.¹⁷¹

Dr. Kelly was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), and Non-verbal Learning Disorder (NVLD). Dr. Kelly had been seeing a psychologist and psychiatrist, at the request of UBC to assist with resolving his difficulties.¹⁷² Dr. Kelly had disabilities which were directly connected to his assessment and evaluation, denial of access to remedial and probation options, and ultimate dismissal from his residency and his employment. He had proven a prima facie case of discrimination.¹⁷³

The court ruled, citing *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Bombardier Inc.*, 2015 SCC 39 (S.C.C.), that the third step of the prima facie test is whether the protected group or characteristic was a factor or connection in the adverse treatment. There must be a "link or nexus between the protected ground or characteristic and the adverse treatment" and that the goal of protecting people from arbitrary or stereotypical treatment is incorporated in this element.¹⁷⁴

The BCSC ruled that despite UBC's argument that Dr. Kelly was not adversely treated because it provided individual accommodations based on his needs, UBC's positive accommodations and the process UBC used to assess Dr. Kelly's performance and abilities are properly considered not under the second or third stage of prima facie discrimination analysis but instead under the justification defence once a prima facie case of discrimination has been demonstrated.¹⁷⁵

The BCSC ruled the duty to accommodate analysis should include both the procedure of the inquiry and the substantive results of those inquiries.¹⁷⁶

Duty to Accommodate and Justification for not doing so

The BCSC ruled that UBC failed to meet their burden of proof to demonstrate their actions to exclude Dr. Kelly were reasonable.¹⁷⁷ Regarding the defence justification and onus to fulfill a duty to accommodate, the BCSC ruled the issue is not whether any further accommodation was "possible", but rather, the issue is whether UBC could have further accommodated Dr. Kelly, without incurring undue hardship, having regard to the entire context of the relationship between Dr. Kelly and UBC. It is not necessary for the individual to prove that accommodations proposed by experts would have guaranteed success in the Program. Rather, it is incumbent upon

¹⁷¹ *Ibid* at para 50 citing *Moore* at para 33.

¹⁷² *Ibid* at paras 21, 22.

¹⁷³ *Ibid* at paras 105-107.

¹⁷⁴ *Ibid* at paras 45, 49.

¹⁷⁵ *Ibid* at paras 86, 87, 90, 91.

¹⁷⁶ *Ibid* at paras 94, 95.

¹⁷⁷ *Ibid* at para 131.

UBC to legally demonstrate that implementing the expert's recommendations would have resulted in undue hardship.¹⁷⁸

The BCSC ruled that because UBC was already able to implement accommodations to support residents who were having difficulty it was unreasonable and unconscientious to curtail access to accommodations that may have been provided to other residents but were not provided to Dr. Kelly because of his disability. The Court further ruled that in the absence of solid factual foundation, UBC acted on its stereotypical assumptions about Dr. Kelly and prematurely dismissed him from the residency program.¹⁷⁹

Expert Opinion and Recommendations

UBC was provided expert recommendations on alternatives to reduce Dr. Kelly's symptoms and improve his adaptive functioning. These included:

1. providing him with longer familiarization periods and allowing repeated exposure to new material;
2. giving clear instructions, ideally in written form making clear the specific goals of an activity;
3. encouraging the use of memory aids;
4. reducing time pressure to allow mastery of steps in a task before improving speed and fluency;
5. encouraging him to pursue his interests;
6. working with a counsellor or coach to assist him in developing effective organization and life skills and assist in providing perspective in solving inter-personal problems;
7. providing him with a one-to-one preceptor rotation to improve his skills in family practice.¹⁸⁰

The BCSC ruled that it was unreasonable that Dr. Kelly was not provided the opportunity to demonstrate his abilities with the benefit of reasonable accommodation.¹⁸¹ The BCSC ruled that it was unreasonable for UBC to reject the accommodation recommendations without consideration upon receiving them from an ADHD expert.¹⁸² The court also agreed it was incumbent upon UBC to engage in dialogue with Dr. Kelly about these potential accommodations. UBC focused on the limitations that ADHD presented and not on the positive steps that might have been taken to address these limitations. Failure for UBC to do so was a failure to meet its legal duty to accommodate. The court dismissed UBC's argument that the expert recommendations for accommodations were not adequate because the expert had no experience with the Family Medicine Residency Program specifically, he was not an educator in the program, nor could he predict the success of the accommodations.¹⁸³

¹⁷⁸ *Ibid* at paras 109, 110, 111, 130.

¹⁷⁹ *Ibid* at paras 114, 115.

¹⁸⁰ *Ibid* at para 116.

¹⁸¹ *Ibid* at para 129.

¹⁸² *Ibid* at paras 123, 124.

¹⁸³ *Ibid* at paras 119, 120.

