IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

B E T W E E N:

Frederick Moore on behalf of his son Jeffrey Patrick Moore

COMPLAINANT

A N D:

Her Majesty the Queen in right of the Province of British Columbia, as represented by the Ministry of Education, and North Vancouver School District No. 44

RESPONDENTS

A N D:

The Deputy Chief Commissioner

THIRD PARTY

A N D:

The Learning Disabilities Association of Canada

INTERVENOR

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REASONS FOR DECISION

Tribunal Chair: Heather M. MacNaughton
Counsel for the Complainant: Frances Kelly and Lisa Rae

Counsel for the Respondent Ministry: Leah Greathead, Timothy Leadem, and Harvey Groberman (for part of the hearing)

Counsel for the Respondent School District: Laura Bakan and David Bell

Counsel for the Third Party: Angela Westmacott and Deirdre Rice (for part of the hearing)

Counsel for the Intervenor: Yude Henteloff

# Introduction

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INTRODUCTION

The Complaint

[1] Jeffrey Moore’s father, Frederick Moore, filed two human rights complaints under s. 8 of the *Human Rights Code*. One complaint is against the Board of Trustees of School District No. 44 (the “District”), and the other is against Her Majesty the Queen in right of the Province of British Columbia, as represented by the Ministry of Education (the “Ministry”) (together the “Respondents”). The Deputy Chief Commissioner (“DCC”) was, for part of the proceedings, a party to the complaints and the Learning Disabilities Association of Canada (the “LDAC” and, with respect to the British Columbia branch of the Association, the “LDABC”), a support and advocacy organization, was granted intervenor status.

[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 complaints were filed with the BC Human Rights Commission which, after investigation, referred them to the Tribunal for hearing. The DCC was initially a party to the complaints but he later withdrew.

Jeffrey Moore was born on December 9, 1986. His parents, Frederick and Michelle Moore, testified that they had no forewarning of his learning difficulties in his preschool years. As a presholder, he was a happy, energetic and friendly boy. He was outgoing and made friends easily and his parents had no concerns about his development.

The Moores are a family of modest means. Mr. Moore testified that he had been a bus driver for more than twelve years and his wife is a secretary. Jeffrey’s parents have been extremely supportive of him throughout his learning difficulties. When Jeffrey testified, he presented as a bright, engaging, and well-adjusted young man of almost 15.

Jeffrey started kindergarten in September 1991 at Braemar Elementary School in the District. While at Braemar, he was diagnosed as having a severe learning disability, dyslexia, a fact not disputed by the Respondents. Mary Tennant, an experienced psychologist employed by the District, whose evidence will be discussed extensively in this decision, described Jeffrey’s learning disability as one of the most severe she had ever seen.

At the end of Grade 2, Jeffrey was designated as SLD, a category of disability entitling the District to supplemental funding from the Ministry to support his education program. The District recommended that he attend a specialized district facility for intensive remediation, but the District closed it for financial reasons before he could attend. Jeffrey left the public school system at the end of Grade 3 and has since attended private schools specifically geared to SLD students.

There is no unequivocal and universally-accepted definition of learning disabilities. The LDAC uses the following definition:

A learning disability is a distinct, lifelong neurological condition. This condition encompasses a group of disorders which are intrinsic to an individual and vary in their manifestation, combination, and severity. Learning disabilities arise from genetic inheritance and/or other biological
factors that adversely affect the developing brain. They interfere selectively with the acquisition, integration, and application of verbal and/or nonverbal abilities, and affect learning and behaviour in areas such as language; spatial functions; executive functions, including problem solving, attention, organization and planning; reading; written expression; spelling; mathematics; and social competence. Learning disabilities do not include learning difficulties that are primarily the result of visual, hearing, or motor disabilities; generalized intellectual impairment; or emotional disturbance.  

[10] The experts who testified at the hearing generally agreed that the term “learning disabilities” refers to a variety of disorders which are distinct neurological conditions. The disorders vary in how they manifest themselves and in their severity. They make it difficult for some children to learn in certain areas including reading, math, listening comprehension, and written and oral expression, despite average or above-average intelligence.

[11] Dyslexia is a specific type of learning disability. There is no universally-accepted definition of dyslexia; it is generally considered to be present if a child experiences difficulty in learning to read, despite conventional instruction, adequate intelligence and socio-cultural opportunity. In addition to reading, it can also manifest itself in difficulties in writing and spelling. It is believed to be a language-based disorder, perhaps neurological in origin, and is characterized by difficulty in learning single word decoding. Researchers now understand that dyslexia usually reflects insufficient phonological processing abilities. Dr. Barbara Bateman, whose evidence will be discussed in more detail elsewhere in this decision, testified that dyslexic children have difficulty breaking down a word into its component sounds or phonemes. They cannot, for example, recognize the three separate sounds in “dog” or, given the three separate sounds, “de” “aw” and “ge”, have trouble blending those sounds together into one word.

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1 As cited in Ex. 8
[12] Learning disabilities, including dyslexia, are a lifelong condition that can be remediated but not reversed. Through remediation, the effects of a learning disability can be minimized. All of the experts who testified agreed that if a learning disability is identified early, and supports are provided, the effects of the disability can be mitigated and some aspects of it overcome. Without remediation, a child with dyslexia will not be able to read or write at a level necessary for functional literacy.

The Hearing

[13] The scope of these complaints has continued to be a subject of dispute between the parties. The District and the Ministry sought judicial review of a decision of the Tribunal regarding disclosure, in which the scope of the complaint was determined. Mr. Justice Shaw found that the complaints against the District and the Ministry extended to systemic discrimination in regard to dyslexic children throughout British Columbia.² Neither the Ministry nor the District appealed that decision. Nevertheless, at various points in the hearing, the Ministry unsuccessfully sought to revisit the scope of the complaint.

[14] The hearing extended over many days spread over two calendar years, and involved a number of legal counsel, many expert and other witnesses, thousands of pages of documents, many journal articles, extensive exhibits, and lengthy submissions.³ Oral and written submissions followed. The Tribunal benefited throughout from the cooperative attitude of counsel and the professional manner in which they presented their cases.

[15] On behalf of Mr. Moore, I heard evidence from: Frederick, Michelle and Jeffrey Moore; Elaine Stubson, Jeffrey’s teacher in Grades 4 and 5 at Kenneth Gordon School; 

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³ Some of the documents were produced in the exhibit binders for more than one party. Occasionally, different versions were produced. To avoid confusion in the references to the exhibits, I have only referred to one version of the exhibit except where important to do otherwise.
Eleanor Nesling, Head of the Fraser Academy, the school Jeffrey has attended since Grade 7; and Dr. Valerie Overgaard, the Associate Superintendent for the Vancouver School District. I also heard from Dr. Christina Fiedorowicz and Dr. Barbara Bateman.

[16] On behalf of the Ministry, I heard evidence from: Claudia Roch, first an Assistant Director and then a Director of the Ministry’s Special Programs Branch; and Robert Gage, a senior manager in the Ministry’s Finance Branch.

[17] On behalf of the District, I heard evidence from: Dr. Robin Brayne, the District’s Superintendent of Schools; Mary Tennant (formerly La Liberté), a District psychologist; and Braemar staff Barbara Waigh (formerly Jackson), a learning assistance teacher; Kristie Green, Jeffrey’s special education aide; and Kathy Ray, Jeffrey’s Grade 3 teacher. I also heard from Dr. Linda Siegel.

[18] On behalf of the DCC, I heard evidence from Cathie Camley, Executive Director of a branch of the LDABC, and Dr. Nancy Perry.

[19] The experts who testified were well-qualified. Dr. Christina Fiedorowicz was called by Mr. Moore. She is a neuro-psychologist who, since 1969, has conducted neuro-psychological assessments. A large part of her practice involves the assessment of individuals who have learning disabilities. She has developed computer programs which assist in the remediation of individuals with learning disabilities and which have been used in public school settings, including in British Columbia. I qualified her as an expert in psychology, specializing in the area of learning disabilities. In addition to her testimony, Dr. Fiedorowicz filed a report.  

[20] Dr. Barbara Bateman was called by Mr. Moore. Dr. Bateman has an extensive background in research and work with special needs children. Her many publications focus on teaching techniques for learning disabled children. More recently, she has

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4 Ex. 8
concentrated in advising both parents and school boards with respect to their obligations under the American *Individuals with Disabilities Education Act*\(^5\). She was qualified as an expert in special education with expertise in identification and remediation of learning disabilities within the education system. In addition to her testimony, Dr. Bateman filed a report.\(^6\)

[21] Dr. Linda Siegel was called by the District. She was qualified as an expert in educational and neuro-psychology, cognitive and language development, learning disabilities and their remediation, psycho-educational testing, and special education. A substantial focus of her research involves identifying those with learning disabilities, the cognitive processes that are involved in learning disabilities, and some work on remediation. In 1999, on behalf of the Ministry, Dr. Siegel coauthored the Review of Special Education referred to below.\(^7\) In addition to her testimony, Dr. Siegel filed a report.\(^8\)

[22] Dr. Nancy Perry was called by the DCC. She is an Assistant Professor with the Department of Educational and Counselling Psychology and Special Education in the University of British Columbia’s Faculty of Education. She was qualified as an expert in special education. In addition to her testimony, Dr. Perry filed a report.\(^9\) She gave evidence about the Ministry’s definition of learning disabilities, the application of that definition, the issues raised by the definition, the importance of early identification of children with learning disabilities, and the availability of resources for learning disabled students in British Columbia.

\(^5\) (IDEA), 20 USC §1400 et. seq.

\(^6\) Ex. 25

\(^7\) Ex. 2, Tab 37

\(^8\) Ex. 43

\(^9\) Ex. 14
While there were many points of controversy, as will become apparent from the recitation of evidence which follows, most of the chronology of events is not in dispute. Where there is a dispute, I will make findings of fact as necessary. The parties do not dispute that Jeffrey has a disability, or that the District and the Ministry are public service providers, as those terms are defined in the Code or in human rights jurisprudence.

The Issues to be Determined

This case involves important legal and public policy issues.

I must determine the nature of the service in issue: is this case about the delivery of special educational services in particular or access to educational services for SLD students more generally? To determine that issue, I must examine the statutory basis for the delivery of educational services, the funding mechanisms, and the policy framework.

Having determined the service, I must then consider the individual and systemic discrimination claims. To do so, I must consider the appropriate test for whether discrimination has been established; the appropriate comparator group; whether the evidence supports the allegations of both individual and systemic discrimination; and whether the discrimination can be justified. Finally, if necessary, I must look at the appropriate remedies.

The Structure of this Decision

Because the events giving rise to these complaints span a number of years, and because those years saw both a significant change in the way the Province funded education and significant policy development for special needs students, there are a number of different factual chronologies that are important to understanding the Ministry’s and the District’s decisions which affected Jeffrey and other students like him.

I start with an overview of the legislative framework for the provision of educational services in British Columbia, and examine the role of the Ministry and the school districts. I next consider the changes the Ministry made to the way it funded
education during the relevant years. I move to a consideration of the ongoing policy work that was done by the Ministry with respect to special needs students. I then consider the impact of the Ministry’s financial and policy changes on the District and the service cuts it made, particularly with respect to special education. Finally, I review Jeffrey’s history in both the public and private education systems. I have left most of my factual findings to the analysis section of this decision because, while I have separately related the chronologies, it is how they overlap that is important for the factual findings.

THE STRUCTURE OF THE EDUCATION SYSTEM IN BRITISH COLUMBIA

[29] Claudia Roch testified on behalf of the Ministry. Between 1984 and 2002, she was employed in the Ministry’s Special Education Branch, latterly as its Director. The Special Education Branch employs a variety of specialists in special education who provide technical expertise and advice to other branches of the Ministry.

[30] Ms. Roch, and other witnesses, described the British Columbia education system as “co-managed” by the Ministry and school districts. By this they meant that each education partner had defined responsibilities under the legislation governing its operation.

The Legislation Governing Education

[31] During the period of time covered by these complaints, there were a number of changes to the legislation governing education in British Columbia which were implemented through amendments to the School Act,\textsuperscript{10} and its regulations.

[32] The School Act and the School Regulation\textsuperscript{11} were brought into force effective September 1, 1989. At the same time, the Minister of Education issued a “Mandate for

\textsuperscript{10} S.B.C. 1989, c. 61
“the School System” as the statement of education policy for British Columbia (the “Education Policy”). It included a mission statement, various policy statements on the attributes of a public school system, and outlined the duties, rights and responsibilities of the various participants in the public school system. It provided, in part:

Government is responsible for ensuring that all of our youth have the opportunity to obtain high quality schooling that will assist in the development of an educated society. To this end, schools in the province assist in the development of citizens who are:

- thoughtful, able to learn and to think critically, and who can communicate information from a broad knowledge base;
- creative, flexible, self-motivated and who have a positive self image;
- capable of making independent decisions;
- skilled and who can contribute to society generally, including the world of work;
- productive, who gain satisfaction through achievement and who strive for physical well being;
- cooperative, principled and respectful of others regardless of differences;
- aware of the rights and prepared to exercise the responsibilities of an individual within the family, the community, Canada, and the world.13

[33] The Education Policy also sets out the responsibilities of those directly involved in the education system. With respect to school boards and the Ministry, it provides:

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11 B.C. Reg. 265/89
12 OIC 1280/89, August 31, 1989 under s. 183(3) of the School Act, S.B.C. 1989, c. 61
13 Supra note 12, at p. 6
School Boards: have a duty to govern districts and their schools in accordance with specified powers in a fiscally responsible and cost effective manner. They have a responsibility to ensure that schools provide students with opportunities for a quality education; to set education policies that reflect the aspirations of the community and that are consistent with overall provincial guidelines; to provide leadership and encouragement to schools and the community; to cooperate with the community and social service agencies in the delivery of non-educational support services to students; and to focus on the following areas of district concern: (1) implementation of provincial and local education programs; (2) school finance and facilities; (3) student access and achievement; (4) teaching performance; and (5) accountability to parents, taxpayers, the community and to the Province.

The Ministry of Education: has a duty to set policies for the British Columbia public school system in accordance with specified duties and powers. The Ministry has a corresponding responsibility to ensure that the education system provides students with opportunities for a quality education in a cost-effective manner; to set standards and overall directions for the education system; to provide leadership and encouragement to all educational agencies in the province; to cooperate with provincial agencies in the delivery of non-education support services to students; and to focus at a high level of provincial concern on the following areas: (1) finance and facilities; (2) program direction, development and implementation; (3) student access and achievement; (4) teaching performance; and (5) system evaluation and public accountability.14

[34] The School Act is divided into parts which deal with different aspects of the school system. I will briefly review each of the relevant parts.

[35] The preamble to the School Act provides that the purpose of the school system is to enable learners to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy society and a prosperous and sustainable economy.15 The language of the preamble tracks the mission statement in the Education

\[\text{\textsuperscript{14}} \text{Supra note 12, pp. 8-9}\]

\[\text{\textsuperscript{15}} \text{The preamble was amended by the School Amendment Act, S.B.C. 1993, c. 6 to read: WHEREAS it is the goal of a democratic society to ensure that all its members receive an education that enables them to become personally fulfilled and publicly useful, thereby increasing the strength and contributions to the}\]
Policy. By its provisions, the *School Act* outlines how this goal is to be realized. Every child in British Columbia is entitled to a free, publicly-funded education. School boards are statutory bodies created under the *School Act*. Members of a school board are elected in the district they represent. A board must provide educational services within the limits of available government funding.

[36] Part 2, Section 2 provides that children of school age, resident in a school district, are entitled to enrol in an educational program provided by the board in that district. An educational program is defined in s. 1:

“*educational program*” means an organized set of learning activities that, in the opinion of

(a) the board, in the case of learning activities provided by the board,

(b) the minister, in the case of learning activities in a Provincial school, or

(c) the parent, in the case of learning activities provided to a child registered under section 13,

is designed to enable learners to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy society and a prosperous and sustainable economy.

[37] Further provisions set out the entitlements of students and parents. Students and parents are entitled to consult with a teacher or administrative officer with regard to the student’s educational program. Parents are entitled to be informed of the student’s attendance, behaviour and progress in school, to request annual reports respecting the general effectiveness of educational programs in the school district, and to belong to parents’ advisory councils.

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health and stability of that society; AND WHEREAS the purpose of the British Columbia school system is to enable all learners to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society and a prosperous and sustainable economy;....
Section 11 allows an appeal to a school board from a decision of a board employee that significantly affects the education, health, or safety of a student.

Part 3 of the School Act deals with school personnel. Under s. 15(1), the board employs the staff and is responsible for staff management. Section 17 notes teachers’ responsibilities include “designing, supervising and assessing educational programs and providing instruction to individual students and groups of students”. Section 17(2) provides that teachers shall perform the duties set out in the regulations. The School Regulation sets out a number of specific duties of teachers. Section 19 of the School Act prohibits a board from hiring uncertified teachers except in limited circumstances.

