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Moore v. British Columbia: A Good IDEA?

Robert E. Charney and Sarah Kraicer*

I. INTRODUCTION

In *Moore v. British Columbia (Education)*,¹ the Supreme Court of Canada was faced with the question of whether the special education program provided by a British Columbia District School Board to Jeffrey Moore, a student with severe learning disabilities (“SLD”), infringed the British Columbia *Human Rights Code*,² and, if it did, what the appropriate remedy was under the Code. At first instance the Human Rights Tribunal³ found both individual and systemic discrimination. It concluded that the District School Board had failed to provide Jeffrey and other SLD students with the level of support needed, and that the Ministry of Education provided inadequate funding for SLD students and failed to appropriately monitor the delivery of special education services provided by the school district. The Tribunal ordered damages and systemic remedies against both the District School Board and the Ministry of Education. The damages award included reimbursement of the costs of tuition and partial transportation paid for Jeffrey to attend private schools

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¹ [2012] S.C.J. No. 61, [2012] 3 S.C.R. 360 (S.C.C.) [hereinafter “*Moore SCC*”].

² R.S.B.C. 1996, c. 210.

³ *Moore v. British Columbia (Ministry of Education)*, [2005] B.C.H.R.T.D. No. 580, 54 C.H.R.R. D/245 [hereinafter “*Moore BCHRT*”].

up to and including the end of Grade 12. The systemic remedies required the Ministry to rewrite the funding methodology for special education, and to centralize oversight of individual special education programs within the Ministry of Education.

The Tribunal's decision was reversed by the British Columbia courts,⁴ which found that there had been no discrimination against Jeffrey because he had been provided with the same or better special education program as any other SLD student in the province.

The Supreme Court of Canada "substantially allowed"⁵ the appeal, reinstating the Tribunal's damages award against the District School Board, but rejecting both the damages award and the systemic remedies that had been ordered against the Ministry of Education.

In considering the Supreme Court decision in *Moore*, we will divide our analysis into three parts. The first will be a general consideration of private school vouchers in Canada and the United States, because we are of the view that this consideration is relevant to both the substantive and remedial issues confronting courts in cases involving accommodation in the public school system. The second part is consideration of the substantive question of whether Jeffrey had been discriminated against by the District School Board or the Ministry. The third is whether, assuming that the District School Board had failed to accommodate Jeffrey, the damages order upheld by the Supreme Court was appropriate in the circumstances. While we are in general agreement with the Supreme Court's mode of analysis of the substantive question, and agree with its dismissal of the systemic remedies against the Ministry, we take issue with the damages award made against the District School Board.

II. PRIVATE SCHOOL VOUCHERS

Public funding of private schools has been a hotly contested political issue across Canada. Parents who are dissatisfied with the public school system promote the public funding of private schools on the basis of parental choice, religious or cultural diversity, and/or the premise that greater competition will lead to better schools. Different provinces have

⁴ *British Columbia (Ministry of Education) v. Moore*, [2008] B.C.J. No. 348, 81 B.C.L.R. (4th) 107 (B.C.S.C.) [hereinafter "*Moore SC*"]; and *British Columbia (Ministry of Education) v. Moore*, [2010] B.C.J. No. 2097, 12 B.C.L.R. (5th) 246 (B.C.C.A.) [hereinafter "*Moore CA*"].

⁵ *Moore SCC*, *supra*, note 1, at para. 71.

responded to these arguments with different education policies. Some, like Ontario, limit public funding to the public school system;⁶ others, like British Columbia and Quebec, provide limited funding to private schools and impose strict limits and eligibility criteria on this funding.⁷ No province in Canada funds private schools on an equal basis with public schools, and no province in Canada has followed the example of some American states of offering parents a “voucher” to cover the cost of private school tuition. Certainly no province in Canada has decided to provide *more* funding to private schools than to public schools.

In Canada, the political consensus remains that public dollars should primarily, or exclusively, focus on building a public school system that is open and accessible to all students in the community. The importance of this government objective has been recognized by the courts, which have rejected Charter⁸-based claims to funding for private schools based on religion, ethnicity and language.⁹ While parents have the right to send their children to private schools, there is no constitutional right to public funding of private schools. The decision whether to fund private schools, or to offer tuition vouchers to parents who opt out of the public school system, is a policy choice for government to make.

Americans have taken a somewhat different approach to private school funding, and, based on a combination of philosophical and historical factors, have been more receptive to public funding of private schools. Some of this sympathy for private school funding is likely a result of the American distrust of government monopolies and a preference for a private enterprise model. The same *laissez-faire* political philosophy that

⁶ This policy is complicated in Ontario by s. 93 of the *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.), which guarantees public funding to Roman Catholic Separate Schools, which are thereby part of the public school system in Ontario (*Reference re Bill 30, An Act to Amend the Education Act (Ontario)*, [1987] S.C.J. No. 44, [1987] 1 S.C.R. 1148 (S.C.C.)). Like public schools, the separate schools are governed by elected school boards under the *Education Act*, R.S.O. 1990, c. E.2 [hereinafter “Ontario Education Act”], Part IV. Throughout this paper the term “public school system” is meant to refer to schools governed or managed by an elected school board.

⁷ British Columbia: *Independent Schools Act*, R.S.B.C. 1996, c. 216 and *Independent School Regulation*, B.C. Reg. 262/89, as am. B.C. Reg. 90/2011, at ss. 3-4; Quebec: *An Act Respecting Private Education*, R.S.Q. c. E-9.1, Chapter V (Subsidies), Div. I-IV.

⁸ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

⁹ See, e.g., *Adler v. Ontario*, [1996] S.C.J. No. 110, [1996] 3 S.C.R. 609 (S.C.C.); *Bal v. Ontario*, [1997] O.J. No. 2597, 34 O.R. (3d) 484 (Ont. C.A.); *Cooper v. Ontario (Attorney General)*, [2009] O.J. No. 3589, 311 D.L.R. (4th) 480 (Ont. Div. Ct.).

made the Obama administration's proposal for public health insurance so controversial in the United States influences their view of the delivery of education.¹⁰ Certain efforts to provide state funding to private schools can be traced to America's troubled history of racial segregation. As the United States courts ordered the desegregation of the public school system, recalcitrant state legislatures tried to circumvent the court rulings by offering parents private school vouchers so they could opt out of the desegregated public school system.¹¹ Other states offered private school vouchers in an effort to provide financial support to religious schools and thereby circumvent the establishment of religion clause in the First Amendment of the United States Constitution, which prohibits states from establishing programs that have the "primary effect" of advancing religion.¹²

Funding private schools is one approach that the United States has taken to provide special education programs for students whose mental or physical disabilities require special accommodation. The federal *Individuals with Disabilities Education Act* ("IDEA")¹³ establishes the standards that school districts must meet in order to receive federal funding for the education of students with disabilities. IDEA provides that students with disabilities are entitled to a "free and appropriate public education" ("FAPE") set out in an individualized education plan ("IEP") developed with parental input to meet the child's special education needs. School districts can meet their obligations under IDEA by providing a FAPE at a public school or by referring a student to a private

¹⁰ Consistent with this, Sarah Palin, the Republican Vice-Presidential nominee for 2008, advocated changing the federal regulations to enable federal education funding to be "fully portable to any public or private school elected by the parents". In contrast, Barack Obama went on record in opposition to "using public money for private school[s]" during his campaign. Wendy F. Hensel, "Vouchers for Students with Disabilities: The Future of Special Education?" (2010) 39 J.L. & Educ. 291, at 310 [hereinafter "Hensel"].

¹¹ See *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964), in which the Supreme Court found that closing public schools and providing grants of public funds for children to attend private schools was an unconstitutional scheme to avoid desegregation.

¹² *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 93 S. Ct. 2995 (1973), invalidating a New York program that was found "unmistakably to provide desired financial support for non-public, sectarian institutions", at 773-74. Such vouchers are permissible, however, where the program is neutral with respect to religion and provides assistance to religious institutions "only by way of the deliberate choices of numerous individual recipients": *Zelman v. Simmons-Harris*, 536 U.S. 639, 122 S. Ct. 2460 (2002).

