O'DEA EARLE

February 10, 2016

Newfoundland & Labrador Teachers' Association
3 Kenmount Road
St. John's NL
A1B 1W1

Attention: Mr. Steve Brooks

Dear Mr. Brooks,

Re: Inclusive Schools Initiative

You have asked us to provide an opinion on the parameters on decisions as regards funding for the resourcing of the Inclusive Schools Initiative (ISI). A Committee has been established under Article 30.02 of the Provincial Collective Agreement for the purpose of review of resourcing of the ISI. The Committee must then bring forward a report and recommendations on the resourcing of the ISI.

As part of our review, particular attention was placed on the *Moore* v. *British Columbia (Ministry of Education)* [2012] 3 S.C.R. 360 decision from the Supreme Court of Canada, a unanimous decision which affirmed the right of a student to receive an education, regardless of a student's special needs. *Moore* involved a student with a severe learning disability who claimed he was discriminated against because the remedial instruction he required in his early school years was not available in the public school system. Before turning to *Moore*, we wish to set out the legislative background in this province.

NL Legislative Background and Policy:

The Schools Act, 1997 SNL1997 c. S-12.2 mandates that a child older than 5 and younger than 21 who meet all criteria set out therein is "entitled in that year to an education program in accordance with this Act."

The Human Rights Act, 2010 SNL2010 c. H-13.1 specifically includes learning disabilities as a prohibited ground of discrimination. This is set out in s. 2(c) which defines "disability" to include a learning disability or a dysfunction in one or more of the processes required in understanding or using symbols or language.

Discrimination would include denying a person services or facilities that are customarily offered to the public based on a prohibited ground (s. 11).

The Newfoundland and Labrador Department of Education and Early Childhood Development recognize Inclusive Education and Inclusive Schools, noting that "(R)esearch and evaluation data indicates that students show improvement in academic, social and behavioural outcomes when taught in inclusive classrooms."[1] The Department also states that it defines inclusive education as a philosophy which promotes:

> **the right of all students to attend school with their peers, and to receive appropriate and quality programming;**
>
> **a continuum of supports and services in the most appropriate setting (large group, small group, individualized) respecting the dignity of the child;**
>
> **a welcoming school culture where all members of the school community feel they belong, realize their potential, and contribute to the life of the school;**
>
> **an atmosphere which respects and values the participation of all members of the school community;**
>
> **a school community which celebrates diversity; and**
>
> **a safe and caring school environment**

The Department of Education also has a Service Delivery Model for Students with Exceptionalities Professional Learning Package, Fall 2011. The Model provides for a Service Delivery Team which is to direct special education services in the school including the optimal deployment of resources (Chapter 2). A Service Delivery Team is required in each school.

A Program Planning Team may be commenced for a student. If one is initiated, the Planning Team's role includes programming decisions which would take into account accommodations required and modifications (Chapter 3).

Chapter 9 addresses Guidelines for Decision Making pertaining to the Optimal Deployment of Resources:

> **When determining the best use of a school's available resources, consideration must be given to:**
>
> **the school's profile**
>
> **individual programming to address each student's strengths and needs**
>
> **the most optimal environment for instruction including:**
>
> **IEP outcomes**
>
> **dignity of student**

[1] See the attached "Inclusive Schools" information obtained from the Department of Education and Early Childhood Development website http://www.ed.gov.nl.ca/edu/k12/inclusion.html. See "Frequently Asked Questions" in particular question 2. See also "Inclusive Education" pamphlet and "Important Information if your child has an exceptionality" pamphlet provided by the Department of Education

subject area

group size

classroom resources

opportunities for co-teaching

social climate

teacher curricular expertise and skills

We next turn to a discussion of the *Moore* decision.

Moore Decision:

Background:

This case arises out of British Columbia. In 1990/1991 the provincial government of the day decided to institute a block funding system which set out an overall amount of money that was available for education. This amount was then allocated to the various districts by the Minister.