Section 20 provides that a board may appoint a person as an administrative officer to perform the duties and have the powers set out in the regulations. Section 5 of the School Regulation sets out the powers and duties of administrative officers including Directors of Instruction and Principals.

Section 22 of the School Act requires a board to appoint a superintendent to perform some mandatory responsibilities, including supervision and direction of educational staff and supervision and evaluation of all educational programs in a district. Section 6 of the School Regulation sets out further duties of a superintendent.

Section 23 of the School Act requires a board to appoint a bonded secretary treasurer as its corporate financial officer to perform duties set out in the School Regulation, including compliance with the accounting and administrative procedures specified by the Minister and recording board proceedings.

Part 4 of the School Act requires a board of school trustees in each district and sets out a process for election and appointment to the board. Part 6, among other things, sets out the status of school boards, their powers and duties, the health and other support services for which they are responsible, and a limitation of actions and indemnification regarding school boards.
Section 94, subject to the other provisions of the *School Act*, regulations and orders of the minister, requires school boards to make available an educational program, free of charge, to school age children resident in the district and who enrol in a school.

Section 98 requires a board to prepare an annual report respecting the general effectiveness of its educational programs for submission to the minister and for the public.

Section 100 requires a board to provide instruction in an educational program, and educational resource material, sufficient to meet the general requirements for graduation set out in the orders of the minister.

Section 103 of the *School Act* sets out specific powers, functions and duties of the school board, including the authority to:

- determine local policy for the effective and efficient operation of schools in the district;
- subject to the orders of the minister, approve educational resource materials and other supplies and services for use by students;
- make rules including the establishment, operation, administration and management of schools operated by the board and educational programs provided by the board;
- suspend students;
- develop and offer local programs for use in schools in the school district; and
- subject to the orders of the minister, cause an educational assessment to be made of students or groups of students.
[48] Part 8 of the School Act contains provisions with respect to education financing. The Ministry of Finance must provide to each district a base grant to cover its operating expenses and may provide special purpose grants. A board must prepare an annual budget, in a form specified by the minister, detailing the estimated operating expenses for the next fiscal year.

[49] Part 9 of the School Act sets out the roles and responsibilities of the Ministry. The Ministry is established pursuant to s. 181. Section 182(1) sets out the jurisdiction of the minister who, subject to the School Act and regulations, has direct responsibility for:

- the maintenance and management of all Provincial schools;
- advising the Lieutenant Governor in Council on all matters relating to education in British Columbia;
- designating a member of the public service to act on behalf of the minister; and
- charging fees with respect to any goods or services provided by the minister or the Ministry.

A “Provincial school” is defined in s. 1 as a school directly operated and maintained by the minister.

[50] Under s. 182(2), the minister may make ministerial orders to carry out any of his or her powers, duties or functions. They include orders:

- governing the provision of educational programs;
- determining the general requirements for graduation;
- determining the general nature of educational programs for use in schools and specifying educational program guides;

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16 The School Act was amended by the School Amendment Act, S.B.C. 1990, c. 2. The amendment changed the way the Province funded education and instituted block funding which is discussed in detail elsewhere in this decision.
• preparing a process for the assessment and effectiveness of educational programs and requiring schools to participate in the assessment for the purpose of comparison to provincial, national and international standards;

• governing educational resource materials in support of educational programs;

• establishing and operating Provincial resource programs and Provincial schools, and providing in them specialized types of education;

• requiring a board to close a school where enrolment is low;

• respecting correspondence educational programs and the tuition and other fees to be charged with respect to those programs;

• establishing committees and authorizing the payment of expenses to the members of the committees and other advisory bodies established by or under the Act;

• governing fees that may be charged by a board; and

• that the minister otherwise considers advisable to effectively administer the Act or the regulations.

[51] Pursuant to s. 182, the minister issued the Special Needs Students Order M150/89, effective September 1, 1989, which provided:

**Handicapped Students**

(1) A board shall ensure that an administrative officer offers to consult with a parent of a handicapped student regarding the placement of that student in an educational program.

(2) Unless the educational needs of a handicapped student indicate that the student’s educational program should be provided otherwise, a board shall provide that student with an educational program in classrooms where that student is integrated with other students who do not have handicaps.\(^{17}\)

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\(^{17}\) Effective September 1, 1995, Ministerial Order 150/89 was amended by Ministerial Order 397/95.
This Ministerial Order will be discussed later in this decision.

[52] Section 183 of the *School Act* requires the minister to report annually to the Legislature on the state of education in British Columbia, including the effectiveness of educational programs. The minister is required, from time to time, to issue a statement of education policy for British Columbia. Such an Education Policy is set out above.

[53] Section 185 requires the minister to appoint an education advisory council to assist on policy matters respecting education.

[54] Section 186 permits the Lieutenant Governor in Council to appoint an official trustee to conduct the affairs of any school district when the board is in serious financial jeopardy; there is substantial non-compliance with the *School Act*, the regulations, or any rules or order made under the *School Act*; or there is substantial non-performance of the duties of the board.

[55] The *School Act* also grants the Lieutenant Governor in Council discretion to make regulations. The *School Regulation* is an example of such a regulation.

**Legislative Changes in 1990**

[56] In 1990, the *School Amendment Act*\(^\text{18}\) repealed and replaced the education finance provisions contained in Part 8 of the *School Act*. It instituted block funding which is explained in detail later in this decision. Briefly, s. 124 of the *School Act*, as amended, creates the Provincial block, which was the block amount of funds provided to school districts for educational programs. It was arrived at by multiplying the number of full-time equivalent students by the average per student amount determined by the minister. Section 125 requires the minister to allocate the block based on enrolment and district variations in the cost of delivering educational programs.
The requirement for districts to provide detailed annual budgets to the Ministry continued. Under s. 127(2), budget estimates could not exceed the district’s share of the block, plus local revenues and appropriated operating reserves, unless the district held a referendum which approved the excess.

Section 130 requires the Minister of Finance to pay a grant to each district for that district’s allocation of the Provincial block plus the approved debt service expense estimate of the district. Section 131 contemplates that, in addition to the block, the minister can recommend to the Minister of Finance the payment of special purpose grants. As will be discussed below, with respect to the evidence of Mr. Gage and Dr. Brayne, special purpose equalization grants were used to ease the transition to block funding and soften its impact in certain districts, including the District.

**Legislative Changes in 1991**

In 1991, the *Miscellaneous Statutes Amendment Act (No. 2)*\(^{19}\) amended the *School Act* to add s. 129.1 regarding funding for special education programs. It provides:

**Funding of special education programs**

1. In this section “special education programs” means special education programs as determined by the minister.

2. Notwithstanding the budget adopted by a board under section 129,

   a) the board shall not, without the prior approval of the minister, reduce or eliminate the amount budgeted for students enrolled in special education programs below the budgeted expenditures for those students for the previous fiscal year, and

   b) the board shall ensure that all funds that the minister, before or after the coming into force of this section, has designated for

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\(^{18}\) S.B.C. 1990, c. 2

\(^{19}\) S.B.C. 1991, c. 14
students enrolled in special education programs are spent on those students’ educational programs.

(3) Subsection (2)(a) applies with respect to the budget of a board for the 1991-92 fiscal year and budgets for succeeding fiscal years.

(4) Subsection (2)(b) applies with respect to the 1991-92 and subsequent fiscal years.

Section 129.1 is discussed below.

Legislative Changes in 1992, 1993 and 1994

[60] Amendments in the 1992 School Amendment Act\textsuperscript{20} changed the definition of a Provincial school. Amendments in the 1993 School Amendment Act\textsuperscript{21} amended the preamble of the School Act and the definition of an educational program by striking out “healthy society” and substituting “healthy, democratic and pluralistic society”. In addition, administrative officers of a school, or the superintendent, were given power to suspend students.

[61] In 1994, the Budget Measures Implementation Act\textsuperscript{22} repealed s. 129.1 of the School Act and added s. 125.1, a section on targeting or capping, deemed to come into effect on March 10, 1994. It provides:

**Targeting or capping of allocation**

(1) The minister may, in respect of an allocation to a board under section 125 (1) provide a direction to the board specifying

(a) a minimum amount or percentage of the allocation that must be budgeted and spent by the board for students enrolled in

\textsuperscript{20} S.B.C. 1992, c. 51

\textsuperscript{21} S.B.C. 1993, c. 6

\textsuperscript{22} S.B.C. 1994, c. 4
(i) an aboriginal education program specified by the minister, or

(ii) an education program specified by the minister for students with special needs, and

(b) a maximum amount or percentage of the allocation that may be budgeted and spent for school or district administration specified by the minister.

2 The minister may vary a direction provided to a board under this section if there is a change in the circumstances under which the direction was made.

3 A board shall budget and spend its allocation in accordance with any direction of the minister provided to it under this section.23

Section 125.1 is discussed below.

**Legislative Changes between 1995 and 2001**

[62] Many of the amendments to the provisions of the *School Act* between 1995 and 1999 are not relevant to the issues in this case. Relevant amendments include the following. In 1995, amendments made to the block funding provisions did not change the calculation process. Under Ministerial Order 638/95, the *Individual Education Plan Order*, effective December 1995, districts were required to design an Individual Education Plan ("IEP") for each student with special needs as soon as practical after the student was identified, unless the student received 15 hours or less remedial instruction. Also in 1995, Ministerial Order 150/89 was amended by Ministerial Order M397/95 as follows:

**Special Needs Students Order**

Interpretation

23 *Supra* note 22, sections 9, 10
1. In this order “student with special needs” means a student who has a disability of an intellectual, physical, sensory, emotional or behavioural nature, has a learning disability or has exceptional gifts or talents.

Students with special needs

2. (1) A board must ensure that an administrative officer offers to consult with a parent of a student with special needs regarding the placement of that student in an educational program.

(2) A board must provide a student with special needs with an educational program in a classroom where that student is integrated with other students who do not have special needs, unless the education needs of the student with special needs or other students indicate that the educational program for the student with special needs should be provided otherwise.

[63] The Revised Statutes of 1996 consolidated the various amendments to the School Act. With respect to the sections noted above, the provisions remain the same, apart from section number changes.

[64] In 1998, the Individual Education Plan Order was amended to raise the level at which an IEP was required to students receiving more than 25 hours of remedial instruction.

Legislative Changes in 2002

[65] In 2002, the School Amendment Act was passed although not all of its sections are presently in force. It was not referred to by the parties.
The School Act in Practice

[66] Ms. Roch described how the School Act works in practice. She said that both the Ministry and school boards play a role in providing educational services. The Ministry is required to provide funding for the public school system, to set standards and policy in support of those standards, and to monitor for results. Ms. Roch agreed that one of the Ministry’s primary responsibilities is to define the core program, with the assistance of education partners, and to ensure equal access to it. The Ministry sets the subjects making up the core curriculum and graduation requirements. It expects all districts to provide core curriculum courses to all district students. Special needs students, as part of the group to which public education is available, are to be provided with an educational program.

[67] The Ministry offers programs, some in conjunction with other ministries, to all students while in hospital, treatment centres or containment centres. Under the School Act, the Ministry may provide direct services for special needs students through Provincial resource programs, although most were phased out by the early 1990s because school districts began to introduce similar programs. None are currently offered.

[68] Of the various Ministry branches, key to this case are: the School Finance Branch, responsible for fiscal compliance; the Curriculum Branch, responsible for the development of curriculum; and the Special Education Branch, which provides advice and expertise on the needs of special education students. Mr. Gage explained the Finance Branch’s two major components: the funding allocation component, responsible for distribution of education funds among districts; and the budget accounting component, responsible for ensuring district compliance with statutory budgeting requirements. Ms. Roch explained that the Special Education Branch advises the Curriculum Branch on the development of curriculum and advocates for resources from the Finance Branch for special needs students.

[69] School boards have been delegated responsibility to deliver educational programs and manage the district schools and facilities. Ms. Roch noted that they are responsible for enrolment of children, assessing their learning needs, providing instruction, assessing
their performance, and reporting on it to parents and the public. They also hire and supervise the teachers and other staff needed to fulfill their mandate.

[70] I now review the Ministry’s role with respect to education funding and then its role with respect to policy.

EDUCATION FUNDING IN BRITISH COLUMBIA

[71] Mr. Gage testified about the history of education funding in British Columbia. When he retired in 2002, he was the Manager of the Ministry’s Funding Allocation Unit, a part of the Finance Branch. He had worked in the unit from 1989 to 1994 and from 1996 to 2002.

[72] Public school funding is approved annually by the Province, by a vote in the Provincial legislature as part of the annual budget process. The Ministry of Finance and Treasury Board provide the Ministry with an amount for public school education as part of the government’s estimate process. The Ministry then distributes it to the districts. The Ministry is consulted with respect to pressures that might affect the cost of education but the amount allocated is ultimately set by the Ministry of Finance and Treasury Board.

Basic Educational Program

[73] Prior to 1982, the Ministry funded a basic education program by determining the cost of instructional units. A unit cost was calculated based on the total expenditures by school districts in the previous year, divided by the number of units in that year. The number of units was determined by dividing student enrolment by 20, the average number of students in a class. The cost of an instructional unit was multiplied by the number of units in a district to arrive at the basic program for each district. School districts could use their own property tax base to generate additional funding to cover inflation or offer enhanced programming.

[74] Mr. Gage described the basic education program as a highly inflationary program that did not address the unique features of specific districts.
Between 1982 and 1984, a government restraint program froze allocations for education.

The Fiscal Framework

In 1984, the government introduced the fiscal framework for education funding. It identified the reasonable levels of service that districts could provide in each of a listed number of program areas, based on a number of district-specific factors including: demographics, student enrolment, and the number of schools. It also identified the costs of programs. For example, the costs of an instructional unit included the cost of the teacher’s salary and benefits, supplies, and substitute teachers. A level of funding, the shareable operating amount, was set based on those reasonable service levels. More than 60 different programs were recognized for funding including: regular instruction, learning assistance, counselling, library services, operations, maintenance, transportation, and administration. Programs were grouped into broad categories called functions.

Initially, there were nine functions: Instruction K-7; Instruction 8-12; Special Programs; District Administration and Instructional Support Services; Operations and Maintenance; Auxiliary Services; Transportation and Housing; Non-Shareable Capital; and Debt Services. Later, the three instruction functions of K-7, 8-12 and special programs were merged into one called Instruction.

There were programs within each broad function. In the Special Programs function, the programs were divided into categories based on the kind of special need involved. The categories of special education are discussed in more detail in the section of this decision dealing with the Ministry policies for special education.

Formulae were developed with respect to each program; some based on a district’s actual expenditures, others on enrolment. The formulae in the fiscal framework incorporated cost factors and service levels based on grade enrolments, number of students in special education programs, number of schools, geographical dispersion of the district, and distance from Vancouver. The same formulae were applied to each district but each district had unique cost drivers. Actual enrolment was applied to a standard
formula for every district but a northern district had higher heating costs and a remote or rural district had higher transportation costs. The information was plugged into the formulae which, in turn, generated the funding that would be provided to each school district. As a result of the unique, district-based cost drivers, the per student amount for education varied throughout the Province.

[80] The purpose of the formulae was to ensure that every district received consistent funding. The fiscal framework was intended to be very mechanical in its approach and not subject to arbitrary decisions and lobbying, thereby ensuring equity in service levels around the Province. Districts could see that they were getting their equitable share of available resources.

[81] If school boards set budgets higher than their district’s allocation, that money had to be raised locally, primarily through additional residential taxation. More affluent districts, such as the District, thus were able to offer enriched programming.

[82] Annually, a Ministry committee would review comments from the districts, and others, on the financial management system and make recommendations to the Minister for the following fiscal year. The Minister had final say over whether they were implemented. At some point, this committee was replaced by an Education Advisory Council with which the Minister consulted on issues affecting education, including funding issues.

**Block Funding**

[83] In 1987, Barry Sullivan conducted a Royal Commission into education in British Columbia (the “Sullivan Commission”). It released its report entitled: “A Legacy for Learners” in 1988.²⁸ I understand, from the documentary record and Mr. Gage’s

²⁸ The Report of the Sullivan Commission was not filed as an exhibit.
evidence, that following the Sullivan Commission, the Minister initiated a complete review of the Province’s education funding which led to the 1990 amendments to the School Act described above.

[84] The block funding system became effective the 1990/91 school year. Section 124 of the School Act, as amended, creates the Provincial block; a block of funds to be paid to school boards for the provision of all public education programs. Once the Province sets the amount of the block as part of its budgetary process, it is divided among all school districts based upon full-time student enrolment and district variations in the cost of program delivery. The Ministry continued to use the fiscal framework, and the formulae under it, as the mechanism for distribution of the Provincial block. The amount of the block was adjusted annually to reflect economic indicators, growth in enrolment and changes in mandate.