¹³ 84 Stat. 175, as amended, 20 U.S.C. §1400 *et seq.* (this statute was previously entitled the *Education for All Handicapped Children Act* (1975)).

special education program at public expense.¹⁴ In addition, the United States Supreme Court has interpreted the court's broad remedial authority under IDEA as authorizing courts to order reimbursement of private school tuition and expenses in cases where the parents unilaterally withdrew their child from the public school because the school's special education services did not meet the child's needs. The Supreme Court held that "when a public school fails to provide a FAPE and a child's parents place the child in an appropriate private school without the school district's consent, a court may require the district to reimburse the parents for the cost of the private education".¹⁵ This authority to order reimbursement of private school tuition may be applied even in cases where the child has never attended a public school.¹⁶

In addition to the federally mandated IDEA, three states provide universal vouchers for all students with disabilities, and a number of other states have proposed similar legislation.¹⁷

There are obvious public policy implications to requiring public school boards to cover the cost of private school for students with disabilities, and the impact of these vouchers on the public system in the United States remains controversial.¹⁸ The most significant impact is financial: public school funds, whether generated from grants or local property taxes, are spent by public school boards for the benefit of all students in the public system. As the number of children attending private school at public expense increases, the funds available to educate students with disabilities in public schools decreases.¹⁹ Capital improvements like ramps and elevators, and equipment such as specialized software, lifting devices and hearing support equipment, are not the property of individual students, but remain part of the board's investment for future students with similar disability-related needs. Professional staff, including special education teachers and teaching assistants, even

¹⁴ In contrast, Ontario school boards have no authority to spend board funds on private school tuition: see *Ontario Education Act*, *supra*, note 6, s. 170(1)7 and text at footnote 70 below.

¹⁵ *School Comm. of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359, at 370, 105 S. Ct. 1996 [hereinafter "*Burlington*"]; *Forest Grove School District v. T.A.*, 557 U.S. 230 at 232, 129 S. Ct. 2484 (2009) [hereinafter "*Forest Grove*"].

¹⁶ *Forest Grove*, *id.*

¹⁷ Hensel, *supra*, note 10. Hensel indicates that Florida, Utah and Georgia provide "universal special needs vouchers", and a fourth state, Ohio, provides a voucher only for children with autism and autism spectrum disorder (at 299).

¹⁸ *Id.*, at 294.

¹⁹ *Id.*, at 318.

when assigned to individual students, are available as a resource for other teachers and students in the class or school. Specialized staff training enables public schools to develop institutional expertise for the benefit of current and future students. Requiring public funding of private schools redirects scarce resources from the public system. It does nothing to enhance the capacity of public schools to accommodate the special education needs of students with disabilities and may ultimately undermine the ability of public school boards to fulfil their public education mandate, including the provision of special education services and programs for students with special education needs.²⁰

If the public policy goal is to make public schools accessible to students with disabilities, then resources must be focused on making public schools accessible to students with disabilities, not on providing access to private schools. To use a simplistic example, if a public school is inaccessible to a disabled student because it does not have a ramp, the solution is not to require the public school to pay for that student to attend a private school with a ramp; the solution is to order the public school to build a ramp.

As will be seen when we examine the *Moore* case, however, the issue is never as simplistic as the ramp example given above. School boards rarely, if ever, simply refuse to provide any accommodation.²¹ The issue,

²⁰ Similar concerns have been stated by the Florida Supreme Court, which invalidated an earlier version of the Florida voucher program as being inconsistent with art. IX, s. 1(a) of the Florida state constitution, which guarantees a “uniform system of public free schools” and “the liberal maintenance of such system of free schools”. The Court stated:

It diverts public dollars into separate private systems parallel to and in competition with the free public schools that are the sole means set out in the Constitution for the state to provide for the education of Florida’s children. This diversion not only reduces money available to the free schools, but also funds private schools that are not “uniform” when compared with each other or the public system. Many standards imposed by law on the public schools are inapplicable to the private schools receiving public monies.

Bush v. Holmes, 919 So.2d 392, at 399 (2006). Discussed in Hensel, *supra*, note 10, at 311-12.

²¹ All school boards in Canada are obliged by statute to provide special education programs for their students: British Columbia: *School Act*, R.S.B.C. 1996, c. 412, s. 168(2)(a) [hereinafter “B.C. School Act”]; *Individual Education Plan Order*, Ministerial Order M638/95, December 18, 1995, s. 2(1). Alberta: *School Act*, R.S.A. 2000, c. S-3, s. 47(2) (new legislation was enacted in 2012 and is awaiting proclamation). Saskatchewan: *The Education Act*, 1995, S.S. 1995, c. E-0.2, s. 178(8). Manitoba: *The Public Schools Act*, C.C.S.M. c. P250, s. 41(1)(a.1). Ontario: *Ontario Education Act*, *supra*, note 6, s. 170(1)7. Quebec: *Education Act*, R.S.Q. c. I-13.3, s. 244 [hereinafter “Quebec Education Act”]. New Brunswick: *Education Act*, S.N.B. 1997, c. E-1.12, s. 12. Nova Scotia: *Education Act*, S.N.S. 1995-96, c. 1, s. 64(2)(d). Prince Edward Island: *School Act*, R.S.P.E.I. 1988, c. S-2.1, s. 7(1)(e). Newfoundland: *Schools Act*, 1997, S.N.L. 1997, c. S-12.2, s. 75(1)(d).

rather, is how to measure the adequacy of the accommodation that the school board does provide. Is it measured against the optimum program recommended by experts? If this is the standard, it is unlikely that it could be met by *any* public education programs, whether typical or special. Or is it whether the special education program offered by the public school is “as good as” the program offered by the best private school? This is an issue that presents itself to all parents, whether or not their children have special education needs, who consider whether to place their child in a private school. Or is it an expectation that the accommodation will put the student in the position she would have been in had she not had a disability “by comparing the achievement of a disabled student to the achievement of his or her nondisabled peers”,²² a standard of accommodation that may not be possible to meet for children with certain complex disabilities including some cognitive disabilities? Or is it an expectation that the accommodation will provide an equivalent opportunity to access the program offered in public school to non-disabled students,²³ however that is to be measured?

Moore arose under the British Columbia *Human Rights Code*, which prohibits discrimination in the provision of services customarily available to the public. As the challenge was framed as a matter of discrimination, the standard to measure adequacy of the accommodation had to bear some relationship to “equality”. The proper comparison for the equality analysis was, in part, where the Supreme Court of Canada disagreed with the British Columbia courts. Significantly, American jurisprudence has expressly rejected “equality” as the appropriate standard to be applied under IDEA, stating that this would “present an entirely unworkable standard requiring impossible measurement and comparisons”:

Yukon: *Education Act*, R.S.Y. 2002, c. 61, s. 15. Northwest Territories: *Education Act*, S.N.W.T. 1995, c. 28, s. 7. Nunavut: *Education Act*, S. Nu. 2008, c. 15, s. 41(1).

²² Judith Deberry, “Comment: When Parents and Educators Clash: Are Special Education Students Entitled to a Cadillac Education?” (2003) 34 St. Mary’s L.J. 503, at 524, 534 [hereinafter “Deberry”].

²³ See Mark C. Weber, “Common-Law Interpretation of Appropriate Education: The Road Not Taken in Rowley” (2012) 41 J.L. & Educ. 95, at 110-15. Requiring the provision of an education that enables a child with a disability to “achieve his or her full potential” would fail to recognize that “even the best public schools rarely have the resources to enable every child to reach his or her full potential” (at 115).

The educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom. The requirement that States provide "equal" educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons ... The theme of the Act is "free appropriate public education," a phrase which is too complex to be captured by the word "equal" whether one is speaking of opportunities or services.²⁴

Instead, the United States Supreme Court has interpreted FAPE as requiring only that the program offer "some educational benefit"; as long as a disabled child is receiving "some educational benefit" from his or her education, the requirement of FAPE will be met.²⁵ While access to education must be made meaningful, this does not require a school board to maximize the potential of disabled students commensurate with the opportunity provided other students, or to provide a specified program even if it may offer superior results.²⁶ This limited duty in turn limits the potential liability of school boards to pay for private schools under IDEA. The question is whether the standard of accommodation established by the Supreme Court of Canada in *Moore* is more demanding than the standard under IDEA, potentially making public payment of private school tuition more available in Canada than it is in the United States.

III. *MOORE V. BRITISH COLUMBIA*

At first blush, *Moore v. British Columbia* does not appear to be about public funding of private schools. In our view, however, the Human Rights Tribunal remedy upheld by the Supreme Court of Canada, with virtually no comment and no examination of its implications, is exactly that: a voucher for private school tuition. The remedy ordered in that case — reimbursement of nine years of private school tuition (from Grades 4 to 12) — bears no relation to the perceived inadequacy of the special

²⁴ *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, at 198-99 (1982).

²⁵ *Id.*, at 201-202. For a general discussion of the *Rowley* case and its progeny, see T. Daris Isbell, "Making Up for Lost Educational Opportunities" (2010-2011) 76 Brook. L.R. 1717, at 1728-49.

²⁶ Deberry, *supra*, note 22, at 534-35.

education program actually offered by the school board in this case, nor did it accomplish its purported goal of providing access to the public education system. This remedy has profound implications beyond the interests of the individual student and the impact of a single order for payment of private school tuition. As a result of the Supreme Court's decision in *Moore*, private school tuition payment orders have the potential to become a widely sought alternative to accommodation within the public school system.

1. Human Rights Tribunal Decision

The *Moore* case concerned a student, Jeffrey, with a severe learning disability (dyslexia) that prevented him from learning to read and write through standard teaching methods. He attended the public school system from kindergarten to Grade 3, where, as a result of several assessments, various special supports were provided to help him to learn to read and write. In Grades 1 and 2 these supports included individual help from a teaching aide and attending a Learning Assistance Centre three times a week for half-hour individual sessions with a learning assistance teacher and a volunteer tutor. He continued to make poor progress in Grades 1 and 2, and underwent a full psycho-educational assessment in Grade 2. Following this assessment the school board psychologist "concluded that Jeffrey needed more intensive remediation than he had been receiving and suggested that he attend the Diagnostic Centre".²⁷

The Diagnostic Centre ("DC1") was operated by the District School Board from 1976 to 1994, and offered intensive remediation to severely learning disabled students. It consisted of three teachers and up to 18 learning disabled students who were enrolled in a segregated program for three or four months in one of the DC1 classes. In addition, the DC1 teachers would work one day per week with classroom and learning assistance teachers after the student returned to his or her home school. This follow-up continued for two years. The District was the only one in British Columbia to offer a segregated program for students with dyslexia.²⁸

Jeffrey Moore did not attend the DC1 in Grade 3, however, because the District School Board closed it that year. Instead he was provided

²⁷ *Moore* BCHRT, *supra*, note 3, at para. 13.

²⁸ *Moore* SC, *supra*, note 4, at para. 21.

with approximately five hours per week of individual special education supports in his current school consisting of two 30-minute sessions of individual instruction 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 per week of individual instruction from a teacher's aide in the classroom. After Jeffrey completed Grade 3, the Moores withdrew him from the public school and placed him at Kenneth Gordon School, a private school specializing in teaching students with learning disabilities from Grades 4 to 7. Jeffrey Moore never returned to public school, and graduated from Grade 12 at the Fraser Academy, another private school specializing in children with disabilities.²⁹

The evidence before the Tribunal was that the District School Board closed the DC1 in 1995 for financial reasons. The DC1 cost the Board \$292,500 per year to operate. The District School Board blamed its decision to close the DC1 on "underfunding" by the province. The Board did not consider the DC1 model to be financially sustainable, and, given the philosophy of integration or inclusion,³⁰ expected that the services provided by the DC1 could be provided in the neighbourhood schools through individual support from specialized aides in the classroom.³¹

The central legal question was whether Jeffrey had been discriminated against contrary to section 8 of the British Columbia *Human Rights Code* because he had been denied a "service ... customarily available to the public" on the basis of disability.³²

The Tribunal held that the special education program offered by the school board after the closure of the DC1 was not sufficient for Jeffrey's needs, and "concluded that there was both individual and systemic discrimination against Jeffrey and systemic discrimination against Severe

²⁹ *Moore SCC*, *supra*, note 1, at paras. 15, 16.

³⁰ The evidence before the Tribunal did not support segregated facilities for SLD students, but indicated that the critical issue was level of support provided regardless of the location. *Moore SC*, *supra*, note 4, at paras. 14, 68. At the time these facts arose, many parents of children with disabilities were advocating for integrated settings as the presumptive placement required by Charter s. 15(1). See *Eaton v. Brant County Board of Education*, [1996] S.C.J. No. 98, [1997] 1 S.C.R. 241 (S.C.C.) [hereinafter "*Eaton*"].

³¹ *Moore SC*, *id.*, at paras. 68-70.

³² Section 8 of the British Columbia *Human Rights Code*, R.S.B.C. 1996, c. 210, states that it is discriminatory if a "person ... without a bona fide and reasonable justification ... den[ies] to a person or class of persons any accommodation, service or facility customarily available to the public" on the basis of a prohibited ground.

Learning Disabilities (“SLD”) students in general”.³³ It ordered that the Moores be reimbursed for the costs related to Jeffrey’s attendance at private schools (tuition and half his transportation costs) from Grade 4 until the end of Grade 12. Both the District School Board and the Ministry of Education were held responsible for these damages; the District School Board because, *inter alia*, it did not follow its own staff’s recommendation that Jeffrey attend the DC1 and it did not ensure that, following the closure of the DC1, other sufficiently intense and effective interventions were in place to replace it. While the Tribunal expressed sympathy for the Board’s “compelling”³⁴ financial circumstances, it nonetheless concluded that the District School Board had failed to “reasonably consider a range of alternatives to meet the needs of SLD students before cutting available services”.³⁵ Among the alternatives it failed to consider was cutting funding to the District School Board’s “Outdoor School”, which was a program available to all District students but “was not part of the core educational services”.³⁶

With respect to the Ministry, the Tribunal concluded that it had failed to provide adequate funding to the District School Board and had failed to monitor the Board’s decisions to ensure that the appropriate special education programs were available to SLD students. Accordingly, it found that the Ministry was jointly and severally liable for the damages award.

The Tribunal also ordered what it called “systemic remedies” against the Ministry. These remedies gave the Ministry one year to:

- a) make available funding for SLD students at actual incidence levels;
- b) establish mechanisms for determining that the support and accommodation services delivered to SLD students are appropriate and meet the stated goals of the *School Act* and the *Special Needs Student Order*;

³³ *Moore SCC*, *supra*, note 1, at para. 20.

³⁴ *Moore BCHRT*, *supra*, note 3, at para. 931. The Board was permitted to run a deficit of \$1.8 million in 1991/92 on the condition that it balance its budget by 1994. It began the 1994/95 school year with a \$1.12 million deficit, *Moore SC*, *supra*, note 4, at paras. 64–66.

³⁵ *Moore BCHRT*, *supra*, note 3, at para. 938.

³⁶ *Moore BCHRT*, *id.* The Tribunal also concluded that the District School Board had failed to assess Jeffrey at an earlier stage, although this finding was quashed by the British Columbia Supreme Court and this part of the BCSC’s decision was not appealed and was therefore not before the SCC, *Moore SCC*, *supra*, note 1, at para. 40.