Special education funding was set up in such a manner that the provincial government classified students into various groups. Those learning disabilities that were considered severe, such as dyslexia, were treated as a high incidence/low cost disability. From 1987/88, British Columbia capped the specific funding that was available for high incidence/low cost students, based on a percentage of a district's student population. The funding cap was instituted to control the increasing number of students qualifying for this supplementary funding.

In 1991, the School Act in British Columbia set out minimum spending levels for high incidence/low cost and low incidence/high cost students, which meant that once a child was identified as having a severe learning disability, additional support was mandatory. At the time there were various ways students with special needs were supported including assistance in and out of the classroom from special education Aides, to referrals to a school-based Learning Assistance Centre where special needs students would work with learning assistance teachers or tutors. For those students who required more intensive assistance, they could be placed in the Diagnostic Centre which allowed for more individualized teaching.

From 1991 to 1995 the school district in question (the District) faced ongoing budgetary shortfalls. It requested additional funding from the Province but did not receive any, though the District was granted permission to run temporary deficits. The District's consistent deficits eventually led to its making budget cuts, including a reduction of almost $1.5 million on spending for high incidence/low cost students with learning disabilities.

In the 1994/95 budgetary process, the District restricted or eliminated some programs due to ongoing financial difficulties. Ultimately, the District made a series of cuts, which included closing the Diagnostic Centre in 1994. The closure of the Diagnostic Centre was a key factual component in this case.

When Jeffrey Moore started kindergarten in September 1991, he was described as happy and energetic. However, it quickly became evident that he needed extra support to learn to read. He was referred to the

Elementary Learning Resource Team, a group of specialists who provided support and assistance to students in the District who had severe learning disabilities, including dyslexia. He would receive 15 minutes of individual help from an Aide three times a week.

Jeffrey was assessed twice by the Elementary Learning Resource Team in Grade 1, again due to his difficulties with literacy skills, and he started attending the Learning Assistance Centre three times a week. He also had two 40-minute sessions in the Learning Assistance Centre. In addition, his parents, at the school's recommendation, hired a private tutor to work with Jeffrey.

In January 1994 when Jeffrey was in Grade 2, his parents, concerned about his worsening headaches, took him to a neurologist. The neurologist advised that Jeffrey was under significant stress and that this could be improved if his learning difficulties were addressed. The next month Jeffrey was again referred to the Elementary Learning Resource Team, and was given a full psycho-educational assessment on April 1, 1994. This assessment was a prerequisite to his designation as a Severe Learning Disabilities student. Following the results of the assessment, a psychologist employed by the District concluded that Jeffrey needed more intensive remediation and suggested that Jeffrey attend the Diagnostic Centre. However, since the Diagnostic Centre was being closed, Jeffrey could not obtain the intensive remediation he needed within the District's public schools. Instead, to obtain these services he would need to be enrolled in a private school specializing in teaching children who had learning disabilities. Unfortunately, Jeffrey could not enroll in the private school until Grade 4. He continued to perform poorly in school despite receiving two 30-minute sessions of individual assistance in the Learning Assistance Centre, two 40-minute periods of individual assistance with a tutor in the Learning Assistance Centre, and four 40-minute sessions with an Aide, primarily in the classroom while in Grade 3.

Jeffrey eventually did attend the private school from Grade 4 to 7, and when he left he was reading at a Grade 5 level and was at Grade 7 level in math. He remained in a private school which specialized in learning disabilities until he completed high school.