[85] Block funding was introduced to provide stability and predictability in education funding. As Mr. Gage described it, block funding sets the size of the pie; the distribution system allocates its pieces among districts.

[86] Block funding was based on two principles. First, there would be an overall amount of money available for education which would be split equitably between the districts. An appropriate starting point, or base year, would be selected for funding, using the services actually provided in schools and the costs actually incurred by districts to deliver those services. If the services provided in the base year were reasonable and acceptable, then the level of spending by school boards in that base year would serve as a suitable funding base. Second, the amount of the block, as determined in the base year, would be adjusted annually to allow for changes in enrolment, mandated services, and economic indicators such as changes in the cost of resources.

[87] The 1989/90 year was chosen as the base year because it was the year for which the Ministry had the most recent, reliable information. The amount of the block was established by taking all of the actual 1989/90 expenditures by school districts for education, including the fiscal framework amount provided by the Ministry, amounts raised by districts through supplementary residential property taxes, pension amounts and
local capital amounts. This total, $2.42 billion, was accepted as the base for funding in the 1990/91 school year. The base amount was inflated by over 12 per cent to cover inflationary and other pressures and to arrive at the amount of the Provincial block for the 1990/91 year.

[88] The amount of the Provincial block is established annually by the Ministry of Finance and Treasury Board staff with input from the Ministry. Each summer the Ministry reviews the prior year’s information generated by the financial management system, in consultation with school districts, and makes recommendations to the Ministry of Finance and Treasury Board with respect to the economic factors affecting education for the following year. As a result, there is a two-year lag in the information.

[89] In some cases, the pressures identified during the review, such as inflation, are system-wide; in others, they are particular to a district. However, the Ministry of Finance and Treasury Board ultimately decide on the level of the increase to the Provincial block. Once the global amount is determined, the Ministry decides how the block is to be allocated among the various school districts. Until 1995/96, the Ministry used the fiscal framework, described above, for this purpose. A per pupil amount was determined at the district level by dividing a district’s share of the Provincial block by the projected number of enrolled students.

[90] As noted above, the cost drivers within the fiscal framework were frozen at 1989/90 levels so that the fiscal framework would be consistently below the Provincial block. The fiscal framework amount was inflated by a percentage to raise it to the block level. Districts were allocated a basic amount for each enrolled full-time student. The Provincial block was not automatically increased to reflect inflation; it was only one of the economic factors taken into account. In some years, known inflation did not result in an increase to the block and in some cases known cost pressures in districts were not recognized or funded. Mr. Gage testified that was dependent on how much Provincial revenue was available for education as opposed to other priority initiatives of government.
Mr. Gage acknowledged that the amount of the block does not take into account individual districts’ obligations under their collective agreements. The block was based on a Province-wide average of teacher salaries. The Ministry believed that recognizing differences in collective agreements could potentially influence the bargaining process and deliberately decided to remain neutral with respect to them. As a result, the block did not recognize or fund differences in class size provisions in collective agreements, even though these were common and added to a district’s costs. Further, if a collective agreement provided teacher salary increases, they would not be recognized except to the extent that they affected Province-wide average teacher salaries. Mr. Gage acknowledged that districts with more experienced teachers had higher salary costs than the Provincial average and that only a portion of the additional cost would be recognized in the block.

Coincident with the introduction of block funding, individual school districts lost their ability to raise supplemental amounts through local taxation. It was still possible, although rare, for a district to hold a referendum to raise funds for new or enhanced programs, additional activities for student, or local capital initiatives. The purposes for which a referendum could be used were restricted by s. 128(2) of the School Act.

Special Purpose Grants

From time to time, the Ministry also provided targeted funds for specific initiatives. A district had to spend targeted funds for the stated purpose. Depending on the political climate, other trust funds could be established in any year. Examples included grants for technology and in-service training. A district could not move money between the capital budget, or trust funds, and the operating budget.

With the introduction of block funding in 1990/91, the Ministry recognized that there were school districts in which local taxation had historically provided significant supplementary education funds. It provided special purpose equalization grants to ease the transition and soften the impact of block funding. The District was eligible for special purpose equalization grants until 1992/93.
In 1990/91, the special purpose equalization grants provided eligible districts with 70 percent of the funds lost from local taxation. In the two subsequent years, the grant dropped to 40 percent. In 1992/93, the final year, the District received $2,567,714. Once the grants were eliminated, there were no other sources of supplemental funding unless a district held a referendum. Referendums could not fund operating deficits and had to be repeated annually. Mr. Gage testified that referendums held by Richmond and Vancouver in 1990/91 were successful. The District held an unsuccessful referendum. The Spangelo Report, discussed below, described the referendum process as a cumbersome and impractical instrument for school boards.

Mr. Gage acknowledged that there were pressures on government from 1990/91 to 1994/95 to limit increases to educational spending. Amounts were not frozen but funding levels did not increase to keep up with school district expenditures. He acknowledged that school districts expressed concern about the level of the Provincial block and some districts requested that the special purpose equalization grants be maintained. Mr. Gage acknowledged that the District was one and it was after the implementation of block funding that the District experienced its first deficit.

The 1992 Education Funding Review

In response to concerns about how the Provincial block was distributed and the reduction in some service levels, the Minister established an Education Funding Review Panel to conduct Province-wide public hearings and produce a report. The report,

29 Ex. 82, Tab 22, p. 17 and ss. 128(2) and (10) of the School Act as amended by the School Amendment Act, S.B.C. 1990, c. 2

30 Ex. 82, Tab 45, p. 29
entitled: "Building Partnerships: A Finance System for Public Schools", was submitted on November 19, 1992 (the “Spangelo Report”).³¹

[98] Mr. Gage testified that a significant goal of the funding review was equitable access to education. He described equity as being both horizontal, ensuring that each district had more or less appropriate resources to offer comparable services, and vertical, ensuring equity among students, recognizing that special needs students, Aboriginal students, and ESL students may require additional resources to have comparable educational opportunities.

[99] The Spangelo Report recommended that a resource-costing model be adopted to replace the fiscal framework for distribution of the Provincial block. The resource-costing model was to be based on defined services, required resources and actual costs and was to be used both to determine the amount of the block and as a method, or formula, for distribution of it to each district.³² The resource-costing model required defining a common level of services, determining the resources required for delivery, and recognizing the actual cost of purchasing the resources.

The Technical Distribution Group

[100] Mr. Gage described the Spangelo Report as a high level review of the funding allocation system. It did not look at the mechanics of the system. As a result, the Minister created three committees: an Education Finance Advisory Committee, to advise the government on the allocation of resources; a Technical Distribution Group (“TDG”), to conduct detailed analytical work on the funding distribution system and to support the work of the Advisory Committee; and a Financial Reporting and Accountability Committee, to address accountability.

³¹ Ex. 82, Tab 45

³² Supra note 31, p. 17
[101] The TDG was mandated to develop a simpler system for distribution of the Provincial block than the very complicated fiscal framework. It was to consider principles of equity, stability, predictability, effectiveness and efficiency. The TDG was to look at the funding distribution system, and the formulae under it, and to make recommendations for the redistribution of the existing funds among the 75 school districts. It was required to work within the envelope, that is, it could recommend redistribution but not increases to the block. Mr. Gage represented the School Finance Branch on the TDG.

[102] The TDG report, released in November 1993 (the “TDG Report”), recommended changes to the manner in which some functions (or areas of education expenditures) were funded. Mr. Gage explained that the TDG recommended changes to the way the Ministry funded special education but that the recommendations would have resulted in approximately the same level of funding as the fiscal framework had.

[103] Mr. Gage said that the TDG Report recommendations were controversial because, without an increase in the overall Provincial block, increasing one district’s share required cuts to another’s.

[104] As discussed in more detail in the sections of this decision dealing with the District’s financial situation, had the recommendations been implemented then, the District would have received approximately $1.5 million more commencing in 1994/95, the date of proposed implementation. The District would have received less money in some functions and more in others.

[105] From 1993, and as its financial situation worsened, the District repeatedly requested the Ministry to implement the TDG Report; however, it was not until 1995/96

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33 Ex. 4, Tab 81

34 Ex. 4, Tab 81, p. 65
that the recommendations were implemented in part, and not until 1996/97 that they were implemented fully. As a result, while Jeffrey was enrolled in the District, it did not receive the recommended additional $1.5 million annually.

[106] In 1995/96, following the recommendations in the TDG Report, the Ministry moved away from the fiscal framework model for funding to an incremental model. More money was not made available for special needs students. However, rather than having all of a special education student’s funding calculated and funded in a special education program, all students were provided with a basic education amount and those requiring extra supports received an increment.35

[107] Mr. Gage testified that, regardless of the method used to arrive at the amount of funding, it was a funding formula, not a spending formula and once the funds were received by a district it determined how to allocate its funds among its programs. The only exception to this was targeted funds. For example, pursuant to s. 125.1 of the School Act, funds provided for special and Aboriginal education had to be spent on those programs. Section 125.1 will be discussed further below.

[108] I now consider the Ministry’s policy work in the area of special education.

THE MINISTRY’S ROLE IN SPECIAL EDUCATION POLICY

[109] Ms. Roch testified that Ministry policy documents provide a framework for districts to deliver educational services. The Ministry expects that districts will operationalize Ministry policy according to their needs and circumstances and provide a broad range of services appropriate to their students.

[110] Ms. Roch testified that the 1990s were a period of evolution and there were divergent views with respect to best educational practices for special needs students.

35 Ex. 4, Tab 81, pp. 5, 11-15
Some were in favour of integration into the neighbourhood school; others were not. There were debates about the appropriateness of labelling students for the purposes of funding. She testified that knowledge and understanding about the necessity of early identification and intervention was developing in the late 1980s and early 1990s. That evolution was reflected in the policy work of the Special Education Branch.

The 1985 Manual

[111] In May 1985, after consultation, the Special Education Branch published: “Special Programs, A Manual of Policies, Procedures and Guidelines” (the “1985 Manual”). It remained the applicable policy manual while Jeffrey attended Braemar and until it was replaced in 1995. Its provisions were not mandatory.

[112] The 1985 Manual set out the Ministry’s policies regarding special education, its philosophy, the goals and objectives of special programming, the procedures to follow regarding funding, and a recommended service delivery model. It also set out program guidelines for each category of special education.

[113] Its introduction provides:

Wherever possible, educational opportunities should be provided for children with special needs by the usual method of enrolling a child in a school and in a program since there is immense value to be derived from having a handicapped child participate in some of the activities of a regular classroom. Not only does the child benefit, but so do his peers. When this is not possible, alternate strategies must be developed...The Special Education Division supports placement of exceptional children in the least restrictive environment according to the needs of the child and available resources.37

36 Ex. 44
37 Ex. 44, p. 2.1

32
Ms. Roch testified that the overall philosophy was that special needs students are entitled to an education regardless of their disability, and should be provided with services, within the framework of general education, in the least restrictive environment possible. Ms. Roch said that, by “least restrictive”, the Ministry meant the least restrictive relative to an individual child’s needs. Dr. Siegel testified that the trend towards inclusion of students with special needs into the neighbourhood school was introduced gradually during the 1970s and early 1980s and was set out very clearly in the 1985 Manual.

The 1985 Manual noted that the philosophy, goals and objectives of the special education branch rested on the following beliefs:

(a) All children should be afforded opportunities to develop their full potential.

(b) Education is a responsibility shared by the Ministry of Education, Boards of School Trustees, and parents, each having primacy for some areas of the child’s education while sharing mutual responsibility in other areas.

(c) Special Education programs and services are based on the assumption that every child has the fundamental right to an education regardless of the child’s disability.

(d) Individualized education plans for children with special needs should be developed based on the child’s strengths and needs rather than on generalized labels or categories.

(e) Children with special needs should be provided services within the framework of general education and in the least restrictive environment possible, within available resources, and in a setting that will allow for the achievement of their specified learning goals.

(f) Special Education is an extension of regular curriculum, modified as necessary to meet the unique needs of each student.\(^{38}\)

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\(^{38}\) Ex. 44, p. 3.1, emphasis in original
The goals of special education programming were set out. The primary goal was to provide continuous, quality programs designed to meet the needs and abilities of all exceptional children in as normal an environment as possible.

More particularly the goals included: fostering the least-restrictive, least-segregated, environment for all exceptional children; ensuring a continuum of educational settings and services appropriate to the changing needs of individual children; encouraging, promoting and evaluating the development and provision of special services and programming; adapting the school system to the needs of exceptional students; encouraging the development and provision of adequate educational support services in the Province; and developing accountability procedures for all levels of responsibility.  

The goals of the Special Education Branch (then called the Division of Special Education) were also specified:

To achieve their objectives the Division of Special Education will:

(a) develop necessary policies, procedures and guidelines to implement provincial legislation, policies and the financial administration related to funding of programs for exceptional children;

(b) review, monitor and evaluate educational programs and services for exceptional children; to ensure accountability to established standards, guidelines and level of resource allocations;

(c) assist school districts in the provision of all necessary special programs and special services;

(d) serve as liaison with other governmental and community agencies or organizations serving the needs of exceptional children;

(e) monitor program trends in British Columbia and other jurisdictions and provide leadership and consultation in the improvement of standards of practice;

39 Ex. 44, pp. 3.2-3.4
(f) maintain a management information system on special programs in British Columbia;

(g) encourage the provision and development of appropriate curriculum adaptations and specialized materials for exceptional children;

(h) foster the professional development of teachers and administrators in school districts in relation to meeting the needs of exceptional children; and

(i) assist school districts to establish and maintain appropriate program evaluation procedures.\(^{40}\)

[119] Section 4 of the 1985 Manual outlines the Ministry’s recommended service delivery model:

…a broad continuum of service delivery be provided, extending from placement in a regular class, with no need for special education, to special education provided in settings that may be very highly specialized.\(^{41}\)

[120] The continuum of services contemplated that special education students should be taught in the regular classroom in the neighbourhood school wherever possible. Smaller numbers of students might require a more highly specialized education environment. The 1985 Manual described a “cascade” model of service delivery in which a range of placements would be available.\(^{42}\) Most special needs students would be provided with supports in a regular class; smaller numbers would be successively, and by degree, removed from the integrated classroom until a few would be educated in a residential school, or at home. It recognized that a range of placement options might be necessary. Placement options included assessment and programming centres, resource rooms, self-contained classrooms and itinerant services.

\(^{40}\) Ex. 44, p. 3.5, reproduced as written

\(^{41}\) Ex. 44, p. 4.1

\(^{42}\) Ex. 44, pp. 4.1-4.2
As will be discussed below, the District operated a diagnostic centre until 1994. Its closure is one of the significant allegations of discrimination in these complaints. Ms. Roch was familiar with diagnostic centres and described them as places that students would attend for a set period of time to receive their educational program with a view to returning, ultimately, to more integrated classroom settings. She said they provided further analysis of a student’s learning needs and strengths using diagnostic teaching methods and different material to find out what worked for that student. They then developed a plan for the student to take back to the regular classroom. She testified that diagnostic centres are an option within the cascade model of service delivery as outlined in the 1985 Manual.

She explained that the term “mainstreaming” was commonly used in the 1960s and 1970s in special education and that, as a philosophy, it bears a close resemblance to the cascade model. Neither is a pure integration model because both allow for specialized services outside the regular classroom. Both Ms. Roch and Dr. Perry explained the term “inclusion”, which is more commonly used today. Inclusion is a value system, a belief that all students are included in the community of learners and entitled to equitable access to learning, achievement and the pursuit of excellence in all aspects of their education. It is not the same as integration. Integration is one way to achieve inclusion. Inclusion envisions having special needs students included in general education classrooms, and involved in the same tasks and activities as their age/grade peers. Inclusion could refer to placement but is broader than that. Inclusion allows for special needs students to be integrated but with the necessary accommodations and adaptations to level the playing field and allow them to succeed. Ms. Roch described it as integration with appropriate supports. She said that the Ministry never suggested that a full integration model is the only proper placement for learning disabled children.

The Provisions of the 1985 Manual as they Relate to SLD Students

Ms. Roch explained that when the 1985 Manual was introduced, special education was funded in two ways. Some services, including learning assistance, speech and language pathology, occupational/physiotherapy, and school psychology, were funded by
the Ministry under the Instruction K-7 or 8-12 functions. Amounts were calculated, and provided to districts, on a per capita basis without requiring districts to advise the Ministry which, or how many, students were receiving those services. Other special education funds were provided on a categorical basis. Once a student was identified as having a specific category of disability, for which discrete funds were available, additional funding was provided by the Ministry for the provision of special education services to that student. The categories for which additional funding could be received are set out in the 1985 Manual.