- c) ensure that all districts have in place early intervention programs so that SLD students can be identified early and appropriate intensive remediation services provided; and
- d) ensure that all school districts have in place a range of services to meet the needs of SLD students.³⁷

While it made these systemic orders, the Tribunal declined to “direct how the Ministry is to comply with the above orders”.³⁸

2. British Columbia Courts

The British Columbia Supreme Court allowed the application for judicial review. The Court found that Jeffrey “should be compared to other special needs students, not to the general student population as the Tribunal had done”.³⁹ There was no evidence that Jeffrey had been discriminated against as compared to other students who required special education programs,⁴⁰ and therefore the finding of differential treatment had not been established. A majority of the Court of Appeal confirmed the British Columbia Supreme Court’s ruling, agreeing that the appropriate comparator group was other special needs students, not the general student population. In this regard, the Court of Appeal noted that “Jeffrey Moore received more special education services than any other student in his school”.⁴¹ Neither court found it necessary to consider the Tribunal’s remedial orders since they both rejected the finding of discrimination.

³⁷ *Moore* BCHRT, *id.*, at para. 1015.

³⁸ *Id.*, at para. 1016.

³⁹ *Moore* SCC, *supra*, note 1, at para. 23. See *Moore* SC, *supra*, note 4, at paras. 131, 139: “Did other special needs students receive supports or accommodations that Moore did not receive?”

⁴⁰ *Moore* SC, *id.*, at para. 147:

There is no basis upon which this Court could infer that other special needs students were provided with special education programs so unique to their needs that academic literature was scrutinized for options to promote individual potential and then those optimal new programs were implemented regardless of whether they had been integrated into teacher education or the general public education plan.

⁴¹ *Moore* CA, *supra*, note 4, at para. 75.

3. Supreme Court of Canada

(a) Substantive Analysis

The Supreme Court described the “central issue” in this case as “what the relevant ‘service ... customarily available to the public’ was”.⁴² While the Tribunal and the dissenting judge in the Court of Appeal defined the service as “general” education, the reviewing judge and the Court of Appeal majority defined it as “special” education. Justice Abella agreed with the former, noting that “for students with learning disabilities ... special education is not a service, it is the *means* by which those students get meaningful access to the general education services available to all British Columbia students”.⁴³ While we are in agreement with this analysis, it is important to qualify this description of the service by noting that the service is not just a “general education”, but a general *public school* education, a factor which should be relevant at each stage of the equality and remedial analysis.

While comparing the special education program that Jeffrey was getting to the special education programs available to other students with disabilities may be a relevant consideration, we agree with the Supreme Court of Canada that it cannot be the primary basis of the comparison in this case. As Abella J. recognizes, limiting the analysis exclusively to this comparison would permit the District School Board to “cut *all* special needs programs and yet be immune from a claim of discrimination”.⁴⁴ The fact that a student or group of students has received the same or even more services than other students with disabilities does not tell us whether any of those students have been appropriately accommodated through an equitable allocation of the resources available to the board. Students who require more support should receive more accommodation than students who need less support, and the mere fact that a student gets more than others does not foreclose the inquiry into whether what that student has received is appropriate. On the other hand, there is always a concern that a Human Rights Tribunal (or a court) will focus exclusively

⁴² Moore SCC, *supra*, note 1, at para. 27, quoting from s. 8 of the British Columbia *Human Rights Code* (see *supra*, note 32).

⁴³ Moore, SCC, *supra*, note 1, at para. 28.

⁴⁴ *Id.*, at para. 30 (emphasis in original).

on the complainant before it,⁴⁵ and assess the duty to accommodate without regard to the competing needs of other disabled students who are not parties to the claim. All of these cases would be relatively simple if the school board had only one special education student to accommodate.

Having determined that the service in question is general education, the Court held that the standard required by the Code was “[m]eaningful access to the educational opportunities offered by the Board”.⁴⁶ In describing what this standard means in the context of special education, the Court referred to the familiar example of a ramp as a metaphor for all special education services. But the ramp analogy is of limited assistance in answering the difficult questions of what is required to achieve “meaningful access” for students with learning disabilities and other disabilities that require accommodation to the educational program itself. A ramp simply removes a physical barrier to accessing the same school building, programs and services that other students use. It does not give better access, or better or different programs and services to those who use it. It can be difficult to draw the line between what is an accommodation that must be given to provide “meaningful access” to a service available to all, and what is a special, different or enhanced service that government may choose to give in allocating resources among deserving groups. As the Court held in *Eldridge*, the right to “meaningful access” to medical and hospital services required the provision of sign-language interpretation, but not hearing aids, as that would be a discrete service or product that would go beyond ensuring access to the particular service at issue and instead “alleviate general disadvantage”.⁴⁷

The Court gave mixed signals about what the standard of “meaningful access” requires in the context of special education. On the one hand, it stated that what is required is “adequate” special education, and that is not measured by the result that the student achieves, as a board may have

⁴⁵ Donna Greschner & Steven Lewis, “*Auton* and Evidence-Based Decision Making: Medicare and Courts” (2003) 82 Can. Bar Rev. 501, at 507-508:

[G]overnment departments are better equipped than courts to manage complex programs and use resources effectively ... Moreover, they have the major advantage of perspective: they not only can, but must consider the needs of all patients, compare the sometimes incommensurable and make often tragic trade-offs. In contrast, courts run a higher risk of telescopic vision: focussing on the case before them magnifies that case, and removes other needs and problems from their field of vision.

⁴⁶ *Moore* SCC, *supra*, note 1, at para. 4.

⁴⁷ *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624, at paras. 78, 92 (S.C.C.).

done what was necessary to give access, “yet the hoped-for results did not follow”.⁴⁸ Nor is it determined by whether broad, aspirational policy statements of governments or boards have been met; these “may not reflect realistic objectives” and therefore “a margin of deference is, as a result, owed to governments and administrators in implementing these broad, aspirational policies”.⁴⁹

On the other hand, the Court also referred to Tribunal findings that certain programs “would have benefitted” Jeffrey and were not available. The Court also appeared to support the view that the District School Board ought to have sacrificed the Outdoor School and retained the Diagnostic Centre, as “specialized and discretionary initiatives cannot be compared with the accommodations necessary in order to make the core curriculum accessible to severely learning disabled students”.⁵⁰

The Court did qualify this statement by indicating that the more significant flaw in the Board’s decision-making was that it undertook no assessment of what alternatives would be available if the Diagnostic Centre were to close.⁵¹ This aspect of the Court decision recognizes the reality that every transfer payment agency can legitimately make a claim to having a “funding shortfall”, but cannot use this as an excuse to allocate its available resources in a discriminatory way. The Supreme Court of Canada’s decision indicates that, at the very least, this requires the District School Board to enter into a genuine process to properly consider the consequences of its allocation decision, and suggests that had the Board actually given proper consideration to these consequences and still come to the same conclusion, the result of the case may well have been different. In this regard, it is important to remember that the facts of this case arose in 1994-1995, and school boards and other public institutions have (we hope) come a long way since then in ensuring that their decision-making process takes into account their obligations to accommodate persons with disabilities. As a 2012 judicial review of a 1994 school board decision, the *Moore* case may prove to be little more than an anachronism.

If “meaningful access” required the provision of all special education programs or services that “would benefit” a student, it would not only

⁴⁸ *Moore* SCC, *supra*, note 1, at para. 35.

⁴⁹ *Id.*

⁵⁰ *Id.*, at para. 51, quoting Rowles J.A. in *Moore* CA, *supra*, note 4, at para. 154.

⁵¹ *Id.*, at paras. 46 and 52.

impose unlimited and unrealizable requirements on Boards, but would also bear no relation to the public education service available in the public system, which does not provide students with all programs that would benefit them. While we do not suggest that the Supreme Court has endorsed this extreme view, if “meaningful access” means that all non-core programs must be eliminated before cuts are made to special education programs, this could severely impact a Board’s ability to allocate its funds among all programs. Given the undefined and potentially unlimited demand for special education services, this could have a significant effect on arts, music, physical education and other “non-core programs” that benefit all students of the Board. This extreme scenario illustrates the difficulties with this kind of discrimination standard, which would require human rights tribunals to delve deeply into education policy and funding allocation decisions and would require findings about the benefits of so-called non-core, core and special education programs for all students, including students receiving special education services, as part of the general education program.