Analysis of *Moore* Complaint and Findings:

In May 1997 Mr. Moore filed a Human Rights Complaint against the District on behalf of his son Jeffrey. He later filed a second identical complaint against the Ministry in August 1999. The allegations were that the District and the Ministry discriminated against Jeffrey on the basis of his mental disability, dyslexia, in the provision of educational services. The British Columbia Court of Appeal referenced the complaint as follows:

> **[2] Mr. Moore alleges in his complaints that the District and the Ministry discriminated against his son Jeffrey on the basis of his mental disability in the provision of educational services. Jeffrey is a student who is of average or above average intelligence. However, he has dyslexia, a severe learning disability which has affected his ability to read throughout his education.**
>
> **[3] The complaints allege that the District, acting on behalf of the Ministry, failed to identify Jeffrey's disability soon enough and failed to provide him with the supports that he needed to allow him to access the educational services available in the District. In addition, they allege that the District and the Ministry systemically discriminated against all children with severe learning disabilities ("SLD"). In general, the systemic allegations against the District relate to**

> **the level of services that it provided to SLD children; while those against the Ministry relate to the adequacy of the methods of remediation available to SLD students, the role of the Ministry in monitoring the delivery of special education services, and levels of funding for SLD students throughout British Columbia.**

The Tribunal's decision was released on December 21, 2005. The matter was heard over numerous days between October 2, 2001 and December 17, 2002 with some 18 witnesses called. The Human Rights Tribunal determined that there was both individual discrimination against Jeffrey and systemic discrimination against Severe Learning Students in general. Both the District, along with the Province, were found to have discriminated against Jeffrey. The Human Rights Tribunal found no evidence that the District had considered any reasonable alternatives for meeting the needs of Severe Learning Disabilities students before cutting the Diagnostic Centre. The Tribunal arrived at this conclusion despite acknowledging the District's financial circumstances.

The Tribunal also found systemic discrimination against the Province for what were essentially funding issues: the imposition of the high incidence/low cost cap; underfunding the District; failing to ensure that necessary services, including early intervention, were mandatory; and failing to monitor the activities of the districts. The Tribunal made a number of remedial orders against the District and the province.

The District and the Ministry brought petitions for Judicial Review seeking to quash the Tribunal's decision, or alternatively, to quash the remedial orders made by the Tribunal. On February 29, 2008 Madam Justice Dillon quashed the Tribunal's decision. She determined that Tribunal erred in finding discrimination in the absence of evidence of disparate treatment.

Mr. Moore filed appeals on behalf of Jeffrey. In a decision dated October 29, 2010, a majority of the British Columbia Court of Appeal dismissed the appeal. The majority agreed with Justice Dillon that Jeffrey ought to be compared to other special needs students only, and not to the general student population:

> 183 **Jeffrey Moore and other severely learning disabled students were given the same opportunity to receive a general education as was given to all other students. To compare these students with the general student population is to invite an enquiry into general education policy and its application. That cannot be the purpose of the hearing of a human rights complaint because it almost inevitably would lead to a critique of the system at large, and lose focus on whether the specific complaint has been proven.**

Justice Rowles, in dissent, would have allowed the appeal, finding that special education was the means by which meaningful access to educational services was provided to students with learning disabilities. The Tribunal's analysis showed that Jeffrey did not receive the intensive remediation he required to have meaningful access to educational services after the Diagnostic Centre was closed and that this justified the findings of discrimination.

Mr. Moore appealed to the Supreme Court of Canada.

Supreme Court of Canada

The Supreme Court of Canada substantially allowed the appeal by unanimous decision. The Supreme Court of Canada found, based on the evidence and determinations of the Tribunal, that Jeffrey was discriminated

against because he was denied meaningful access to education. However, the findings against the province were not upheld, as the Supreme Court found that issues of provincial budgeting too remote to ground a finding of discrimination against Jeffrey:

> **64 But the remedy must flow from the claim. In this case, the claim was made on behalf of Jeffrey, and the evidence giving concrete support to the claim all centred on him. While the Tribunal was certainly entitled to consider systemic evidence in order to determine whether Jeffrey had suffered discrimination, it was unnecessary for it to hold an extensive inquiry into the precise format of the provincial funding mechanism or the entire provincial administration of special education in order to determine whether *Jeffrey* was discriminated against. The Tribunal, with great respect, is an adjudicator of the particular claim that is before it, not a Royal Commission.**
>
> **65 The connection between the high incidence/low cost cap and the closure of the Diagnostic Centre is remote, given the range of factors that led to the District's budgetary crisis. There is no particular reason to think that these funding mechanisms could not be retained in some form while still ensuring that Severe Learning Disabilities students receive adequate support. It is entirely legitimate for the Province to choose a block funding mechanism in order to ensure that districts do not have an incentive to over-report Severe Learning Disabilities students, so long as it also complies with its human rights obligations. In other words, while systemic evidence can be instrumental in establishing a human rights complaint, the evidence about the provincial funding regime, and the high incidence/lost cost cap in particular, was too remote to demonstrate discrimination against *Jeffrey*...** (emphasis in original)

The determinations in *Moore* clearly set out that despite budgetary constraints, all options must be investigated fully prior to eliminating a program which would restrict a special needs student from meaningfully being able to obtain what every child in this Province is entitled to: an education. The access to an education is the service that students have a right to; the programs for special needs students are the accommodation or means to allow them to achieve that right. In *Moore*, the District knew that Jeffrey required intensive remediation in order to have meaningful access to education. With the closing of the Diagnostic Centre, the District failed to provide any services to enable Jeffrey to have an education in the public school system. As such, *prima facie* discrimination was found.

Once *prima facie* discrimination is made out, the decisions and conduct must be justified. If the argument being made is that there was no choice but to cut the program because of budgetary constraints there must be evidence that this is in fact the case, and that other options, services and possible accommodations were considered. *Moore* firmly establishes that accommodation is not based on questions of "mere efficiency". To recite the Court:

> **50 The District's justification centered on the budgetary crisis it faced during the relevant period, which led to the closure of the Diagnostic Centre and other related cuts. There is no doubt that the District was facing serious financial constraints. Nor is there any doubt that this is a relevant consideration. It is undoubtedly difficult for administrators to implement education policy in the face of severe fiscal limitations, but accommodation is not a question of "mere efficiency", since "[i]t will always seem demonstrably cheaper to maintain the status quo and not eliminate a discriminatory barrier" (VIA Rail, at para. 125).**

The Court accepted the Tribunals determinations that when the Diagnostic Centre was closed, there was no analysis of how students like Jeffrey would be addressed, and no replacement plan was considered. No plan was put into place as to how those students who needed the Diagnostic Centre would be looked after and provided with aid at a similar level to allow them to continue their education. The Supreme Court of Canada accepted the reasoning from the Tribunal and the dissent of Justice Rowles that the spending cuts made by the District were disproportionably made to special needs programs, particularly when other discretionary programs remained in place stating:

> **51 In Jeffrey's case, the Tribunal accepted that the District faced financial difficulties during the relevant period. Yet it also found that cuts were disproportionably made to special needs programs. Despite their similar cost, the District retained some discretionary programs, such as the Outdoor School — an outdoor campus where students learned about community and the environment — while eliminating the Diagnostic Centre. As Rowles J.A. noted, "without undermining the educational value of the Outdoor School, such specialized and discretionary initiatives cannot be compared with the accommodations necessary in order to make the core curriculum accessible to severely learning disabled students" (para. 154).**
>
> **52 More significantly, the Tribunal found, as previously noted, that the District undertook *no* assessment, financial or otherwise, of what alternatives were or could be reasonably available to accommodate special needs students if the Diagnostic Centre were closed...The failure to consider financial alternatives completely undermines what is, in essence, the District's argument, namely that it was justified in providing no meaningful access to an education for Jeffrey because it had no economic choice. In order to decide that it had *no* other choice, it had at least to consider what those other choices were.** (emphasis in original)

Conclusion and Opinion:

Moore requires that a full and complete analysis be undertaken before cuts are made which may have a disproportionate impact on special needs students. Evidence will need to demonstrate that if cuts to specific programs are undertaken that those cuts were made because there were no other viable options. The proportionality of the impact may be much more severe on students who require some accommodation in order to have access to an education mandated as a right of all students under the Schools Act, 1997.