[124] For funding purposes, the Ministry clusters a number of disability categories into the following classifications: 1) low incidence/high cost (“LIHC”); those students who have conditions that occur less frequently in the special education population but are high cost in terms of the level of resources and services they require, and 2) high incidence/low cost (“HILC”); those students who have conditions that occur more frequently in the special education population but are lower cost in terms of the level of resources and services they require. SLDs have always been clustered as a HILC disability. As will be discussed below, some of the disabilities clustered within the HILC program were subject to a cap on the available funding.

[125] Section 7 of the 1985 Manual specifies the program guidelines for each disability category, including the definition a child must meet in order to qualify for the categorical funding, identification procedures, programs expected to be in place, qualifications of personnel providing the programs, available resources and contacts. With respect to the SLD category, the 1985 Manual says:

3.26.1 DEFINITION

The Ministry of Education recognizes that 1-2% of students in the schools will be severely learning disabled. These students experience difficulties with learning that are so severe as to almost totally impede educational instruction by conventional methods. It is anticipated that the mild to moderately learning disabled will be supported at the school level by the Learning Assistance teacher.

The following definition is advanced by the Ministry of Education:
Learning disabilities is a processing disorder involved in understanding or using symbols or spoken language. These disorders result in a significant discrepancy between estimated learning potential and actual performance. Generally, a discrepancy of two or more years on grade equivalent scores or a similar discrepancy on standardized score comparisons is recognized as significant. This discrepancy is related to basic problems in attention, perception, symbolization and the understanding or use of spoken or written language. These may be manifested in extreme difficulties in thinking, listening, talking, reading, writing, spelling or computing.

The defined population is limited to children whose learning difficulty can be clearly identified as a communication disorder. This category does not include children with learning problems primarily resultant from factors such as:

1. Sensory or physical impairments;
2. Mental retardation;
3. Emotional disturbance;
4. Environmental or cultural disadvantage;
5. English as a second language;
6. Lack of opportunity to learn: due to irregular attendance or transiency

3.26.2 IDENTIFICATION/PLACEMENT

Students suspected of being severely learning disabled should be referred for an in-depth psychoeducational assessment…Prior to this referral, however, it is essential that sufficient school based data collection be compiled and instructional intervention strategies attempted.

…

3.26.3 PROGRAM

An Individualized Educational Plan (IEP) should be carefully planned for the student with a severe learning disability. The program should include a statement of the student’s present levels of educational performance, the long range goals and short term instructional objectives, the services to be provided, the evaluation procedure, the anticipated duration of services and a date for reviewing the program…
Individualized planning should be provided on an intensive basis, with a view to maintaining the student in/or returning the student to the regular classroom as quickly as possible. Each student’s program and placement should be reviewed regularly.

Duration of service will vary according to degree of disability and rate of learning. It is recognized that even when students with severe learning disabilities respond well to intensive short term instruction, they may still need ongoing support which is usually provided by the learning assistance teacher. Some students may require ongoing intensive long term service in a resource room or a self-contained class…


[127] In 1980, SLD was first recognized as a separate category of disability distinct from mild to moderate learning disabilities. Ms. Roch testified that, for the first time, based on Ministry guidelines, districts began to identify and count SLD students as well as students who had severe behaviour difficulties and mild intellectual difficulties. The definition of SLDs in the 1985 Manual recognized that 1-2% of learning disabled students would be at the severe end of the spectrum. Only they received supplementary funding from the Ministry. Mildly or moderately learning disabled students were expected to be supported in schools by the learning assistance teacher. Funding for learning assistance was provided in the general education functions as opposed to the special education function.

[128] Ms. Roch acknowledged that the Ministry did not conduct any studies to determine the actual incidence of SLD students. It based its prevalence figure on various references then available. She did not agree that the figure was a conservative estimate of prevalence but agreed that the Ministry had access to the actual incidence rates in the information it compiled from the districts. The importance of this evidence is discussed below regarding the cap on funding for some categories of HILC disabilities.

43 Ex. 44, p. 7.34, emphasis in original
Section 9 of the 1985 Manual deals with identification, assessment and planning, and sets out strategies that a school should implement before a student suspected of being SLD is referred for a psycho-educational assessment. These are called “pre-referral interventions”, where the teacher implements classroom strategies, often in consultation with the learning assistance teacher. If unsuccessful, a referral is made to the School Based Resource Team (“SBRT”) who may make a referral to the school-based learning assistance centre (“LAC”). Only after school-based interventions fail does Ministry policy contemplate referral for psycho-educational assessment.\textsuperscript{44}

Ms. Roch explained pre-referral assessment and intervention. She described assessment of a student’s learning needs as progressive, starting with the classroom teacher identifying a need, trying interventions, evaluating results, and adjusting the program. After exhausting all these options, and determining that more in-depth information is necessary, they progress from classroom interventions to a range of other services, for example, consulting a learning assistance teacher for further assessment and additional strategies.

Once the options of the teacher, learning assistance teacher, and other experts such as speech and language pathologists and school psychologists have been exhausted, a psycho-educational assessment would be done. Technical assessment instruments are used to understand a student’s difficulties, determine learning needs, and design an individual program. Progressive steps are taken when a student is identified with learning difficulties, to intervene, analyze, and build a picture of the learner. The emphasis is on assessment and intervention rather than testing. The 1985 Manual recommends regular evaluation of programs for SLD students and provides evaluation resource materials to do so. It further recommends the skill set for teachers of SLD students.

\textsuperscript{44} Ex. 44, section 9.1
[132] Ms. Roch also testified that the 1985 Manual provides that programs for exceptional students should not be static but measured against the student’s progress. All were to contain effectiveness evaluation plans. The 1985 Manual suggested that all SLD students should have an Individual Education Plan (“IEP”) describing their strengths, needs, the goals and strategies for addressing those needs, and a method to assess whether the strategies were working. This suggestion became mandatory when the Minister issued Ministerial Order 638/95 discussed above.

[133] Section 13 of the 1985 Manual describes learning assistance as a school-based, general special education support service designed to meet the range of needs of a number of special needs students. The LAC teacher is described as a generalist in special education. Despite an error in the wording of the 1985 Manual, it is clear that the Ministry intended the LAC to provide assistance to students with mild or moderate learning disabilities but not to SLD students. Ms. Roch said that, over time, as schools moved to a full-service philosophy, they have become more resourceful and LAC programs have provided service to a broader range of students. She described this as a resource teacher model.

[134] The 1985 Manual includes forms used by the Ministry to collect information from the districts about the number of students within each special education category.

[135] The 1985 Manual was distributed to the districts and was intended for use by those responsible for designing the services to be delivered to special needs students.

Other Policy Work of the Ministry

The Special Needs Student Order

[136] In 1989, the Minister issued the Special Needs Student Order M150/89, the terms of which are set out above. Ms. Roch testified that this was the first legislative articulation of integration as the Ministry’s policy. The Ministry’s philosophy was to encourage districts to direct resources to integrate special needs students into neighbourhood schools. The Ministry did not provide additional grants in the 1990s to
districts for segregated schools and by 1994 was providing such grants for training teachers and teachers’ assistants to integrate students into neighbourhood schools. As discussed below, the District used some of its grant for its planning after closing its Diagnostic Centre.

Section 129.1 of the School Act

[137] In the early 1990s, the Ministry became concerned about extensive cuts that districts were making to their budgets for special needs students and the resulting erosion of services. In July 1991, in response to this concern, the School Act was amended to add s. 129.1, as set out above.

[138] Section 129.1 prevented districts from reducing special education program expenditures below their 1991/92 levels and ensured that funds designated for special needs students were spent in programming for them. Any reduction in such spending had to be justified. The Ministry briefing note indicated that:

The legislation was enacted in response to concerns being expressed that some school boards had indicated their intention to cut special education services to meet other financial priorities or commitments.45

[139] In his letter to the districts, the Minister said:

The legislation has become necessary to provide protection for our special needs children since some school boards have indicated their intention to cut special education services in order to meet financial priorities or other commitments. The Province provides, through Block Funding, additional funding support for programs and services to special needs students on the basis that boards will utilize the full extent of this funding for such purposes and in accordance with Ministerial Orders and Ministry guidelines.46

45 Ex. 82, Tab 32

46 Ex. 85, Tab 53, p. 3
All special education programs were included in the restriction in s. 129.1. The programs relevant to these complaints are: learning assistance, high incidence low cost (SLD, mildly mentally handicapped, severe behaviour and rehabilitation), and identification and planning.\textsuperscript{47}

The Ministry’s Finance and Special Education Branches monitored compliance with s. 129.1 and spending reductions were only permitted with Ministerial consent. The District and 67 others were not in compliance in their 1991/92 budgets and were asked for explanations by the Ministry.\textsuperscript{48} The Ministry instructed them to review their proposed 1991/92 expenditures and advise the Minister of their plan to comply with the legislation.\textsuperscript{49}

The District requested permission to reduce its spending levels but the evidence did not reveal the outcome of this request. The documentary record also indicated that the District, and others, was not in compliance with s. 129.1 in 1993/94.\textsuperscript{50}

In May 1993, guidelines were established for considering requests for reductions in special education funding.\textsuperscript{51} They included evidence that: the number of students being served was lower as a result of lower enrolment or fewer students in the funding categories; reductions in one category were counterbalanced by increased expenditures in another based on shifting student needs; senior staff had been replaced by more junior staff; or that interventions in the prior year had been successful with the target students and services were no longer required. With respect to the last guideline, the Ministry required the district to provide data to support improvements in student performance.

\textsuperscript{47} Ex. 2, Tab 75, an explanation of the high incidence low cost program is set out below.

\textsuperscript{48} Ex. 82, Tab 32 and Tab 41

\textsuperscript{49} Ex. 85, Tab 55

\textsuperscript{50} Ex. 85, Tab 57
Some districts believed that s. 129.1 interfered with the exercise of their discretion and decision making but parents and advocates supported the provision.

The 1993 Review of Special Education

In April 1993, following, and partially in response to, the recommendation in the Spangelo Report, the Minister announced a comprehensive Review of Special Education (the “1993 Review”) to identify required programs for special needs students, the resources required to integrate them, and the way districts used Provincial funds for special needs students. The Spangelo Report was critical of s. 129.1 because it focussed on what districts spent for special education as opposed to how effectively the funds were spent. It said:

Under the co-governance model in place in British Columbia, school boards have the primary responsibility for managing schools and delivering programs in the best interests of their students. For this reason, the Province sets the broad framework for education and provides most of the funding required but leaves to each school board the responsibility for the day-to-day management of the schools. In keeping with this division of responsibility, the finance system puts very few specific restrictions on the way school boards spend provincial funds.

We agree with this approach. In general, provincial funding should not be a prescription for school spending, and the resource-costing model should not be an attempt to simulate a line-item budget for each school district. In some situations the Province may wish to target funds: for example, where all districts do not provide a particular program, or where the Province has a special interest in seeing the funds used in a well-defined manner…Such situations should remain small in number, and the targeted funds should be provided outside the block of funds.

We appreciate that many people are not satisfied with the current approach; they wish to see more restrictions on school board spending and more guarantees that provincial funds are spent for the purposes which

51 Ex. 85, Tab 23
52 Ex. 2, Tab 78, p. 1
they were intended. We are sympathetic to the concerns raised, but we see the answer in stronger accountability for spending decisions rather than in tighter restrictions on spending decisions. For example, we are not satisfied that the restrictions on how much school districts budget for special needs programs (Section 129.1 of the School Act) are a useful way of ensuring that schools deliver suitable services to students with special needs. We are concerned that placing too much emphasis on how much school boards spend for particular programs may detract from the more important question of how effectively boards use their money. We believe the school system should pay more attention to the issue of integrating special needs children and in particular, to the level of resources required and how these resources are used. But we believe this issue requires an in-depth review, not arbitrary budgetary rules.53

[146] Ms. Roch acknowledged that there was a perception within the districts, and among parents, leading to the 1993 Review, that special needs funding was inadequate. Between 1991 and 1994, districts advised the Ministry that they were not receiving enough funding for special education. In 1992, the Ministry noted that there had been a steady increase in the enrolment of special needs students, including those with SLDs, between 1991/92 and 1992/93.54 Documents produced by the Ministry indicated that that trend started in 1987/88 and peaked in 1997/98.55

[147] The 1993 Review envisioned three phases: establishing a policy framework for the overall directions and principles for special education in British Columbia, developing guidelines describing the services and standards required of districts in delivering programs, and developing and producing resource materials to support them.

[148] A Student Support Services Advisory Committee, sometimes referred to as the Special Education Advisory Committee, (the “Advisory Committee”) was established to oversee the 1993 Review. It had representatives from school districts, teachers,

53 Ex. 82, Tab 45, pp. 25-26
54 Ex. 85, Tabs 16 and 17
55 Ex. 82, Tab 18
universities, parents, advocacy groups, and the Ministry. The Ministry engaged Johnstone & Associates to assist the Advisory Committee by collecting and analyzing data, and making recommendations, with respect to the inclusion of special needs students. Their report entitled: “The Inclusion of Students with Special Needs: Data Collection and Analysis” (the “Johnstone Report”), was released in January 1994. Section 129.1 of the School Act remained in effect.

On March 24, 1994, while the Advisory Committee was involved in the 1993 Review, the Special Education Branch prepared an internal discussion document for consideration by the Policy Branch of the Ministry. It raised a number of issues the Special Education Branch believed needed a clear statement of policy direction. In particular, it questioned whether the Ministry should be more directive with school boards regarding the standards set for special education, the requirements for funding and programming, and accountability for outcomes for special needs students. It posed questions about the Ministry’s role and sought direction about whether the Ministry was prepared to institute additional accountability mechanisms.

Ms. Roch acknowledged that the Ministry recognized that its accountability mechanisms were poor and that the delivery of services to special needs students throughout the Province varied. The Ministry also recognized that its information regarding what services were being delivered, their effectiveness, and special needs student progress was poor.

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56 Ex. 82, Tab 5, pp. 3-4
57 Ex. 87
58 Ex. 85, Tab 27
59 Ex. 85, Tab 28
The Advisory Committee met over the course of a year and delivered its report and recommendations to the Minister in May 1994. The Advisory Committee based its recommendations on the following fundamental assumptions:

- British Columbia policy and legislation states that students with special educational needs shall be enrolled in classrooms with other students who do not have handicaps, unless their own educational needs dictate otherwise. School districts must therefore ensure that their policies and operating procedures reflect the requirements and the spirit of the law.

- In order that appropriate educational programs for all students can be put in place, the necessary human, material and technical support for those programs must be available.

- Non-instructional support services must be provided so that all children can take advantage of the learning opportunities offered by schools. To ensure that this happens, the Ministries of Education, Social Services, Health and the Attorney General will develop and implement protocols consistent with the mandate and responsibility of each Ministry, which describe processes for the provision of services to children.

- Financial and human resources are limited and the educational system is being challenged to provide support services to students with special needs in innovative and cost-effective ways. Keeping in mind that the needs of students should be the primary focus, there is a need to balance the interests of all students in the system and the resources which are available.

The Advisory Committee made recommendations regarding: the services required; how to provide them; training and certification of teachers, teachers’ assistants, specialist teachers and ancillary personnel; accountability for student performance; and funding.

The policy framework, developed from the Advisory Committee report and the 1993 Review, was adopted by the Ministry in June 1995 and was accompanied by guidelines for the services and standards required of districts. During the Advisory Committee’s work, resource materials were made available to support teachers. In

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60 Ex. 82, Tab 9

61 Ex. 82, Tab 9, p. 4
February 1994, and 1995, the Ministry made $3 million available to districts for special education training. During this period, the Minister announced a further $30 million for special education. The Advisory Committee recommended that it be directed to students with severe behaviour problems. A new funding category was created for students with severe behaviour and they were removed from the categories of disability subject to the HILC cap which is discussed in detail below.

Section 125.1 of the School Act – Targeted Funding

[154] In June 1994, retroactive to March of that same year, the School Act was amended by replacing s. 129.1 with s. 125.1. Its provisions are set above. It grouped nine special education programs into one function and set minimum spending levels for them. The programs were: learning assistance; special health services; HILC; LIHC; dependently handicapped; gifted; hospital/homebound; and identification/planning. Thereafter, the Ministry monitored the aggregate amount spent by each district for special education but no longer reviewed spending on a program-by-program basis. At the same time, the Ministry set an upper limit for district spending on the administration function.

[155] Mr. Gage testified that, while the aggregate funds were targeted and spending could not drop below the targeted amounts, there was no restriction on the amount that a district could spend in these programs and districts could decide which programs to spend the aggregate amount in. After the repeal of s. 129.1, the level of monitoring by the Ministry declined.