In *Moore*, certain “bad facts” found by the Tribunal and relied on by the Supreme Court (these findings of fact were not the subject of the appeal to the Supreme Court) gave a strong evidentiary basis for the Court’s finding that the programs and services offered by the District School Board to Jeffrey after the closure of the Diagnostic Centre were “far from adequate”. Those findings, supported by the testimony of District School Board employees, were that Jeffrey required intensive remediation, that the services available through the District provided insufficient intensive remediation to meet his needs, and that such services were only available in private schools. The strong adverse factual findings about the insufficiency of the services available to Jeffrey, given his needs, grounded the Court’s conclusion that, in this case, Jeffrey had been denied meaningful access to general education available to other students. The Court has otherwise provided very little guidance on the very difficult and education policy-laden question of what will constitute “inadequate” special education that denies “meaningful access” to the publicly funded general education system. Parents and school boards may well disagree on what these inchoate standards require in individual cases. We hope that in interpreting and applying these standards in the future, the broader education policy issues that public schools face in delivering meaningful education to all students, including students with special education needs, will be given their proper consideration.

(b) Remedial Analysis

(i) Damages

The Supreme Court upheld the damages claim against the District School Board⁵² with virtually no analysis, stating simply that remedial decisions by the Tribunal are subject to a standard of patent unreasonableness, and that “this order ... is sustainable given the actual scope of the complaint”.⁵³ There are, however, in our view, several serious concerns with this damages award, both as a matter of principle and as an assessment of quantum.

Our first concern is that the damages remedy transforms the *Human Rights Code* into a provincial equivalent of the United States IDEA statute by authorizing a Human Rights Tribunal to “require the district to reimburse the parents for the cost of the private education”.⁵⁴ The decision whether to fund private schools or offer tuition vouchers to parents who opt out of the public school system is a policy choice for governments to make. As indicated above, all provinces in Canada have decided to dedicate all or the bulk of public education funding to the public school system as the best way to ensure that public schools have the resources available to provide educational programs to all students, including students with special education needs. The damages remedy permits the Tribunal to circumvent the thrust of provincial education policy and creates a private school “voucher” that will siphon resources from the public school system.

There is a second principled objection to remedying the public school system’s inadequate accommodation through private school tuition reimbursement. Private schools may provide enhanced programs, services, ancillary benefits and facilities that are not available in any public school, and that may not be “accommodation” for a student’s disability-based needs. As a result, the tuition charged to parents in private schools may far exceed the per-student funding available to all other

⁵² The amount of tuition to attend private school up to and including Grade 12, one-half the costs incurred for transportation to those schools and \$10,000 for “the injury to dignity, feelings and self-respect”: *Moore* BCHRT, *supra*, note 3, at para. 1022.

⁵³ *Moore* SCC, *supra*, note 1, at para. 55. For a discussion of the meaning of the phrase “patent unreasonableness”, see *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190 (S.C.C.) [hereinafter “*Dunsmuir*”], and discussion at note 93, *infra*.

⁵⁴ *Burlington*, *supra*, note 15, at 370; *Forest Grove*, *supra*, note 15, at 232.

students, with or without special needs, in public schools. Ordering payment of private school tuition imposes a standard of accommodation that bears no relationship with the education provided to students in the public school system. Instead of reasonably accommodating a student's needs within the multiple demands and fiscal and human resource limits and constraints of the public school system, a private school tuition payment voucher gives the student a different kind of education benefit that is not equivalent to what other public school students receive.

Private schools are not subject to significant public oversight and do not have the same obligations as public schools to provide services to all students with all educational needs. Private schools may specialize in particular kinds of learning disabilities, and may reject students whose disabilities do not fit within their area of specialization or whose disabilities are too serious to be accommodated by the private school.⁵⁵ Public schools do not have this option. In addition, we now expect that most children with disabilities will be integrated within the regular classroom,⁵⁶ so that public school teachers may need to teach a broad range and ever-changing student population with a variety of disabilities.

Given these circumstances, it is not surprising that some parents may find a private school that, in their view, offers a better or more specialized program for their child. But this observation may be made about parents of all children, regardless of whether they have "special education" needs. That is one reason many parents are prepared to spend in excess of \$30,000 per year tuition for their child to attend the most expensive private schools. In contrast, the average funding provided in the Ontario public school system was approximately \$11,209 per pupil in 2012-2013.⁵⁷ The fiscal reality is that some private schools will be able

⁵⁵ Hensel, *supra*, note 10.

⁵⁶ O. Reg. 181/98 (*Identification and Placement of Exceptional Pupils*), s. 17 provides: When making a placement decision ... the [special education placement and review] committee shall, before considering the option of placement in a special education class, consider whether placement in a regular class, with appropriate special education services, (a) would meet the pupil's needs; and (b) is consistent with parental preferences.

⁵⁷ This average is based on adding the foundation grants (Primary (JK to Grade 3) \$5,528.94, Junior and Intermediate (Grades 4 to 8) \$4,602.92, Secondary (Grades 9 to 12) \$5,747.53), which represented 46.4 per cent of school board funding, and all other capital and special-purpose grants. The special-purpose grants include grants specifically provided to supplement special education programs. It is important to remember that these "average" per-pupil grants are just that — averages — and do not reflect either the variability across the province of the funding flowing to school boards or the actual amount spent by boards on a per-student basis. School boards generally spend more than the average per-pupil amount on students receiving special

to outspend public schools on a per-pupil basis. Ordering public funding for a private school education that does not parallel the public system is not a reasonable accommodation to access the public system; it is instead an award of an entirely different educational benefit and may even be an entirely different type of service.

These concerns are compounded by the Tribunal's order that the tuition be paid not only for Grade 4 (the DC1 was only a two- to four-month program) but from Grades 4 to 12, a total of nine years. It is interesting to examine how the Tribunal arrived at this result. While the case was presented as a denial of access to the public education system, the only remedy ever sought by the complainants was payment of private school tuition. Jeffrey Moore left the public school system at the end of Grade 3 in 1995, but his *Human Rights Code* complaint against the District School Board was first filed in May 1997.⁵⁸ By this time, accommodation of Jeffrey in the public school for Grade 4 was a moot point since he was already completing Grade 5 at the private school. The 43 days of hearing before the Tribunal were drawn out over a number of years (2001, 2002 and 2005) and the reasons of the Tribunal were not handed down until December 21, 2005, by which time Jeffrey had already completed Grade 12. Clearly these kinds of protracted legal proceedings are wholly inadequate if the real goal is to find an appropriate accommodation for a disabled child *within* the public school system. The inference here is that the Human Rights Tribunal, which has no expertise regarding either education or special education, may not be the appropriate tribunal to be making these kinds of decisions. Instead, these proceedings should be brought before a specialized tribunal that can quickly assess parent complaints and order an appropriate placement for the student *within* the public school system. Such specialized processes do exist.⁵⁹ For example, Ontario legislation provides for a

education programs and services, with the actual amount spent reflecting the cost of programs and services for their individual needs. For a detailed explanation of Ontario's funding model, see "Education Funding, Technical Paper, 2012-13, Ministry of Education", <<http://www.edu.gov.on.ca/eng/policyfunding/funding.html>> [hereinafter "Education Funding Technical Paper"].

⁵⁸ The complaint was amended in August 1999 to add the Ministry of Education as a respondent (*Moore SC, supra*, note 4, at para. 3).