The BCSC ruled that in making a legal defence in justifying their actions to exclude Dr. Kelly, it is incumbent upon UBC to provide substantive factual foundation to support their argument. A service provider is required to demonstrate more than anecdotal observations, unquantified financial costs, or organizational inconveniences. Much of UBC's evidence was anecdotal and fell far short of the standard necessary to demonstrate undue hardship or to prove a 'conscientious and reasonable' attempt was made to accommodate Dr. Kelly. To the contrary, the evidence demonstrated that UBC was able to provide accommodations, albeit it with some inconvenience, and that UBC's policy specifically contemplated such accommodations for all participants whether or not they were disabled.¹⁸⁴

Dunkley v. UBC¹⁸⁵

In 2015, the British Columbia Human Rights Tribunal (BCHRT) following the decision in *Moore*, found that the University of British Columbia (UBC) discriminated against Dr. Jessica Dunkley for not reasonably accommodating her disability in the Family Medicine Residency Program. The BCHRT found that Dr. Dunkley was adversely treated when she was denied access to the Program and the cost of interpretive services was not an adequate defence to justify denying Jessica access to the Program.

The Tribunal found the failure of UBC to consider financial alternatives to reasonably accommodate Dr. Dunkley was a similar response to the School District in *Moore*. The Supreme Court of Canada in *Moore* said that in order for the School District to justify "it had no other choice, the School Board had to at least consider what the alternative choices were when deciding program services for Jeffrey."¹⁸⁶ The Tribunal in fact gave the parties in this case an opportunity to present additional submissions after the SCC *Moore* decision in November 2012.¹⁸⁷

The Tribunal stated that to deny Dr. Dunkley the opportunity to continue in her program, without considering whether she could be accommodated without undue hardship, would be to perpetuate the historical disadvantage that the Supreme Court of Canada in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, [1997] S.C.J. No. 86 (S.C.C.), paras. 54-57, recognized as one of the indicia of discrimination against people with disabilities in general, and against Deaf people in particular.¹⁸⁸

Dr. Jessica Dunkley is deaf and is of Aboriginal decent. She has been deaf since birth and is a daughter of deaf parents. She received accommodations due to being deaf throughout her education including six years at the University of BC, four years at medical school at the University of Ottawa and even during her primary and secondary school years. In fact, from grades 2-9 she attended regular classrooms with accommodations. She had access to interpreters, note takers,

¹⁸⁴ *Ibid* at paras 127, 128.

¹⁸⁵ *Dunkley v. UBC*, 2015 BCHRT 100 [*Dunkley*]

¹⁸⁶ *Ibid* at para 690 citing *Moore* at para 52.

¹⁸⁷ *Ibid* at para 19.

¹⁸⁸ *Ibid* at para 395.

tutors, an additional classroom resource teacher and assistive technology and devices, including real time captioning services.¹⁸⁹

Amir v. Webber Academy Foundation¹⁹⁰

The Alberta Human Rights Tribunal ruled in 2015 that Webber Academy discriminated against two students for not demonstrating that banning them from praying on campus respecting their sincerely held beliefs during school hours was reasonable and justifiable. The Tribunal cited rulings in *Moore* and *Meiorin* when the SCC stated that alternative approaches to accommodation must be investigated and that Webber Academy has an obligation to show "that it could not have done anything else reasonable and practical to avoid the negative impact on the individual."¹⁹¹

Despite Webber Academy's specifically stated goal of making people of all religious backgrounds feel welcome, its actions, objectively viewed, were not welcoming of them. Webber Academy had not provided the Tribunal with sufficient evidence to establish it would be an undue hardship for Webber Academy to permit the Students to pray on campus during school hours.¹⁹²

The Tribunal cited at para 84 and 85 *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 (S.C.C.) (*Grismer*) at paras 20-22 that exclusion is only justifiable where the employer or service provider has made every possible accommodation short of undue hardship. Accommodation refers to what is required in the circumstances to avoid discrimination. Standards must be as inclusive as possible. The standard was found discriminatory because it did not provide for individualized assessment. Failure to accommodate may be established by evidence of arbitrariness in setting the standard or by an unreasonable refusal to provide individual assessment. The ultimate issue is whether the service provider has shown that it provides accommodation to the point of undue hardship.

The SCC held in *Grismer* that an exclusion from a service will not be recognized as reasonable and justified if the service provider can individually assess a situation and modify conditions or practices without undue hardship. The superintendent of Motor Vehicles failed to demonstrate that individual vision testing accommodating Mr. Grismer's disability imposed undue hardship.¹⁹³ To evaluate the reasonableness of accommodations used at Webber Academy the Tribunal considered the successful approach to accommodating prayer at other schools.¹⁹⁴ In addition, the Tribunal held that Webber Academy's refusal to undertake a balancing analysis to at least ascertain whether there would be any undue hardship involved was not reasonable or justifiable.¹⁹⁵

¹⁸⁹ *Dunkley*, *supra* note 175 at paras 1, 63-65

¹⁹⁰ *Amir v. Webber Academy Foundation*, 2015 AHRC 8 [*Amir*].

¹⁹¹ *Ibid* at para 119.

¹⁹² *Ibid*.

¹⁹³ *Ibid* at para 85.

¹⁹⁴ *Ibid* at para 111.

¹⁹⁵ *Ibid* at para 118.