The 1995 Manual

[156] In June 1995, following the work of the Advisory Committee, the Special Education Branch issued a revised manual entitled: “Special Education Services – A
Manual of Policies, Procedures and Guidelines” (the “1995 Manual”). It replaced the 1985 Manual and included the policy and legislative framework for special education services, as well as the procedures and guidelines for special needs students.

[157] The 1995 Manual continued to identify categories of special needs students, and their eligibility for supplemental funding by category. Section E describes the categories of children with special learning needs.

The Provisions of the 1995 Manual Relating to SLD Students

[158] The 1995 Manual incorporated a 1988 widely-accepted definition of learning disabilities from the National Joint Committee on Learning Disabilities:

Learning disabilities* is a general term that refers to a heterogeneous group of disorders manifested by significant difficulties in the acquisition and use of listening, speaking, reading, writing, reasoning or mathematical abilities. These disorders are intrinsic to the individual, presumed to be due to central nervous system dysfunction, and may occur across the life span. Problems in self-regulatory behaviours, social perception and social interaction may exist with learning disabilities but do not by themselves constitute a learning disability. Although learning disabilities may occur concomitantly with other handicapping conditions (e.g., sensory impairment, mental retardation, serious emotional disturbance) or with extrinsic influences (e.g., cultural differences, insufficient or inappropriate instruction), they are not the result of those conditions or influences.

* for the purposes of this document the term “learning disability” includes conditions described as dyslexia, dyscalculia or dysgraphia, and may include students with Attention Deficit/Hyperactivity Disorder (AD/HD).

[159] The 1995 Manual recognized that SLD students will generally require more intensive intervention. The Ministry provided supplemental funding for that purpose through a discrete funding category for students who met the SLD definition. The 1995

62 Ex. 82, Tab 11

63 Ex. 82, Tab 11, § E, p. 11
Manual acknowledged variations in the severity of learning disabilities and their impact on learning. Students with mild to moderate learning disabilities were expected to be successful when classroom instruction was adapted and combined with support from a learning assistance or school-based resource teacher. Financial support for their programming was non-categorical and was funded through learning assistance. Ms. Roch acknowledged that the intensity of the interventions required will generally vary with the level of disability. The 1995 Manual also supported early identification and intervention.

[160] Dr. Perry testified that the 1995 Manual accepted what the literature suggested was necessary, a continuum or cascade of services with times where it is appropriate for a learning disabled child to be with like students so that they can get specialized attention that targets their specific problems in a way that cannot be done in the general school population.

[161] To receive supplemental SLD funding, a student had to meet the 1995 Manual definition above, and the following criteria:

- severe difficulties in the acquisition of basic academic skills and/or school performance [that] persist after classroom-based remedial interventions, curricular adaptations and learning assistance support.

The severity of these academic difficulties must be such that students demonstrate:

- persistent difficulties in the acquisition of pre-academic skills such as recognition of letters and numbers in the early primary years; and/or

- persistent difficulties in the acquisition of reading, writing and/or arithmetic skills in the later primary years; and/or

- a discrepancy of 2 standard deviations between estimated learning potential and academic achievement as measured by norm-referenced instruments in Grades 3-12;

and
there is a significant weakness in one or more cognitive processes (e.g., perception, memory, attention, receptive or expressive language abilities, visual-spatial abilities) relative to overall intellectual functioning, as measured by norm-referenced assessment instruments, which directly impacts learning and school performance;

and

the criteria listed above are not the result of other disabling conditions or external influences described in the definition above;

and

the student is receiving specific additional services directed at addressing the learning disability (reduction in class size is not by itself a sufficient service to meet this definition);

and

a current IEP is in place.  

[162] Ms. Roch testified that the essence of the definition was that a child fails to progress despite the work of the classroom teacher and all of the pre-referral interventions.

[163] It is useful here to compare the definition and criteria for qualification for supplementary funding as an SLD student in the 1985 and 1995 Manuals. The former applied to all grades and required difficulties with learning so severe as to almost totally impede educational instruction by conventional methods. In particular, it required students to demonstrate a “significant discrepancy between estimated learning potential and actual performance”. Significant was defined as a discrepancy of two or more years on grade equivalent scores or a similar discrepancy on standardized score comparisons.

[164] The 1995 Manual definition requires severe difficulties in the acquisition of basic academic skills that persist. It distinguishes between students in the early primary years,

64 Ex. 82, Tab 11, §E, pp. 11-12, reproduced as original
Kindergarten to Grade 2, and those in Grades 3 to 12. In the early primary years, the student must demonstrate persistent difficulties in the acquisition of basic skills. In Grades 3 to 12, the student must demonstrate a discrepancy of two standard deviations between their estimated learning potential and their academic achievement as measured by norm-referenced instruments. The two standard deviations referred to IQ scores, not to grade levels.

[165] Dr. Perry, whose evidence is reviewed more fully later in this decision, was concerned that the SLD definition in the 1995 Manual did not give enough guidance about what “persistent difficulties in the acquisition of skills” meant in the grades up to Grade 3. Cathie Camley, the executive director of a chapter of the LDABC, testified that the LDABC was concerned about the SLD definition in the 1985 Manual because of its reference to a “significant” discrepancy which was not well defined. They support the SLD definition in the 1995 Manual but object to the two standard deviation requirement for students after Grade 3.

[166] Some school psychologists expressed concern that the SLD definition in the 1995 Manual was more restrictive than the earlier one so that children earlier designated as SLD would no longer qualify. Ms. Roch disagreed and described the changes as a clarifying amendment. However, she agreed that to be designated as SLD, students in grades 3 to 12 must demonstrate a discrepancy of two standard deviations between their estimated learning potential and their academic achievement, as measured by norm-referenced instruments, and that the definition in the 1985 Manual was more open to a range of interpretations by school psychologists.

[167] The 1995 Manual continued to estimate a prevalence of 1-2% of SLD students and continued to require a psycho-educational assessment to determine the presence, nature, severity, and educational implications of a SLD.

65 Ex. 89
The 1995 Manual set out new mandatory requirements for an IEP. The Advisory Committee had recommended that all children with special needs regardless of service levels have IEPs, but after consultation, they were only made mandatory for students receiving more than 15 hours of remedial instruction in a school year, from someone other than a classroom teacher. In 1997, this requirement was increased to 25 hours and the Ministerial Order was amended accordingly.

The 1995 Manual contemplated a broader role for learning assistance. These services were described as school-based, non-categorical, resource services designed to support classroom teachers and their students with mild to moderate difficulties in learning and adjustment. Services included support to the classroom teacher through school-based consultation, collaborative planning and co-ordination with the school-based team, instruction, assessment and evaluation. Learning assistance was to provide an important link to district-based support services.

The 1995 Manual acknowledged that some school districts were using a resource teacher model where the learning assistance teacher provided support to a wider range of children including those with SLDs. The Ministry considered this model appropriate so long as the student supports were consistent with the guidelines and appropriate to student needs. The 1995 Manual indicated that students with SLDs usually required access to more specialized programs and services.

The 1995 Manual sets out the preferred qualifications for staff assisting SLD students, which exceed those required of a learning assistance teacher.

66 Ministerial Order M638/95, as amended by M319/96
67 Ministerial Order M011/98
68 Ex. 82, Tab 11, § D, p. 1
Dr. Perry testified that because teachers and special education specialists were not always familiar with the 1995 Manual and the intent of the Ministry, the policies and procedures in it were not always followed.

**Work Following the Release of the 1995 Manual**

[173] In 1996, the Special Education Branch produced a *Resource Guide for Teachers* for teachers of students with learning and behavioural differences. It was one of a series of guides to assist teachers to integrate special needs students into the classroom.

[174] In August 1996, the Ministry released a background information paper to help school districts interested in establishing early intervention programs in the primary grades. Its focus was reading disabilities and it reviewed some academic information about early intervention. Ms. Roch testified that, by the mid-1990s, the Ministry focused on early intervention. A new source of funds called “Social Equity Envelope Funding” was available and districts could direct those funds to early intervention activities.

**The Working Group on De-targeting and Accountability**

[175] In February 1997, the Minister announced his intention to repeal s. 125.1 of the *School Act*, which targeted funds for special and Aboriginal education, effective in the 1998/99 year and to replace it with other accountability mechanisms. A stakeholder working group, the Working Group on De-targeting and Accountability in Special Education, (the “Working Group”) was formed to advise the Minister. The Director of the Special Education Branch chaired the Working Group and Ms. Roch served as its secretary. It considered overall accountability for the delivery of special education services, not just fiscal accountability.

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69 Ex. 82, Tab 12
[176] The Working Group released its report in November 1997 and recommended against repealing s. 125.1 until alternative accountability mechanisms were in place and their effectiveness demonstrated.\textsuperscript{71} The majority of the Working Group agreed that targeting served a useful function in guaranteeing some level of services to special needs students in the absence of other accountability mechanisms. They said:

\begin{quote}
We agree that the amount of money spent is not the only indicator of a good educational program and that other meaningful indicators would focus on a student’s learning, achievement, and attitudes towards school and education. At the same time, there is a recognition that in the absence of resource allocation, it is unlikely that the kinds of services necessary to provide access to and success in an educational program can be provided for students with special needs.\textsuperscript{72}
\end{quote}

[177] Apart from the recommendation about de-targeting, the recommendations in the Working Group’s report were unanimous.\textsuperscript{73} They included that:

\begin{itemize}
\item Districts be required to describe publicly their identification process for special needs students;
\item The Ministry work with districts to provide models of best practice around identification/assessment processes;
\item All students who meet the eligibility guidelines be reported on a student-level data form, whether they are beyond the cap or not;
\item Districts be required to report on the effectiveness of programs for special needs students in their annual report to the Ministry;
\item The accreditation system be revised to explicitly address the effectiveness of special needs programs;
\end{itemize}

\textsuperscript{70} Ex. 82, Tab 13
\textsuperscript{71} Ex. 85, Tab 70, p. 5
\textsuperscript{72} Ex. 85, Tab 70, p. 5
\textsuperscript{73} Ex. 85, Tab 70, pp. 8-14, Ex. 2, Tab 69, p. 1
• The Ministry continue to develop and refine tools to enable districts to review the effectiveness of their special education service delivery system;

• The Ministry develop resources to streamline the IEP process and research the use of an IEP as an accountability tool;

• The Ministry collect data on the graduation rates of special education students;

• The Ministry restructure the expenditure reporting system to ensure consistent accounting and reporting across the Province; and

• The Ministry establish a standing Advisory Committee on Special Education.

[178] Following release of the report, the Minister reversed his position, and retained targeting.

[179] Ms. Roch testified that the Ministry implemented some of the Working Group’s recommendations. It moved to having districts report special needs students on an individual rather than an aggregate basis. With personal information, the Ministry could track the student’s performance and review a district’s retention and graduation rates for special needs students. Provincial examinations were introduced to measure performance in Grades 4, 7 and 10. With individual reporting, the Ministry could cross reference the achievement of special needs students in reading, writing and math in those three grades beginning about 1999. In 2001, the Ministry began to generate statistics about the performance of special needs students on Provincial examinations for discussion with the districts. Ms. Roch testified that she shared some aggregate information with the directors of special education in the fall of 2001 and some of that information has been discussed with districts as the Ministry moves towards accountability measures.

[180] In cross-examination, Ms. Roch agreed that the data the Ministry collects does not allow it to determine whether specific programs are adequate to meet a special needs student’s needs.
[181] In the spring of 1997, after the changes to the level at which an IEP was required, and, in part, because of criticism about the additional work that was required in preparing IEPs, the Minister commissioned a study of the effect of the IEP requirements and a formal review of learning assistance services (the “1997 LAC Review”). The Ministry retained Desharnais & Associates to conduct the 1997 LAC Review.

[182] The stated purpose of the LAC Review was to determine and describe the role of learning assistance in the delivery of special education support services and to examine the impact of the IEP requirement. Ms. Roch managed the Ministry contract for the review and chaired an advisory committee that guided the process. The 1997 LAC Review involved interviewing school and district representatives, teachers, and parents.


[184] The Desharnais Report concluded that the demands on learning assistance had increased due to an increase both in the number of students receiving learning assistance and their needs. Absent more specialized alternatives, learning assistance teachers increasingly had students with more complex learning disabilities, beyond the scope of learning assistance services, added to their caseloads. This raised questions about whether the remedial intervention needs could reasonably be delivered. The report noted concerns about the consistency and continuity of service delivery and described a system that was “quite a departure from Learning Assistance as described by the Ministry.”75 The Desharnais Report also indicated that many designated SLD students received learning assistance as their only special education service.

74 Ex. 55 and Ex. 84

75 Ex. 84, p. 91
The Ministry’s executive summary of the major findings of the Desharnais Report stated:

- The over-riding issue is the increase in caseloads and the composition of those caseloads in the absence of more specialized alternatives or a system of support…On average, the caseload represents 13.4 percent of the student population, but ranges to as high as 22 percent in some elementary schools and 27 percent in some secondary schools.

- As support services have been reduced, the caseloads of Learning Assistance teachers have increasingly included students with more complex learning difficulties. About 25 percent of the caseloads are students who have severe learning disabilities and intensive remedial needs. It raises the question of whether the amount of remedial intervention needed can be reasonably delivered given these caseloads…. 76

Although the Desharnais Report was completed in July 1997, it was not released until May 1998, almost a year after the Ministry received it. Ms. Roch could not recall the reason for the delay but it was apparent in the documentary record. In a March 1998 briefing note prepared for a meeting with the LDABC, the Minister was told:

Learning Assistance funds ($82 million) are provided to enable school boards to support students with mild to moderate learning disabilities and other mild to moderate learning challenges. A provincial review of learning assistance services (June 1997) suggests that, as other more specialized special education support services are eroding in school districts, existing learning assistance services are being ‘stretched’ to cover greater numbers of students with a broader range of special needs. 77

Also in March, 1998, the Ministry’s communication plan for the release of the Desharnais Report cautioned:

- Special education parents are well organized and vocal. They can be expected to react with an “I told you so” to the Review.

[76 Ex. 2, Tab 58, p.1  
77 Ex. 2, Tab 57, p. 3, reproduced as in original]
• The findings of the Review confirm anecdotal information that supplementary special education support services have eroded in school districts in recent years of fiscal restraint, leaving Learning Assistance Teachers to assume responsibility for greater numbers of students with a greater range of special needs.

• The “network of special education supports” described in BC’s Special Education Policy as being necessary to ensure the successful inclusion of students with special needs, has diminished.

... 

• Ministry messages regarding a corporate response to the findings of the Learning Assistance Review will necessarily be low-key, and should emphasize the allocation of additional resources to local boards to enable them to undertake a local examination of their services, guided by the findings of the Learning Assistance Review Report.  

[188] Ms. Roch admitted that the Desharnais Report noted concerns about learning assistance service delivery and the Ministry had significant concerns about its release. When pressed in cross-examination, she acknowledged that the report did not paint an entirely positive picture.

[189] Concerns about the erosion of specialized settings for SLD children were not new. In December 1992, the president of the LDABC wrote to the Minister about the lack of resource rooms for special needs students, and advising that learning disabled students were not receiving sufficient support from classroom teachers. In June 1994, the LDABC gave the Ministry an overview of their concerns about the provision of service to learning disabled students which included the erosion of specialized settings for SLD children outside the regular classroom. They indicated that the regular classroom is too large, crowded, and not intensive enough for some children. Ms. Roch testified that the LDABC document was considered by the Ministry when drafting the 1995 Manual.

78 Ex. 94, pp. 4-5
[190] The Communications Branch recommended a low key response\textsuperscript{79} to the Desharnais Report, with emphasis on additional resources to enable districts to examine their services in light of its findings, and that the Minister not sign the release because the report largely confirmed a number of problems with Learning Assistance.\textsuperscript{80} Ms. Roch believed that the Ministry proceeded with the communications plan and the Desharnais Report was released in May 1998.

[191] Ms. Roch said that at the time there was a growing concern that a significant number of children who should have been receiving assistance in the classroom were receiving support through special education. The discussion focussed on preserving special education for those who really needed it, and having the classroom teacher assume more responsibility for other students. The report made it clear to the Ministry that specialized supports were not in place and learning assistance was assuming responsibility for a greater number of children.

[192] Ms. Roch testified that the Province therefore provided $75 million of new funding to reduce class sizes in the primary grades and service levels for learning assistance and special education teachers who did not have regular daily classroom activities but consulted with other teachers and provided direct instruction to some students. Where school boards fell below Provincially prescribed service levels in learning assistance and specialist teachers, they received new funds to reach the now standard Provincial levels.