⁵⁹ The process which existed in British Columbia in 1995 provided for an appeal to the School Board pursuant to s. 11 of the *School Act*, S.B.C. 1989, c. 61. This appeal process was replaced in 1996 by R.S.B.C. 1996, c. 412, ss. 11-11.8, which established a formal process for appeal of certain s. 11 board decisions to a Superintendent of Achievement within the British Columbia Ministry of Education. If it had been determined that the pre-1996 appeal process was

two-stage appeal process that includes an informal appeal to a Special Education Appeal Board that can make recommendations to the school board, and a formal appeal to a Special Education Tribunal that involves a hearing under the *Statutory Powers Procedures Act*⁶⁰ as prescribed by the *Education Act*.⁶¹

The primary reason the hearing before the Tribunal took so long was because of the “systemic discrimination” complaints brought against the Ministry. The Supreme Court was critical of this aspect of the Tribunal hearing, stating that

it was unnecessary for [the Tribunal] 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.⁶²

By turning itself into a “Royal Commission” and allowing the hearing to run for years, the Tribunal itself made it impossible to provide the only remedy that would achieve substantive equality: access to an appropriate program in the public school system that met the requirements of reasonable accommodation. Damages should not be provided in lieu of accommodation because of delays brought in commencing the claim or because the Tribunal took years to hear and decide the case.

We recognize that an order requiring the school district to provide Jeffrey with better accommodation would have been of little practical benefit, as Jeffrey had already graduated from Grade 12 by the time the Tribunal issued its decision. The Supreme Court may well have been aware of this and tacitly applied the principle that “every right should have a remedy” when it upheld the Tribunal’s private school tuition award in this case. But if so, then it would have been preferable for the Court to clearly articulate this as the basis for its decision, and to indicate that this

inadequate, there may have been some basis for proceeding before the Human Rights Tribunal instead. Neither the Tribunal nor the Supreme Court of Canada, however, gave any consideration to the adequacy of the appeal process in place in 1995.

⁶⁰ R.S.O. 1990, c. S.22.

⁶¹ Ontario *Education Act*, *supra*, note 6, s. 57. The process is described in detail in Brenda Bowlby *et al.*, *An Educator’s Guide to Special Education Law*, 2d ed. (Toronto: Canada Law Book, 2010), at c. 9 and c. 10. See also *Eaton*, *supra*, note 30.

⁶² *Moore SCC*, *supra*, note 1, at para. 64.

was an extraordinary remedy made necessary as a result of the numerous and very lengthy delays in the proceedings before the Tribunal.

Another concern is the Tribunal's decision that once Jeffrey left the public school system in Grade 4 for the intensive remediation offered by the private school, there was no obligation for him to return to the public system after his learning skills improved. The Tribunal's reasons for this were that the private school staff advised Jeffrey's parents that Jeffrey was never ready to return to the public school system, and the Tribunal concluded that "[t]he Moores were entitled to accept this advice from professionals who had worked closely with Jeffrey, understood his needs, and whom they had come to trust".⁶³ According to the Tribunal, therefore, once a student is sent to private school, it is the staff of that school — who have a direct financial interest in the tuition paid to the private school — who decide whether and when a child is ready to return to the public school system. It would not be surprising if private school professionals are of the opinion that the program that they provide is superior to the program provided by the public school system and will recommend that the child remain with the private school. If they did not believe this they could hardly justify charging parents tuition.⁶⁴

Our point, however (and this brings us back to the substantive issue), is that whether the private school program is superior to the public school program is the wrong question for the Tribunal to ask. The question for the Tribunal is to determine the appropriate accommodation for Jeffrey, and to order that that accommodation be provided within the public school system. If the accommodation cannot be provided within the public school system (for example, because of financial, human resource or other limitations), then it is not a reasonable accommodation. Where, as in Ontario, the public school system is statutorily required to provide education to all students, including students who require special education, accommodation in a private school is never a reasonable accommodation.

There are additional reasons why ordering payment of private school tuition is, in our opinion, bad policy. First, the Tribunal tuition payment

⁶³ *Moore* BCHRT, *supra*, note 3, at para. 976; see also para. 979: "Parents of a vulnerable special needs student are entitled to rely on the advice of the experts providing services."

⁶⁴ One might also question the effectiveness of the private school's intensive remediation program if its professionals were of the opinion that Jeffrey could never be reintegrated into the public school system, even with appropriate accommodation.

order presents the school board with a “zero-sum game”. No matter what accommodation the board is prepared to offer, if the accommodation is not 100 per cent of what the Tribunal holds (some years later) should have been provided, the school board becomes responsible for 100 per cent of the cost of private school tuition. The DC1 program was only of two to four months’ duration with a two-year follow-up. Nevertheless, because Jeffrey instead enrolled in private school and stayed in private school to Grade 12, the Board was ordered to pay the full tuition amount for all of those years. If the accommodation offered by the school board is less than adequate, the appropriate remedy is to require the school board to offer better accommodation, a remedy that may cost the board a fraction of the private school tuition.⁶⁵

Second, the Tribunal order establishes a financial incentive to both parents and school boards that may undermine their efforts to arrive at the appropriate accommodation for special-needs students. While accommodation is generally accomplished successfully and with full cooperation between parents and school board professionals, there are certainly instances where parents and school board professionals disagree about the appropriate program or service.⁶⁶ This is especially true in circumstances like the *Moore* case, where the Tribunal itself acknowledged that there was an “educational debate” and “no consensus among experts” on the best way to teach children with dyslexia.⁶⁷

The potential availability of reimbursement for full private school tuition could provide an economic incentive to those relatively affluent parents who can afford the initial financial outlay of tuition to transfer their child to the private school system and to decline offered programs or services from the public system that, in the parents’ view, fall short of what is available in the private school.⁶⁸ If the parents are determined to send their child to the private school, there is an incentive to act

⁶⁵ Even the American IDEA legislation indicates that reimbursement of private school costs may be reduced in cases where a tribunal finds that the school district has provided a child with some special education services but concludes that these services are inadequate: *Forest Grove*, *supra*, note 15, at 242.

⁶⁶ *Eaton*, *supra*, note 30, at paras. 60, 77, 79.

⁶⁷ *Moore* BCHRT, *supra*, note 3, at para. 1013 and *Moore* SC, *supra*, note 4, at paras. 12-13.

⁶⁸ Indeed, there is some evidence that this has been the effect of tuition payment orders under IDEA. See, *e.g.*, Hensel, *supra*, note 10, at 345.

unilaterally and bring a *Human Rights Code* complaint to recoup the cost of private school tuition.⁶⁹

Conversely, school board officials could avoid their duty to accommodate students with disabilities by offering to pay private school tuition to a parent who, in the school board's view, has unrealistic expectations of the public system. If we are serious about accommodating children with disabilities in the public system, then we should not permit public school boards to avoid this responsibility by paying to send children with disabilities to private schools. Indeed, in direct contrast to the United States IDEA legislation, Ontario legislation does not permit public school boards to pay private school tuition as a means of providing special education programs. School boards must "provide or enter into an agreement *with another board* to provide ... special education programs and special education services for its exceptional pupils".⁷⁰ There is no authority to enter into such an agreement with a private school.

The incentive to school boards to decline accommodation would be compounded if, as originally ordered by the Tribunal in this case, the Ministry of Education is also responsible for the payment of the private school tuition. To the extent that the tuition payments come directly from provincial budgets rather than the school board budget, school boards could actually save money by refusing to accommodate students with special needs within their schools.

The Supreme Court of Canada concluded that the Tribunal had gone too far in ordering the Ministry liable for any damages. While the Court recognized that the "District's budgetary crisis was created, at least in part, by the Province's funding shortfalls",⁷¹ this did not negate the fact that it is the District School Board that has the ultimate responsibility for allocating whatever resources it has in a non-discriminatory fashion: "it was the

⁶⁹ If you think that private school vouchers are a good public policy (and many people do), this would not be the best way to implement such a policy because it makes the voucher available only to those parents who can afford to pay the private tuition upfront and hope to be reimbursed. Less affluent parents who cannot afford the initial outlay of tuition will have no choice but to remain in the public system. If private school vouchers are to be made available, they should be available to all parents without regard to their ability to pay private tuition in advance of a hoped-for damages award.