As stated the Supreme Court of Canada did not uphold the Tribunal's determination that the provincial government was liable for discriminatory conduct towards Jeffrey Moore. Nonetheless the Supreme Court of Canada recognized that if provincial cuts are made which are not in compliance with human rights legislation (paragraph 65 reproduced above) liability could be found:

> **35 ...In some cases, the government may well have done what was necessary to give the student access to the service, yet the hoped-for results did not follow. Moreover, policy documents tend to be aspirational in nature, and may not reflect realistic objectives. A margin of deference is, as a result, owed to governments and administrators in implementing these broad, aspirational policies.**

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

Budgetary cuts or the outright elimination of programs which run afoul of the Human Rights Act, 2010 and constitute *prima facie* discrimination will not be justifiable unless all alternatives are fully considered and addressed and it is still determined that there is no choice but to make the cuts. Even in the case of alternatives being considered, unless some form of accommodations are made which would provide special needs students with the similar help they were receiving under the cut program, it is doubtful the conduct would be justifiable. This is particularly so when the goal is inclusive education.

If for budget considerations a student receiving assistance had her level of services downgraded to accommodate the needs of another special needs student or students at her school, we are of the opinion that if the downgrade resulted in the student being no longer provided with meaningful access to an education this would be discrimination and would not be justified unless all alternatives to the downgrades were fully considered and there was no choice but to institute the downgrade as per the *Moore* analysis. This is especially so when we consider that the Supreme Court of Canada affirmed the view of the Tribunal and Justice Rowles of the Court of Appeal that education is the right a student has and as such, a special needs student is not to be compared to other special needs students but to students as a whole:

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

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

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

[Emphasis added; para. 103.]

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

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

31 If Jeffrey is compared only to other special needs students, full consideration cannot be given to whether he had genuine access to the education that all students in British Columbia are entitled to. This, as Rowles J.A. noted, "risks perpetuating the very disadvantage and exclusion from mainstream society the Code is intended to remedy"...

Thus to downgrade the ability of a student to access a meaningful education when other non-essential programs could be removed first would likely fail scrutiny.

Given the foregoing, there is clearly an obligation on both the Province and the district to ensure that all students have genuine access to education that is statutorily guaranteed. *Moore* is clear in stating that a special needs student is not compared to another special needs student, but to all students who have access to a meaningful education mandated by legislation.

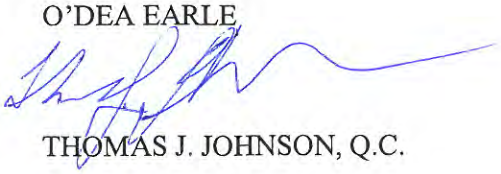
While questions of government funding will always arise, particularly in the current economic circumstances, there is little doubt that providing for the education of students who require additional remediation is an obligation which cannot be easily dispensed with either by the Province or the district. Certainly any cuts to a program which enable a student with special needs to obtain an education must be demonstrably justified, we would suggest to the point where there is no other alternative but to cut the program, as there are no discretionary programs which could be cut and there are no viable alternatives to the services being offered.

As demonstrated by *Moore* a provincial budget cut does not alleviate the duty on the district to ensure that a special needs student is able to access the programs she needs to attain an education, as these cuts could have a disproportionate effect on special needs students. Other discretionary programs will likely have to be terminated first to ensure that the needs of those students who require additional help and resources are met. In this regard, it is clear that discretionary programs do not compare in importance to accommodations required for a student with special needs to avail of a core curriculum.

We ask that you please review this memo and contact me to discuss any questions you may have.

Yours truly,

O'DEA EARLE



THOMAS J. JOHNSON, Q.C.

Encl.