[193] In the fall of 1998, the Ministry released \textit{Starting Points: A Research Summary for Schools Planning Intervention Programs}. It was a resource document which reviewed selected intervention research and described early interventions in reading, mathematics, and social and emotional development.\textsuperscript{81} The Ministry also introduced class size limits in

\textsuperscript{79} Ex. 95 and 96

\textsuperscript{80} Ex. 96, p. 2

\textsuperscript{81} Ex. 82, Tab 14
the Provincial teacher’s collective agreement. Ms. Roch testified that this promoted smaller primary classes.

*The 1999 Special Education Review*

[194] In March 1999, the Ministry announced another Province-wide review of special education (the “1999 Review”). Dr. Siegel and Stewart Ladyman, then the Ministry’s Superintendent of Field Liaison, conducted the review. They were asked to address:

- How special education policy was being implemented;
- How resources were being used, and if they were being spent effectively;
- How effective existing programs were for students with special needs, and how they could be improved;
- What accountability system exists for special education; and
- What, if any, barriers to improvement exist.  

[195] Dr. Siegel and Mr. Ladyman posed a number of questions for consultation and discussion, and solicited written submissions with respect to them.  

[196] In response to the 1999 Review, the British Columbia School Districts Secretary Treasurers Association advised the Ministry that the funding formula needed to be adjusted to reflect the true cost of providing service to special needs students. In particular, it recommended:

1. Funding formulae need to be adjusted to reflect the true cost of providing service to students with special needs.

   Generally funding is not adequate as evidenced by the fact that 55 school districts are subsidizing the special education targeted revenue by $62 million in the 1998/99 school year. This subsidization from other areas

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82 Ex. 88, p.2
83 Ex. 88, p.3
within school districts operating budgets is provided at a significant cost in terms of reduced services and maintenance of facilities which is affecting all students with or without special needs. As resources continue to be reduced within the education system the ability of school districts to continue with this subsidization from other areas is diminished. This is evidenced by a number of school districts forced to reduce special education budgets and services, a situation which has been highly publicized this year.

2. Funding formulae need to recognize the true cost of providing direct service to the students and must also recognize the support services necessary to assess, document and report on these students.

In many incidences, particularly in the high-incidence low-cost categories, the cost of assessing, documenting and reporting for these students consumes a disproportionate amount of the funding received, leaving insufficient funding for follow-through of the needed direct service.

3. Cap within the funding formulae i.e. gifted and high incidence low cost categories need to be removed.

School districts cannot stop providing service to students who are in excess of maximums allowed by the funding formulae and if service is mandatory then the funding must be provided. The current formulae appear to assume an efficiency of scale which simply does not exist….  

[197] The Vancouver School District (“Vancouver”) also made a submission in response to the 1999 Review in which it said:

Basic funding levels for high incidence and gifted students are inadequate for assessed needs within our District. Given that many additional needs exist but cannot be formally documented because assessment costs exceed available resources, and indeed, commensurate programme funding, both populations are underserved. This point must be strongly emphasized. Despite net budget/service reductions of $54.7 million dollars since 1991/1992…the District has consistently over expended in the past several years…to provide services for learners with special needs…If this were an isolated occurrence, a simplistic analysis might blame District management for being overly generous to special needs groups at the expense of other District needs and services. Framed by

84 Ex. 2, Tab 85, p. 2, reproduced as original
Ministry directive, however, and supported as a pattern rather than the exception across the Lower Mainland, these over expenditures must be seen as legitimate responses to need in relation to policy implementation. The average total percentage difference between targeted grants and budgeted expenditures is 29.1% across the Metro Area, with Vancouver and Surrey showing a 33.9% and 39.0% over expenditure respectively…

Clearly the funding formula falls short of addressing the real needs of students and accommodating the actual, including contractual, costs of serving them. This fact is the greatest impediment to implementing the Ministry’s Policy for inclusion…

Vancouver recommended, as a short term solution, the removal of the HILC cap:

[to] more effectively allow service based on needs, rather than limiting educational opportunities because there are more of these students than calculated “in theory”. There are many who would dispute the low level of this cap, particularly when applied to large, urban districts with areas of acknowledged poverty and social deprivation.  

[198] Similar sentiments were echoed by other organizations that made submissions. In his evidence, Dr. Brayne, the District’s Superintendent of Education, said he agreed with that submission.

[199] One of Vancouver’s other concerns was what they saw to be a conflict between the philosophy of inclusion and the funding available for full inclusion. The requirement for a psycho-educational assessment to qualify for supplemental SLD funding was time-consuming and used resources that could be spent on services. Vancouver believed that an assessment should not be required in all cases because often it simply confirmed the views of school staff and parents about a student’s needs. Acceptable alternatives should be available for class and resource room teachers to identify needs in the HILC and gifted categories so that support can be provided quickly. If some resources spent for formal assessments could instead be used for classroom curriculum-based assessments that

85  Ex. 20, pp. 14-18, emphasis added

86  Ex. 2, Tab 84, p. 4; Ex. 2, Tab 85, p. 2; Ex. 56, p. 1; Ex. 57
teachers, learning assistance teachers and resource teachers could use, more people could identify SLD students and therefore support them. In addition, it would free the specialists who now do the assessments and reduce their long waiting lists which limit their availability to consult with classroom teachers.

[200] The report from the 1999 Review entitled: “A Review of Special Education in British Columbia” was released in 2000. The report made 47 different recommendations. Learning assistance was referred to in only one of the recommendations. Because the reviewers concluded that LAC services had become very diverse and it was increasingly difficult for the Ministry and boards to assess their effectiveness, it was recommended that the Ministry re-distribute a synopsis of the Desharnais Report to assist boards in reviewing their own models of learning assistance delivery.

[201] The 1999 Review concluded there was some evidence that:

…in the attempts to ensure the integration of particular students, their educational needs are not well met. As is explained in the [1995] Manual, inclusion and integration do not mean “that students with special needs must spend 100 per cent of every day in neighbourhood school class placements with their age and grade peers.” The goal of meeting the educational needs of all students puts the “emphasis on educating students with special needs in neighbourhood school classrooms with their age and grade peers” but does not preclude “the appropriate use of resource rooms, self-contained classes, community-based training or other specialized settings…It appeared to the reviewers that there is a lack of understanding that a continuum of alternative support services and placements should be available to meet student needs.

[202] In 2000/01, the Ministry introduced funding for early intervention initiatives, such as the purchase of early assessment or intervention materials and teacher training.

87 Ex. 2, Tab 37

88 Ex. 2, Tab 37, p. 33
Additional Monitoring by the Ministry

[203] Ms. Roch described the school accreditation process which requires each school, every six years, to analyse its population and programs. An external team spends an intensive week verifying the school’s findings. An annual growth plan for the school is also required. In the course of the accreditation process, a school also looks at its delivery of programs to special needs students.

[204] Ms. Roch also described the district annual reports required by the School Act. They, too, are not specific to special education but are general reports. Since the 1980s, the Ministry had been working on a specific special education review tool. It is being used by a number of districts for their own purposes but resulting reports do not need to be submitted to the Ministry. She agreed that none of these tools assessed the effectiveness of programs for learning disabled students and the Ministry has not done any real monitoring of the effectiveness of programs for learning disabled children in British Columbia.

[205] Dr. Siegel testified that the Ministry did not have a standard for monitoring the success of interventions. There were Ministry standards for designating a student as learning disabled but, thereafter, the responsibility for monitoring was a district’s.

[206] The 1999 Review recommended that the Ministry change its auditing system from one that focuses on compliance with assessment and planning processes and procedures to one that focuses on the educational progress of students who have special needs and that targeting of funds for special education should remain in place until other assessment mechanisms were in place.  

89 Ex. 2, Tab 37, pp. 12-13

90 Ex. 2, Tab 37, p. 26
The Ministry’s Policy with respect to the Teaching of Literacy Skills

[207] In the early or mid 1990s, the Ministry supported the “whole-language” approach although Ms. Roch acknowledged that there was debate about the best practice for teaching literacy.

[208] In 1990, after the Sullivan Commission, the Ministry published a three document Primary Program for all children in primary schools in British Columbia. It discusses special needs children but is not specifically directed at them. The Foundation Document outlines the vision for primary education. The Resource Document provides practical ideas for teachers in implementing the Primary Program. The Catalogue of Learning Resources lists selected resources to support the Foundation Document.

[209] Ms. Roch testified that the Foundation Document proposed a whole-language approach to reading instruction, as advocated by the Sullivan Commission; however the role of phonics in teaching literacy is also discussed. The Ministry revised the Primary Program in 2000.

[210] As discussed below, one of the programs suggested to the Moores for Jeffrey was the Orton-Gillingham method. The Primary Program does not include this method as a best practice for teaching learning disabled readers.

THE CAP ON FUNDING FOR HIGH INCIDENCE/LOW COST STUDENTS

[211] Much evidence was given about the Ministry’s cap on funding for some categories of students in the HILC program, the genesis of the cap, and its implications for SLD students.

91 Ex. 90

92 Ex. 82, Tab 3
[212] As noted above, special education was originally a separate function for funding purposes. It was later combined into the instruction function. As also noted, some special education funds are allocated to districts on a per capita basis for general special education services, including learning assistance services. School boards are not required to report the number of, or which, students are receiving those services. Other special education funds are provided to school boards on a categorical basis. These are specific funds for students identified as special needs within defined special programs. Some of the categories are clustered together in the HILC program. Unlike other categories of disabilities, there is a cap on the available funding for students in some of the categories of disabilities in the HILC program. Although, as will be discussed below, the categories of students subject to the cap changed, for ease of reference throughout this decision I will refer to the cap and those categories of disabilities funded under it as the “HILC cap”.

[213] Under the HILC cap, districts receive funding for HILC students, up to a fixed percentage of the student population, regardless of the actual numbers within each disability category in the capped program. At the time of the hearing the HILC cap was set at 4% of the student population. Of that 4%, the Ministry expects that 1-2% of the student population will be SLD.

[214] Ms. Roch and Mr. Gage gave evidence about the genesis of the HILC cap. It is also outlined in the May 1992 recommendations to the Fiscal Framework Review Committee.93

[215] Prior to 1970, the Ministry separately funded students who were educably mentally handicapped (those with mild intellectual difficulties), learning disabled, and emotionally disturbed. All of these categories of disability were considered HILC. During the 1970s, these groups were combined for funding purposes into learning

93 Ex. 2, Tab 63 (revised in January 1993)
assistance funding. At the end of the 1970s, the Ministry recognized that the HILC category of disabilities included students with a range of needs and that learning assistance funding was inadequate for those who were at the severe end of the range.

[216] By 1980, recognizing that there was an additional cost to providing services to students at the severe end of the range, the Ministry began providing supplemental funding for those students identified as being SLD, having severe behaviour disorders, and having mild intellectual disabilities. These students, together with children being rehabilitated, described as having severe social-emotional problems, were the original cluster of disabilities in the HILC program eligible for supplemental funding. Learning assistance was still offered for students with mild to moderate learning and behaviour needs.

[217] In 1987/88, the HILC cap was introduced for funding students in the above-noted HILC categories. Initially the HILC cap was 3.5%. Districts were only eligible for supplemental funding for up to a maximum of 3.5% of their student population regardless of the number of students actually designated in the capped categories. Ms. Roch testified that the 3.5% level reflected the 1986 Provincial average of students reported in the capped categories of disabilities, the last year for which statistics were available. Of the 3.5% HILC cap, the Ministry estimated that 1-2% were SLD students. At the HILC cap’s introduction, the Ministry was collecting information about HILC students at the district level. It did not produce any documents which discussed either the policy for the HILC cap or the decision making process which led to its implementation.

**Why was a cap implemented?**

[218] Ms. Roch and Mr. Gage explained the rationale for the HILC cap. Ms. Roch said that the Ministry considered the percentage of students within the various HILC categories to be fairly standard across the student population and so funding distribution was done proportionally to ensure equity across the Province. Because district assessment practices varied, the HILC cap ensured stability across the system; one district would not be disproportionately resourced relative to another.
[219] Mr. Gage believed that the Special Education Branch had difficulty coming up with clear, concise definitions of the students in the special education categories, which made it difficult to verify that students were being accurately categorized. He recalled that some analysis was done by the Special Education Branch which indicated that the incidence was uniform across the Province and throughout North America.

[220] No documentary evidence was produced to support the recollections of either Ms. Roch or Mr. Gage.

[221] Ms. Roch acknowledged that Ministry documents revealed that the HILC cap was not introduced to fund the actual incidence of students within the HILC categories, but to control the increasing number of students qualifying for supplementary funding.\(^9\) When asked whether part of the purpose for the HILC cap was to limit the increase in the number of students in the HILC category, she agreed that resource capacity was one of the factors. Mr. Gage also acknowledged that the Ministry acted because of the rapid escalation in the numbers of students being reported in these categories.

**To whom did the cap apply?**

[222] As noted above, the four categories originally included in the HILC cap were SLDs, severe behavioural disabilities, mild intellectual disabilities, and rehabilitation.

[223] In 1989/90, students with mild intellectual disabilities were removed and were funded on actual incidence, without a cap. The HILC cap continued to apply to the other three categories up to 3% of total enrolment. In 1990/91, it was increased to 3.25% and in 1991/92, to 3.6%. It was increased to 4% in 1993/94 where it stood at the time of the hearing.

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\(^9\) Ex. 2, Tab 63, p. 2
Until 1991/92, districts were funded at the total amount of the HILC cap regardless of their actual incidence levels. If a district identified fewer students in the HILC program, they received the capped amount. Commencing in 1991/92, they were funded based on their actual incidence of students up to the HILC cap.

As discussed above, the Advisory Committee recommended that the $30 million in additional funding for special education announced in 1994 be provided for students with severe behaviour problems. As a result, a new funding category was created in 1994/95 and these students were funded on an actual incidence basis and were no longer subject to the HILC cap. Students with moderately severe behavioural difficulties, a new category of defined disability entitled to supplementary funding, replaced them under the HILC cap.

In 1995/96, Mr. Gage said the system was changed to incremental funding and each student in a disability category received basic education funding in the regular instruction function and an incremental amount in the special education function. The 4% HILC cap still applied.

The system changed once more in 1996/97, when each student was given the same amount of per student funding but each district was given an additional core amount for the HILC program up to the 4% cap.

Does the cap reflect actual incidence of students in the HILC categories?

Reporting to the Ministry about students in HILC categories has changed. In the 1980s, districts reported the aggregate number of students in the categories of disability in the HILC program. In the early 1990s, each school reported the number of children in the HILC program but reported student specific information for those in the LIHC

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95 Ex. 82, Tab 76
program. Starting in 1997 or 1998, the Ministry gradually moved to student specific reporting for all categories of special needs students. The Working Group, referred to above, recommended:

Currently, the most basic demographic information and trend lines to describe the progress of students with special needs through the system are difficult to obtain because there is not consistent identification of who these students are in the Ministry’s data collection system. We believe that this is fundamental to the development of an accountability system.

It is therefore recommended that:

The Ministry include all students with special needs on the student-level data collection system (Form 1701) and that Form 1601 be discontinued for this purpose.

[229] The Ministry’s data showed a steady increase in the number of special needs students throughout the late 1980s and 1990s, including those with SLDs. Ministry records showed a significant increase in the number of SLD children identified by districts between 1987/88 and 1997/98, with a slight drop the following year. Between 1989/90 and 1995/96, the number of SLD students rose from 9,768 to 15,407. Ms. Roch acknowledged that, in the 1998/99 school year, districts reported 4.84% of students in the HILC program and in 2000/01, the number was 4.58%. In both years there were more students in the HILC program than were funded under the 4% cap.

[230] As a result, she said, school districts came under increasing pressure to provide services to students above the 4% cap. Once a child was identified, services had to be provided regardless of whether the district was above the HILC cap. With no additional funding from the Ministry, funds had to be found elsewhere in a district’s budget. Ms. Roch agreed that the Ministry was advised that this was creating a significant pressure.

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96 Ex. 85, Tabs 16 and 17

97 Ex. 82, Tab 18

98 Ex. 2, Tab 64
The documentary record reveals that these concerns were raised repeatedly by districts and advocacy groups.

[231] Throughout the early 1990s, the Ministry was aware of district concerns that they had insufficient resources to sustain both integration and separate settings for SLD students. Ms. Roch agreed that it was a challenge for districts to provide a full range of services.

[232] Ms. Camley testified that the LDABC has made a number of submissions to the Ministry since 1988 on special education issues expressing concern about the assessment and identification process, the level of available funding, teacher preparation programs, specialist qualifications and the HILC cap and its effect on SLD children. As districts identify more students than the HILC cap recognizes, funds have to be spread over a larger population. The LDABC recognized that many school districts spent above the HILC cap but many were cutting back to the capped amount. She believed that the HILC cap produces a disincentive to designate students. The LDABC’s position is that every SLD student should be funded.