⁷⁰ *Ontario Education Act*, *supra*, note 6, s. 170(1)7 (emphasis added). The *Quebec Education Act*, *supra*, note 21, s. 213 does authorize school boards to make agreements with privately funded schools for the provision of instructional services and/or for "the provision of student services and special educational services, literacy services or popular education services".

⁷¹ *Moore SCC*, *supra*, note 1, at para. 54.

District which failed to properly consider the consequences of closing the Diagnostic Centre or how to accommodate the affected students”.⁷²

(ii) Systemic Remedies

This then brings us to the decision of the Supreme Court of Canada to reverse the two “systemic” remedies ordered by the Tribunal against the Ministry. The funding mechanism employed by the province — “block funding” versus “incidence funding” — was a central issue at the Tribunal and resulted in one of the Tribunal’s systemic orders against the province. The Supreme Court rejected the Tribunal’s order that the Ministry “make available funding for SLD students at actual incidence levels” on the basis that the connection between the province’s funding mechanism and the closure of the Diagnostic Centre “is remote, given the range of factors that led to the District’s budgetary crisis”.⁷³ As explained below, any funding mechanism can result in higher or lower funding depending on the level of funding and a host of other variables that must be taken into account. The Court also recognized the province’s interest in establishing a funding mechanism that will “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”.⁷⁴

This point merits further discussion because it has wider implications for a variety of large government programs. While education funding is a highly complex policy area with multiple funding mechanisms at play, the following simplified explanation may be helpful to understand this issue. “Incidence funding” requires the school board to identify and report the actual number of students with severe learning disabilities (“SLD”) within the board, and funding by the province is based on the number of SLD students reported by each board multiplied by a per-student grant.

The per-student grant generated by incidence funding is not “customized” to the needs of a specific student, but is a fixed per-student amount set by the province. Accordingly, the total funding received by the school board will depend upon the grant amount set by the province: higher per-pupil grants will result in more funding, while lower per-pupil grants will

⁷² *Id.*

⁷³ *Moore SCC*, *supra*, note 1, at para. 65.

⁷⁴ *Id.*

result in less.⁷⁵ While special education grants must be spent on special education, the grants generated are not earmarked for any particular student, and the District School Board is responsible for allocating whatever revenue is generated by these grants among all of the special education students in the District.

The difficulty with incidence funding was that it required the school board to provide the province with a claim for every SLD student to qualify for supplemental funding, and these reports consumed professional resources that could have been better spent providing services to the student. In addition, it was difficult for the Ministry to come up with a clear, concise definition of eligibility for SLD funding, which made it difficult for the Ministry to verify the funding claims made by the District Board.⁷⁶ Definitions could not be as simple as a diagnosis, because many learning disabilities, including dyslexia, are of varying severity; some students with dyslexia will have a mild learning disability, while others with the same diagnosis will have a severe learning disability, a distinction that may not be apparent until a child matures.⁷⁷ This definition/verification issue became a concern as the number of SLD students being reported by some school boards began to escalate rapidly. Finally, there was evidence that the incidence of SLD students was fairly uniform across the province,⁷⁸ so it made more sense to dispense with the costs (both financial and time) of providing and verifying the claims, and just provide all boards with stable funding based on the uniform incidence of SLD students. This is referred to as “block funding”. Like incidence funding, the amount of revenue generated by block funding depends primarily on the grant rate set by the province. It also depends on the uniform incidence level chosen by the province. The uniform incidence level depends in turn on how SLD students are defined.⁷⁹ There is nothing inherent in either funding mechanism to ensure any particular level

⁷⁵ Prior to the establishment of provincial grant based funding formulas, most school boards were funded primarily from local property taxes, and revenue was tied to assessment wealth; assessment-rich school boards were able to spend considerably more money per student than assessment-poor school boards at the same or lower tax effort. The ability to fund different levels of spending was not related to student need, see *OECA v. Ontario*, [2001] S.C.J. No. 14, [2001] 1 S.C.R. 470 (S.C.C.) [“*OECA*”].

⁷⁶ *Moore* BCHRT, *supra*, note 3, at paras. 199, 218-219.

⁷⁷ *Id.*, at para. 10 and *Moore* SC, *supra*, note 4, at paras. 7, 10-13, 20, 27.

⁷⁸ *Moore* SC, *id.*, at paras. 54-55.

⁷⁹ Assuming that an objective definition could be found, the “actual” incidence level would also depend upon how “SLD” is defined by the province.

of funding, nor does one mechanism guarantee a higher level of funding than another.

This account is a simplified explanation of two funding mechanisms, and the funding mechanism actually employed by the British Columbia government had certain features of both. The specific details of these mechanisms cover many pages of complex regulations. Details aside, there are three points to remember, whichever funding mechanism is used: (1) school boards have finite budgets that are established by the province, which sets the grant rate; (2) it is the responsibility of the school board to figure out how to allocate this finite budget that it receives from the province; and (3) the school board will not have enough money to provide all the educational programs and services that parents want or education experts recommend.⁸⁰

Education funding is a multibillion-dollar endeavour. In 2012-2013, for example, funding to school boards in Ontario through the provincial grant formula amounted to nearly \$21 billion.⁸¹ Of this amount, over \$2.5 billion was earmarked specifically for special education programs and services.⁸² Over 300,000 students (out of a total of 1.8 million) in Ontario's publicly funded system receive special education programs and services. The Supreme Court of Canada has consistently held that equality in the design of such broadly based government programs does not require perfect correspondence.⁸³ It is unrealistic to demand that any province accurately calculate the "actual incidence" and individual needs of these hundreds of thousands of students and base its allocation of billions of dollars in special education funds to school boards on such individualized assessments.

⁸⁰ District School Boards are not permitted to run deficit budgets without provincial approval: B.C. *School Act*, *supra*, note 21, s. 127(2). The same requirement applies in Ontario: see Ontario *Education Act*, *supra*, note 6, s. 232(3), (4). See also *Ward v. Ontario (Attorney General)*, [2003] O.J. No. 935, 104 C.R.R. (2d) 189 (Ont. S.C.J.), in which public school trustees brought an unsuccessful Charter challenge to these provisions.

⁸¹ Education Funding Technical Paper, *supra*, note 57, at 13.

⁸² *Id.*, at 29. Since most special education students are integrated within the regular classroom, they are also the beneficiaries of the grant money that funds all other educational programs such as classroom teachers, education assistants, textbooks and learning materials, classroom supplies, *etc.* While special education grants can be used only for special education programs and services, special education students (in both integrated and congregated placements) do access programs and services available to all other students.

⁸³ *Martin v. Nova Scotia (Workers' Compensation Board)*, [2003] S.C.J. No. 54, [2003] 2 S.C.R. 504, at para. 82 (S.C.C.); *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429, at para. 55 (S.C.C.).

While a recital of the recent history and details of Ontario's funding formula is beyond the scope of this paper, Ontario's experience with allocating special-education funding to school boards based on individual actual incidence claims by school boards was very similar to that in British Columbia. Following the introduction of the new education grant formula in 1998, Ontario tried to establish a process that would enable it to fund severe learning disabilities on an actual incidence basis. In order to provide funding on an "actual incidence level", the provincial government had to establish a process for validating or verifying school board claims, as the fairness of the allocation depends on the application of criteria, the accuracy of claims and the capacity of boards to submit claims for all potential claimants. Ontario's validation process evolved over several years,⁸⁴ but was criticized by school board officials and professional educators because it diverted human and financial resources from providing programs and services to students, and because consistent, objective verification of actual incidence levels across boards proved elusive. Based on this experience, Ontario largely abandoned the claims-based process in 2005⁸⁵ and has moved toward a system of proxy or "block" funding that better ensures that the needed grants are provided in a timely and efficient manner and that available funds go to programs and services rather than administration.