[233] Dr. Perry discussed the effect of a cap that does not reflect actual incidence. A low estimate of incidence by the Ministry discourages a district from identifying more students than the Ministry will fund. Unidentified students are unlikely to get the same level of service as their peers who have been identified. Alternatively, if districts identify more that the funded percentage, and provide services to all, then they are trying to do more with less. Available funding is being distributed to a larger population of students than those for which it is intended.

[234] In 1991, Vancouver asked the Ministry to establish a Provincial resource program for students who were designated in the HILC program in excess of the HILC cap. They believed that special education costs for students over the cap were not recognized in
block funding and their program costs could only be funded at the expense of other programs, or through funds raised by a referendum.99

[235] Dr. Overgaard, Vancouver’s Associate Superintendent responsible for special education services, described chronic under-funding for special education. She stated that, in 1991, Vancouver spent $7 million more than the Ministry provided for special education. The district has exceeded the HILC cap for a number of years, at the expense of other areas of its budget and, each year, it raises the issues of underfunding and the HILC cap with the Ministry. She also described the need for resources for early identification of undesignated primary students and intensive intervention which, the district believes, could prevent long-term special service needs in many cases. If students are not able to read by the time they are in Grade 3, there is a greater problem later in their school career. Some students need intense remediation early on and Vancouver is not always able to provide it.

[236] Again in 1992, in an internal document, the Ministry made reference to districts reporting students only up to the level of the cap while actually providing service to more students. In 1997, the Working Group report indicated that there was inconsistency in how districts reported incidence because some only reported up to the level of the HILC cap regardless of whether they had other students who would be eligible under the guidelines. The Working Group also reported that the Ministry had been criticized for funding less than appropriate prevalence estimates. They recommended that the Ministry combine funding categories into a single entity called “Special Education Resource Program Support” and include in it funds for learning assistance, SLDs, mild mental handicaps, severe behaviour, and rehabilitation. They also recommended that the funds be allocated by a formula based on total pupil enrolment.100

99 Ex. 85, Tab 35
100 Ex. 85, Tab 70
[237] Ms. Roch also acknowledged that the Ministry was concerned about districts under-reporting in the HILC categories. This was confirmed by the Ministry’s documentary record. For example, in a 1990 internal memo, the Director of Special Education stated that there were districts not reporting due to identification difficulties.

[238] In 1993, the Quesnel school district, whose incidence of HILC students was double the HILC cap, wrote to the Minister about the impact of the 4% HILC cap on their students and requested its removal. In a briefing note, in response, the Ministry explained that, with restrained Provincial resources and variation in assessment practices across the Province, it would be inequitable to allow districts to get a larger share of the resources by identifying a greater number of HILC students.

[239] Quesnel was not the only affected district. Ms. Roch acknowledged that many districts were advising that they did not have enough money to fund services for students in the HILC category. She described the philosophy of education in the 90s as being one of increasing inclusion of children with special needs into the mainstream of schools. This was recognized as being a challenge for educators. She said they were all learning together how to accommodate children with special needs. With increasing advocacy, special education was much more of a consideration in a school’s planning.

[240] In this context, the Ministry announced the 1993 Review referred to above. Ms. Roch said that part of the strategy was augmenting funding, when funding was available from government, and part of it was working smartly within the available funding.

[241] The Johnstone Report, commissioned as a part of the 1993 Review, and discussed above, concluded that most districts reported significantly higher numbers of students

101 Ex. 85 Tab 15
102 Ex. 92
103 Ex. 2, Tab 68
receiving additional special services in the categories of HILC disabilities than were funded under the 4% HILC cap, and recommended that the Ministry re-examine the service levels for the severe behaviour and SLD categories, clarify program criteria, and remove what it described as the “artificial” 4% funding cap.\textsuperscript{104}

[242] The Advisory Committee to the 1993 Review discussed recommending removal of the cap. Minutes of their February 1994 meeting indicate:

\begin{quote}
removal of cap supported in general, however, it was felt that we must have real numbers to work with when the cap is removed, and consistent assessments. Part of the process of acquiring these numbers would be audits and other methods of accountability.\textsuperscript{105}
\end{quote}

[243] Ms. Roch testified that this discussion, however, did not form part of the final recommendations of the Advisory Committee.

[244] Mr. Gage testified that there was less of an “appetite” to increase the HILC cap after 1993/94 because most districts were already reporting incidence at the HILC cap and increasing it would result in more funding going into the HILC program. Without an overall increase to the block, he believed that funding would have been taken from the overall per-pupil amount with no resulting increase in overall funding. He testified that the recommended examination of service levels was carried out in the 1996/97 review of the funding system but the 4% cap was not removed.

[245] On September 13, 1995, Ms. Roch provided Joan Axford, the Director of the Ministry’s School Finance and Data Management Branch, with information on the prevalence of HILC disabilities. She cited an article by Winzer that the prevalence of “students with disabilities serious enough to hamper their educational process [was] from 2 to 4 percent of the school-age population.”\textsuperscript{106} Ms. Roch did not agree that those

\textsuperscript{104} Ex. 87, pp. 24, 28

\textsuperscript{105} Ex. 85, Tab 67, p. 3, emphasis in original

\textsuperscript{106} Ex. 85, Tab 47
prevalence figures were double what the Ministry recognized (i.e. 1-2% were SLD). Despite being asked about students with SLDs (the only level of learning disabilities subject to the cap), she responded with Winzer’s figures which she said were general prevalence figures for all learning disabilities. She agreed however that incidence is variable, changed from district to district, and from year to year.

**The Incidence of SLD Students**

[246] As set out above, in both the 1985 and 1995 Manuals, the Ministry recognized a prevalence of 1-2% of students who would be SLD. While Ms. Roch would not acknowledge that this was a conservative estimate, she did agree that some districts reported a higher incidence of SLD students.

[247] Based on the documents provided by the Ministry, between 1995/96 and 2001/02, the average incidence of SLD students reported always exceeded the maximum 2% projected by the Ministry. The percentages were as follows: 1995/96 – 2.63; 1996/97 – 2.56; 1997/98 – 2.59; 1998/99 – 2.50; 1999/00 – 2.47; 2000/01 – 2.49; and 2001/02 – 2.30. Reviewing the data for the districts in those years, the majority of districts reported incidence in excess of 2% in the SLD category; in some, the incidence was more than double, in others the incidence was over 10%.107

[248] Even these figures may have been too low because, as outlined above, the Ministry was concerned that some districts were under-reporting the number of children with HILC disabilities because identification of more students than were funded under the HILC cap resulted in an obligation to provide the student with services without additional funding.

107 Ex. 2, Tab 64 and Ex. 98
[249] Mr. Gage testified that each year the financial management system was reviewed by a committee with input from the various affected branches of the Ministry. One of the issues that came up periodically in the annual review was the cap on funding for students in the HILC program. The committee reviewed the district’s reported number of HILC students in the prior year. The Ministry could audit a districts’ reporting of the number of students in the HILC category. The audit did not look at a district’s policies for compliance; it was an audit of fiscal compliance which verified that students were appropriately classified in the various categories, that the students’ records reflected the assessment criteria, and that they were receiving additional educational supports in accordance with the funding instructions.

[250] During the course of his evidence, Mr. Gage introduced a chart Ms. Roch had asked him to prepare to explain the levels of the HILC cap. The chart was prepared to instruct counsel in this human rights hearing; it had not earlier formed part of the Ministry’s records. He prepared it based on historical average reported numbers of students in special education categories in the Province and he testified that it demonstrated that funding in the HILC category, although capped, was approximately at actual Provincial incidence levels.

[251] The chart demonstrated a steady increase in the number of students in the HILC category as a percentage of total enrolment, with one exception. In 1985/86 the percent of the total was 3.1, in 1998/99 it was 5.5 and it dropped slightly to 5.3 in 1999/00, the last year for which statistics were provided. The number of students in the HILC category in the same time more than doubled, from 15,258 to 32,329.

[252] Cross-examination of Mr. Gage called into question the accuracy of the information and assumptions on which he based the chart. First, he acknowledged that the documentary record revealed that the Ministry had ongoing concerns about the

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108 Ex. 99
accuracy of district reporting. These concerns were raised by Special Education Branch staff in a discussion paper during the annual review of the Financial Management System in 1988/89. They questioned whether the level of the HILC cap was appropriate and recommended the option of funding the HILC program at actual prevalence levels. At the time, the HILC cap was set at 3.5%, when the Ministry knew actual reported numbers showed a conservative estimate of the Provincial prevalence was 4.35%. Districts would only be funded for their actual incidence up to the HILC cap.

[253] The discussion paper said that although actual prevalence levels were known to districts, few identified or served students beyond the prevalence figures relied on by the Ministry. Mr. Gage conceded that the discussion paper suggested that districts were not reporting, or under-reporting, the number of students in the HILC categories.

[254] Mr. Gage agreed that the Advisory Committee raised a concern about under-reporting in February 1994. Furthermore, in November 1997, the Working Group on De-targeting and Accountability concluded that school districts were reporting HILC student numbers inconsistently. Some districts only reported to the level of the HILC cap, when a greater number of students were eligible under the guidelines. The Working Group concluded:

…the actual prevalence of these students in the system is not known and cannot be determined with accuracy. More significantly, this reporting practice may deter the assessment of student needs which is essential to instructional planning.

This concern led to the Working Group’s recommendation that districts be required to describe their identification and assessment processes publicly.

109 Ex. 104, p. 3

110 Ex. 85, Tab 67, p. 5

111 Ex. 85, Tab 70, p. 8
[255] Mr. Gage acknowledged that, if districts were under-reporting, the chart was inaccurate and the prevalence numbers in it were too low.

[256] Second, Mr. Gage admitted that the introduction of a HILC cap had effectively controlled the numbers of students in the capped HILC categories of disability. Finally, Mr. Gage acknowledged that the Ministry knew that some districts provided resources to HILC students beyond funding limits, using funds from other program areas to do so. He believed that districts were providing the best programs they could within the available resources.

[257] He agreed that, after 1993/94, the effective cap, which covered those students in the three categories funded under the cap and those who had mild intellectual disabilities (who were no longer subject to the cap), stayed relatively stable at 4.7% and he admitted that there was less of an appetite to update it thereafter because most districts already reported at the limit of the cap. An increase would result in potentially more funding going into the HILC program but, because the block was fixed, funding in other programs or the per-pupil amount for regular students, would be reduced accordingly. An increase in funding for one program area required a reduction in another area. Typically, that area would be the basic per-student amount which represented the largest funding area.

[258] In cross-examination, Mr. Gage was presented with another version of the chart with additional calculations.\(^1\) It too was based on reported numbers and did not take into account the under-reporting factor. He agreed that the additional calculations were accurate and that they showed that, in each year, the actual percentage of students in the HILC categories, (excluding mildly mentally handicapped students who were funded outside of the cap from 1989/90 onward), was higher than the cap allowed.

\(^1\) Ex. 101
Conclusions on the HILC Cap

[259] Based on all of the evidence, I find that the Ministry instituted the HILC cap to control any increase in the number of students designated in the disability categories subject to it. The Ministry did so despite knowing that the cap is below the actual incidence of students entitled to supplemental funding in the disability categories concerned, and knowing that the percentage of SLD students in the Province far exceeds the 1-2% prevalence figure for this category.

[260] Additionally, the Ministry knows that the existence of the HILC cap is a disincentive to districts to designate students above the cap because no further funding will be received even though services must then be provided. This results in under-reporting of the actual incidence of students in the capped categories.

THE DISTRICT’S BUDGET PROCESS AFTER BLOCK FUNDING

[261] I now examine the implications for the District of the change to block funding. The District says that its resulting financial difficulties led to its decisions to cut services to its special needs students.

[262] The implementation of block funding reduced the budget funds for the District. Following its implementation, the District experienced a deficit for the first time. Dr. Brayne, the District’s Superintendent of Education, testified that the District’s financial difficulties throughout the 1990s arose largely from what he believed was under-funding by the Ministry. Consequently, from 1991 on, cuts were made in program areas including special education. A deficit was carried with the approval of the Ministry until it removed the school board and appointed an official trustee in January 1996. I will review the history of the deficit, culminating in the appointment of the trustee but before doing so, will discuss how the District set its operating budgets.

[263] There is no dispute that the District faced a financial crisis in the early 1990s. The genesis of the crisis is the subject of debate. At June 30, 1995, the District had an accumulated debt of $2.6 million, a forecasted deficit of $2.3 million for 1995/96, and an
additional $4.0 million projected for 1996/97. Between 1993/94 and 1994/95, it reduced its spending for special needs students in the HILC category by almost $1.5 million. Dr. Brayne said this number reflected either cuts in the budget or declining enrolment in the category.

THE BUDGETING PROCESS GENERALLY

[264] School districts operate on a July 1 - June 30 fiscal year, approximating the school year. Section 127(1) of the *School Act* requires school boards to prepare an annual operating budget consisting of detailed estimates of operating expenses, local capital expenses, annual capital expenses, and revenue. Deficits are not allowed.\(^{113}\)

[265] The annual budget process involves a number of separate but related activities in the year. Early in the calendar year, the Minister announces the Provincial block. After the Ministry provides more particulars about its allocation rules, usually issued in budget instructions, each district must prepare a balanced budget which conforms to the grant it receives plus additional revenues it raises. If the grant does not meet the district’s projected operating expenses, it must reduce expenditures or increase revenues.

[266] Districts must prepare an expenditure plan or operating budget using the seven functions in the fiscal framework. As discussed earlier in this decision, the seven functions were: Function 1 – Instruction, Kindergarten to Grade 7; Function 2 – Instruction Grades 8-12; Function 3 – Special Programs; Function 4 – Administration; Function 5 – Operations and Maintenance; Function 6 – Transportation; and Function 7 – Housing. In the mid 1990s, Functions 1, 2, and 3 were collapsed into one re-named Instruction.

\(^{113}\) s. 127(2) of the *School Act* as amended by the *School Amendment Act*, S.B.C. 1990, c. 2

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[267] There are programs within each function and objects within each program. For example, Function 1 – Instruction, is made up of the programs of: regular instruction, learning assistance, library services and counselling. It now also includes all of the Ministry funded special education programs within a district. Within each program, the objects include all related salaries, benefits, services, and supplies.

[268] Dr. Brayne testified that school district budgeting is not an exact science. It is done in the spring before actual September enrolments are known so preliminary budgets are based on educated guesses and realistic estimates. As the year progresses and things become more certain, the budget is refined.

The District’s Budgeting Process

[269] Dr. Brayne described the District’s budgeting process. Early in the calendar year, after the announcement of the Provincial block, the Board issues broad general directions to the Superintendent and other senior staff for preparation of the budget. The Superintendent then instructs the District’s budget officers who work on budget projections in 901 separate budget areas based on the instructions and the current year’s budget. Weekly meetings are held to review progress. Because the preparation is done before knowing actual expenditures in the current year, it is based on the prior year’s approved preliminary budget. Dr. Brayne said the process is very political, with programs vying internally for funding.

[270] Each program’s budget is developed by reviewing the actual costs of staff providing support to that program. Budget officers review the District’s salary obligations to the staff, their position on the pay grid, and increases due in the coming year. For special education students, budget projections are prepared based on the existing designations and special education aide (“Aide”) levels, and the expected designations for the coming year.

[271] Once working papers are prepared, a preliminary budget is presented to the Board for consideration. The Board provides direction to the District’s administration about areas it wants to focus on to balance the budget. After Board approval of the preliminary
budget, a budget by-law is passed adopting it. In April, as required by the School Act, the District provides the budget to the Minister for review. A final operating budget is submitted in September, once actual enrolment figures are known. The operating budget is never static; and further adjustments may be made during the year.

[272] The Board also has a capital budget for construction and renovations, but cannot move money between it and the operating budget. In addition to the Provincial block, from time to time the Ministry may provide special purpose grants which target funds for a specific program.\textsuperscript{114}

[273] Because the operating budget is not static and involves projections for the following year, there will be an overlap of various operational years in the review of the specific budget years that follow.

\textbf{The District’s Budgets in the Key Years}

\textit{The 1991/92 Budget Year}

[274] During the 1990/91 fiscal year, the first year of block funding, despite an operating surplus,\textsuperscript{115} it became apparent that the District’s share of the block would not support programs at the level that had been previously supported by the local tax base. The District had a strong tax base and had previously been able to raise significant sums to support enhanced educational programming.