The British Columbia Human Rights Tribunal had also concluded that the Ministry's responsibilities extended to ensuring the appropriateness of special education programs and services at the individual level, holding that the Ministry "failed to ensure that Jeffrey's needs were appropriately accommodated in the District" and that the Ministry "does not audit to ensure that districts' special programs meet the needs of individual students or groups of students".⁸⁶ Based on this finding, the Tribunal ordered the government to "establish mechanisms for determining that the support and accommodation services delivered to SLD students are appropriate" and to "ensure that all school districts have in

⁸⁴ *Student Focused Funding – Legislative Grants for the School Board 1998-1999 Fiscal Year*, O. Reg. 287/98 [revoked]; *Student Focused Funding – Legislative Grants for the School Board 2003-2004 Fiscal Year*, O. Reg. 139/03 [revoked].

⁸⁵ *Grants for Student Needs – Legislative Grants for the 2004-2005 School Board Fiscal Year*, O. Reg. 145/04 [revoked]; *Grants for Student Needs – Legislative Grants for the 2005-2006 School Board Fiscal Year*, O. Reg. 400/05; *Grants for Student Needs – Legislative Grants for the 2006-2007 School Board Fiscal Year*, O. Reg. 341/06 [revoked].

⁸⁶ *Moore* BCHRT, *supra*, note 3, at paras. 827, 880.

place a range of services to meet the needs of SLD students”.⁸⁷ This order would have centralized the structure for the delivery of special education by requiring the Ministry to assume a direct role in the design, delivery, oversight and audit of individual special education programs and services, a role that is now undertaken by local school boards.⁸⁸

The Supreme Court of Canada reversed this ruling without any comment or analysis beyond its brief explanation as to why systemic orders were not an appropriate remedy in this case.⁸⁹ This particular remedy, however, merits more analysis because it demonstrates one of the dangers of giving administrative tribunals the jurisdiction to order broad systemic remedies that can fundamentally reshape important social programs subject to judicial review only on the basis of reasonableness.

As a general policy, every province in Canada has determined that special education is most appropriately delivered and monitored at the local level by the school board.⁹⁰ This decentralized structure reflects the consensus view that the needs of individual students are best addressed at the local level, where school board staff of professional educators and consultants who are most familiar with a student’s individual strengths and needs can make decisions about appropriate special education services for that student. It also recognizes that school boards have experience and expertise in designing and delivering special education programs.

The decentralized structure for the delivery of special education also allows school boards to develop special education placement options, programs and services in a manner that reflects local needs, resources and circumstances. In Ontario,⁹¹ school boards have different approaches to placement options and offer different programs and services based on various local and board-specific factors. For example, where a congregated class is the appropriate or preferable placement, it may be easier

⁸⁷ *Id.*, at paras. 827, 880, 1015.

⁸⁸ We would argue that the Ministry had already established “a mechanism for determining that the support and accommodation services delivered to SLD students are appropriate” by establishing local school boards staffed by professional educators to make these decisions at the local level — but this is exactly the mechanism that the Tribunal found to be a source of systemic discrimination.

⁸⁹ *Moore SCC*, *supra*, note 1, at paras. 64-66.

⁹⁰ See provincial legislation, *supra*, note 21.

⁹¹ As indicated above, there are over 300,000 students across 72 school boards receiving special education services and programs in Ontario’s public school system.

for school boards in urban areas to congregate students in self-contained classes than it is for school boards in rural northern areas where two or more students with a particular type of exceptionality and similar needs may live a considerable distance away from one another. School boards may also have differing philosophies when it comes to placement options for exceptional students.

There is a considerable risk that shifting responsibility to the Ministry for the oversight and evaluation of all individual special education programs would lead to an ineffective and unworkable structure overseen by officials who are not in a position to know a student's individual needs or strengths, or the resources that may be available to any particular board given the wide variety of circumstances across the province.

Yet the British Columbia Human Rights Tribunal seems to have perceived greater centralization of special education as a panacea, even though it referred to no evidence and offered no reasoned analysis as to how the shift in responsibility from the school board to the Ministry would eliminate the discrimination it identified. The Tribunal, which acknowledged itself as having "no inherent expertise in the appropriate pedagogical approach to remediating SLDs",⁹² imposed a systemic remedy without any evidence to support, or any consideration of, the efficacy or utility of such a systemic change.

The Supreme Court of Canada held that this remedy did not even meet the reasonableness standard to which the remedial decisions of the Tribunal were subject.⁹³ While we agree with that assessment, we note that challenging a tribunal decision on the basis that it is unreasonable is a notoriously difficult standard to meet. While reasonableness may be the appropriate standard in cases where a tribunal acts within its area of primary expertise and imposes a remedy that has little or no impact beyond an individual employer, landlord or service provider, it is not appropriate in cases where a tribunal imposes a broad systemic remedy that requires

⁹² Moore BCHRT, *supra*, note 3, at para. 1014.

⁹³ Moore SCC, *supra*, note 1, at paras. 55, 57. The standard of review for remedial decisions of the British Columbia Human Rights Tribunal is "patently unreasonable". See *Administrative Tribunals Act*, S.B.C. 2004, c. 45, s. 59. "Patently unreasonable" has been assimilated or "collapsed" into the single standard of reasonableness (see *Dunsmuir*, *supra*, note 53, at paras. 44, 45). Section 45.8 of the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19 also establishes "patent unreasonableness" as the standard of review for Human Rights Tribunal decisions: "[A] decision of the Tribunal is final and not subject to appeal and shall not be altered or set aside in an application for judicial review or in any other proceeding unless the decision is patently unreasonable."

vague but fundamental changes to the delivery of public programs and services and that will have a broad impact beyond the parties to the particular proceeding. In such cases tribunals should be held to a standard of correctness, just as courts are when they impose similar remedies under the Charter. The degree to which public school governance should be centralized or decentralized has been a perennially controversial issue.⁹⁴ The *Moore* case demonstrates the potential danger of permitting such issues to be determined by a single Human Rights Tribunal chair in a single case, so long as she is not acting unreasonably. The public policy stakes are just too high, and this sort of systemic remedy, if it is within the jurisdiction of a Human Rights Tribunal at all, should be reviewable on a correctness standard.⁹⁵

IV. CONCLUSION

All parents want the best possible education for their children. The unavoidable reality of the public school system, however, is that, whatever its many strengths, school boards have the unenviable task of allocating their limited budget in a world of unlimited demand. That is why the substantive and remedial analyses in cases like *Moore* are inextricably intertwined. If, on the one hand, the goal of special education programs is to provide children with disabilities access to the public school system, then the Supreme Court of Canada's decision in *Moore* does little to advance that cause. Neither the Court's substantive analysis of "meaningful access" nor its approval of the reimbursement of nine years of private school tuition provides guidance to tribunals tasked with determining how a child with disabilities might be accommodated within the public school in future cases where parents and the school board disagree. If, on the other hand, our society believes that a private school voucher is an appropriate alternative to accommodation within the public school system, provincial governments should be encouraged to

⁹⁴ See *OECTA, supra*, note 75; *Public School Boards Assn. v. Alberta*, [2000] S.C.J. No. 45, [2000] 2 S.C.R. 409 (S.C.); *Ontario Public School Boards Assn. v. Ontario (Attorney General)*, [1997] O.J. No. 3184, 151 D.L.R. (4th) 346 (Ont. Gen. Div.). All of these cases were unsuccessful challenges to government measures providing for greater centralization of education governance and funding.

⁹⁵ We recognize that such a change may require statutory amendment in jurisdictions like Ontario and British Columbia where the statute itself provides for judicial review on the basis of reasonableness.

enact American-style voucher legislation to offer parents this alternative without the need for costly and time-consuming litigation. In our view, these two visions of education are not compatible, and if we choose the latter route we must accept the impact that the resulting diminished resources will have on the capacity of public schools to accommodate those students with disabilities remaining in the public system. We must also accept the loss of inclusiveness and diversity in the public system that would result from the withdrawal of students with disabilities from public schools. The preferable route is to require that disagreements about special education programs be dealt with expeditiously and by specialized tribunals with sufficient expertise to realistically distinguish between access by a single student to the best possible education that money can buy, and access to a general *public school* education that must serve and accommodate all students.