[275] Preliminary estimates projected a significant deficit for 1991/92. Dr. Brayne established an Ad Hoc Budget Contingency Plan Committee to review all possible expenditure reductions to the 1991/92 operating budget. In January of 1991, the Ad Hoc

\textsuperscript{114} s. 131 of the \textit{School Act} as amended by the \textit{School Amendment Act}, 1990, S.B.C. c. 2

\textsuperscript{115} Ex. 4, Tab 160, p. 6
Committee recommended a number of cuts including closing the Outdoor School and eliminating the Band and Strings Program.\textsuperscript{116} The Outdoor School was a District public education facility operated since 1969 which provided short-stay residential programs for students to learn about community and the environment.\textsuperscript{117} The Band and Strings Program was an enhanced music program. These two recommendations were not acted on.

\textsuperscript{[276]} Dr. Brayne described the budget process in 1991/92 as being quite a struggle. The operating budget was being prepared at an uncertain time during the second year of block funding. There was a resulting rapid reduction in services, contract bargaining with the North Vancouver Teachers’ Association (“NVTA”), and a Provincial election pending. In February 1991, the Board instructed District staff to begin preparing the 1991/92 operating budget on the strict premise of no growth in services and no inflation in costs except those absolutely essential to meet market or negotiated requirements. Reductions were made throughout the year.

\textsuperscript{[277]} On February 16, 1991, preceding the March 5, 1991 announcement of the 1991/92 Provincial block, the District signed a two-year collective agreement with the NVTA which included salary increases. The Provincial block did not provide funding for salary increases.

\textsuperscript{[278]} On April 16, 1991, the Board discussed the draft 1991/92 operating budget, required to be submitted by April 20. The 1991/92 budget expended the District’s total share of the Provincial block but nothing more. It did not take into account inflation, did not provide for growth in enrolment, did not fund the salary increases that had just been negotiated with the NVTA, and did not require any program cuts.\textsuperscript{118}

\textsuperscript{116} Ex. 4, Tab 18

\textsuperscript{117} Ex. 2, Tabs 98-99 and Ex. 74

\textsuperscript{118} Ex. 65, pp. 1-2
[279] About this same time, the Provincial government passed the *Compensation Fairness Act*,\(^{119}\) which precluded the implementation of negotiated collective agreement increases unless a Board could fund them. Boards could apply to the Compensation Fairness Commission, which could declare that the increase did not have to be paid if a board could not afford it, or force the parties to renegotiate.

[280] The District declared that it could pay the negotiated increases in only the first year of the two-year agreement and applied to the Commission.

[281] In approving the 1991/92 operating budget, the Board did not know what, if anything, the Commission would do with respect to the negotiated increases. Subsequently, the increases were rejected by the Commission, which instructed the Board and the NVTA to renegotiate. The NVTA refused and the Board was required to pay the increases.

[282] On April 16, 1991, the Board adopted a by-law approving the 1991/92 operating budget and approved the following motion:

> [t]hat the Board of Trustees of School District #44 (North Vancouver), in adopting the maximum legally allowable operating budget for the fiscal year 1991/92, strongly protests this mandated amount as being inadequate to sustain the quality of education the citizens of North Vancouver expect and deserve;

And furthermore, that the Board protests that the Block funding amendment to the *School Act* and the Compensation Fairness Program have taken from the Board the necessary budget-setting independence and authority it requires to act responsibly and conclude in good faith collective agreements with its employees…

And, in summary, that the Board protests the inadequate amount of block funding provided, the restrictive process which has removed discretionary powers of school boards, and the deleterious effect these changes in

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\(^{119}\) S.B.C. 1991, c. 1, repealed effective July 31, 1992 by the *Compensation Fairness Repeal Act*, S.B.C. 1992, c. 58
education policy have had on the collective bargaining process and employee-school board relations.\textsuperscript{120}

[283] The 1991/92 budget was adopted knowing that it would create financial pressures throughout the year. On April 17, 1991, Mr. Len Berg, the District’s Treasurer, submitted the 1991/92 Budget By-law and operating budget, together with the text of the motion, to the Minister.\textsuperscript{121}

[284] Dr. Brayne testified that over $6 million was cut from the District’s budget in 1991/92. Reductions of approximately $2.1 million were incorporated into the operating budget itself. Starting in May, and culminating in December 1991, the District sought relief under the *Compensation Fairness Act*. The District asked the Minister for an increase to its grant to meet the negotiated second-year adjustment to teachers’ salaries, special aid, or for authorization of a deficit. In June 1991, as it became apparent that the District would not get relief under the *Compensation Fairness Act*, and that no more grant money would be forthcoming, additional reductions were carried out, with further cuts in December.

[285] The District sought either an increased operating grant or a special grant of approximately $5 million from the Ministry to meet its commitments under its collective agreement. The District was not alone in its concerns, and in December 1991, the Minister wrote to all board chairs noting that a number of districts had requested special purpose grants or approval of operating deficits in 1991/92. While the government denied further funding, it would approve operating deficits of approximately two percent of a district’s 1991/92 operating budget.\textsuperscript{122} The Minister wrote to the District on

\begin{itemize}
\item \textsuperscript{120} Ex. 4, Tab 21, p. 2
\item \textsuperscript{121} Ex. 4, Tab 22
\item \textsuperscript{122} Ex. 4, Tab 28, p. 6
\end{itemize}
December 5, 1991, denying it additional funds but allowing it to carry a deficit in the range of $1.7 million, provided that the deficit was retired in 1992/93 and 1993/94.123

[286] The Board then requested approval to carry a 1991/92 deficit of $5.5 million or there would be significant impacts on the quality of education in the District.124 The Minister again responded denying additional funds, instructing the Board to review its operations to try and stay within its resources, failing which the Ministry would approve a deficit of $1.7 million to be retired in 1992/92 and 1993/94.125 The District made further cuts to areas other than staffing. The Board made other attempts to have the Ministry assist it with its financial difficulties with no success.126

[287] On January 23, 1992, Dr. Brayne announced an expenditure freeze.127 On January 28, 1992, the Board met to discuss the projected 1991/92 deficit. The Minutes reflect that:

The Superintendent noted that the Board had directed him “to continue to attempt to ameliorate the magnitude of the potential deficit in the 1991/92 fiscal year without personnel layoffs”. He reviewed briefly for the Board the various fronts on which the Board was working to address its ongoing, critical, and outstanding deficit issues. These were: a deficit approval in excess of the Minister’s guidelines; renegotiation with the NVTA of its 1990/92 collective agreement; a resubmission to the Compensation Commissioner on the basis of inability to pay; and further reductions by program closures in mid-year and consequent layoffs.

He noted that the Minister had recently advised the Board that she was not prepared to approve a deficit beyond her system guidelines, and that the Board had been advised by the Compensation Commissioner that he was

123 Ex. 4, Tab 25
124 Ex. 4, Tab 26
125 Ex. 4, Tab 35
126 Ex. 4, Tab 40
127 Ex. 4, Tab 42
not prepared to reconsider the compensation package. Since the NVTA was unlikely to voluntarily renegotiate its 1990/92 collective agreement, which position it had transmitted to the Board on many occasions, there were only two fronts remaining: amelioration or program closures/layoffs.

[288] On January 30, 1992, the Board Chair wrote to the Minister requesting permission to incur a 1991/92 deficit in the amount of $1,802,000.\(^{128}\)

[289] On February 6, 1992, a memo was distributed to the District’s executive indicating that spending reductions had been focused almost entirely on support services, such as replacement of books and materials, professional development services, curriculum support, and maintenance services, to provide as little disruption as possible in the classroom. At the same time, a posted memorandum explained the deficit problem to all staff.\(^{129}\)

[290] Members of the Board met with the Minister on February 13, 1992. They were advised that no additional funds would be forthcoming for the 1991/92 and 1992/93 fiscal years.\(^{130}\) The Board then realized that, without additional funds, repaying the deficit from the future operating budgets would create pressure in those years. The problem had been deferred, not solved.

[291] The Ministry approved the projected 1991/92 deficit of $1.802 million on condition that it be retired from operating revenues in the following two years. The audited financial statements for 1991/92 show an actual deficit of $1.877 million.\(^{131}\)

\(^{128}\) Ex. 4, Tab 45

\(^{129}\) Ex. 4, Tab 46

\(^{130}\) Ex. 4, Tab 50, p.2

\(^{131}\) Ex. 4, Tab 161, p. 5
The 1992/93 Operating Budget

[292] Because of the obligation to repay half of the prior year’s deficit, the District began 1992/93 with a deficit of more than $900,000. The preliminary budget forecast for 1992/93 projected a deficit of $10.2 million.\(^{132}\)

[293] The 1992/93 operating budget was considered at an April 14, 1992 Board meeting. Dr. Brayne’s Administrative Memorandum, which accompanied the draft budget, explained that it proposed approximately $10 million in cuts over the 1991/92 budget. It proposed that funding for certain programs be eliminated, including the Outdoor School Program and the Elementary Bands and Strings Program at savings of $421,150 and $572,700 respectively. Special education services and other programs suffered significant budget reductions.\(^{133}\) With respect to special education services, the Board was advised:

> Student Services staff will be reduced by 14.4 f.t.e. in 1992/93. This reduction will be made both to District- and school-based staff. This reduction will necessitate significant re-organization of staff, and the delivery of special education services in the days ahead, to ensure this District’s compliance with its mandate for students with special needs.\(^ {134}\)

The proposed savings from special education services were $830,300.

[294] With these changes, Dr. Brayne indicated that the 1992/93 operating budget matched the District’s share of the available Provincial block.

[295] The 1992/93 budget was approved by the Board on April 14, 1992,\(^ {135}\) and forwarded to the Minister with a detailed list of the cuts and reductions.\(^ {136}\) The Chair

\(^{132}\) Ex. 4, Tab 48, p. 1

\(^{133}\) Ex. 65, pp. 3-14

\(^{134}\) Ex. 65, p. 8

\(^{135}\) Ex. 4, Tab 52
advised the Ministry that there was public outrage in North Vancouver as programs were
eliminated.

[296] The Outdoor School and the Band and Strings Program were never actually cut; they began operating with participating students paying the full cost.


*The 1993/94 Operating Budget*

[298] The District began the year with an obligation to repay the other half of the accumulated deficit from 1991/92.

[299] While the Ministry announced an increase of $100 million to the Provincial block for 1993/94 in January 1993, Dr. Brayne testified he advised school principals that the increase was not an actual increase; it only reflected increased enrolment, Year 2000 initiatives, the increased cost of benefits, and money to assist inner-city schools and teen parents. In addition, Dr. Brayne indicated that the elimination of the special purpose equalization grants in 1993/94 meant a loss of $2.5 million in revenue for the District.

[300] In January 1993, the Board wrote to the Minister requesting a meeting and the continuation of the special purpose equalization grants for 1993/94. In February, the Minister declined a meeting and denied a continuation of the grants.

[301] In March 1993, Mr. Berg advised the Board and the District executive of the District’s share of the 1993/94 block and outlined the impact it would have on the

136 Ex. 4, Tab 57 and Ex. 77

137 Ex. 4, Tab 60

138 Ex. 4, Tab 61

139 Ex. 4, Tab 64
operating budget. The Board was required to reduce the budget by a further $2.6 million.  

[302] Dr. Brayne testified that the fiscal framework, used as a distribution formula for block funding, was changed each year based on Ministry objectives. In 1993/94, the Minister reduced allocations in the administration function to all districts by 15% and redistributed some of that amount to other budget functions including increasing the HILC cap from 3.6% to 4.0%. While the District was subject to the 15% administration cut, it did not benefit from the redistribution because its incidence of HILC students was only at 3.06%. The effect of the cut was that the District received $314,000 less in administration funds.  

[303] In March 1993, Dr. Brayne proposed to the Board additional reductions to 1992/93 spending levels in order to meet the available funding for 1993/94. They included reducing the available Aide hours from 131.734 full-time equivalent (“FTE”) staff to 121.0. In addition, the District’s senior administrative staff agreed to a voluntary pay reduction of 2.5%.  

[304] The draft 1993/94 budget was discussed by the Board on April 27, 1993. It maintained staffing at 1992/93 levels with no additional program staff hiring and increases in enrolment being handled by existing staff. Dr. Brayne testified that the budget was so tightly managed that there was no reserve or contingency. He advised the

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140 Ex. 4, Tab 65  
141 Ex. 4, Tab 67  
142 Ex. 4, Tab 68  
143 Ex. 4, Tab 74  
144 Ex. 65, p. 15
Board of the inherent risks and that there were no other known sources of revenue and if any of the risk factors materialized, further cuts would be required.\textsuperscript{145}

[305] Despite the cuts, the District was unable to retire the $901,000 accumulated deficit from the 1991/92 year and obtained approval from the Ministry to carry it into the following year.\textsuperscript{146} The finalized financial statements confirmed an actual deficit of $1,121,187. The Board requested approval for this, proposing that it would be retired by the 1995/96 fiscal year. In response, the Minister demanded an explanation for the increase in the deficit and that it be fully retired in 1994/95.\textsuperscript{147}

\textit{The 1994/95 Operating Budget}

[306] The District began 1994/95 with a $1.12 million deficit, required to be repaid in full in that year, and projected the need for further cuts of between $1.5-2.0 million.\textsuperscript{148}

[307] In September 1993, a Budget Advisory Committee (the “BAC”), chaired by Dr. Brayne and made up of stakeholder representatives, was created by the Board to make budget recommendations to it for 1994/95.\textsuperscript{149}

[308] The District was facing other problems in 1994/95. It had entered into a collective agreement with NVTA covering the years 1992-95 (the “Collective Agreement”).\textsuperscript{150} Effective September 1, 1993, the Collective Agreement required the District and the NVTA to establish a District Screening Committee made up of four representatives each

\textsuperscript{145} Ex. 65, p. 19
\textsuperscript{146} Ex. 4, Tab 90, pp. 28 and 125
\textsuperscript{147} Ex. 4, Tab 130, p. 11, and Ex. 4, Tab 135
\textsuperscript{148} Ex. 4, Tab 90, p.7
\textsuperscript{149} Ex. 4, Tab 99, p. 10
\textsuperscript{150} Ex. 4, Tab 82
of management and the NVTA to consider designating students, referred to it by a School Based Resource Team (“SBRT”), for the purposes of special needs supplementary funding. Students were to be considered within 30 days of referral.

[309] There were two budgetary impacts of designation arising from the Collective Agreement. Once a student was designated in a HILC category, the Collective Agreement required a minimum of 2 hours a week of Aide time. If the District Screening Committee agreed that the student required a higher level of support, the 2 hours could be increased. The Collective Agreement did not place an upper limit on the total Aide time. Further, designation impacted on the class size provisions in the Collective Agreement.\textsuperscript{151}

[310] On October 20, 1993, Mr. Kelly, the District’s Assistant Superintendent of Schools, informed Dr. Brayne of those students designated as SLD by the District Screening Committee up to October 1993. 392 students had been referred, of whom 50 had been previously designated, and 83 were newly designated. Mr. Kelly wrote that he was reporting on the outcome “of what has been a new, intense and rather hurried process, but which is extremely significant for us financially and organizationally.”\textsuperscript{152}

[311] In January 1994, the Minister announced the 1994/95 block.\textsuperscript{153} It had no provision for salary increases. It contained the $30 million to help with the integration of students with special needs referred to above.

[312] In March 1994, the Ministry provided the 1994/95 Budget Instruction Manual. The District was advised that its share of the block would increase by 2.6% over its 1993/94 final adjusted amount. Dr. Brayne testified that the increase was a result of

\textsuperscript{151} Ex. 4, Tab 82, Clauses D.1 and D.4

\textsuperscript{152} Ex. 67, p. 2

\textsuperscript{153} Ex. 4, Tab 91, pp. 49-55
increased District enrolment and was not an increase in core funding. The Ministry advised that the recommendations in the TDG Report would not be implemented.\textsuperscript{154}

[313] The failure to provide funds for salary increases was particularly difficult for the District because it was committed to a July 1994 salary increase of 2.0% and a 0.5% increase in January 1995. Other districts, with expired two-year agreements, knew that the Province was moving to Provincial bargaining. The Ministry also introduced s. 125.1 of the \textit{School Act} with its two significant limits on budget flexibility for 1994/95. First, districts had to spend at least the amount they had spent in the previous year for their Aboriginal and special education programs. Second, expenditures for administration were capped.

[314] Dr. Brayne testified that the Board, District staff, and others, were concerned about the loss of autonomy resulting from targeting and capping. In February 1994, the Chair wrote to the Minister about the Ministry’s increasing and unprecedented tendency to become involved in the management of the District.\textsuperscript{155} The Minister responded on April 29, 1994.\textsuperscript{156}

[315] In March 1994, the BAC released its report to the Board. It included a number of recommendations. With respect to special education, the BAC wrote:

\begin{quote}
\textit{…that the Board examine the reasonableness of its current level of programs and services to students with exceptional learning needs in light of the recommendation of the Provincial Special Education Advisory Committee and, mindful of collective agreement obligations, adjust its current funding levels accordingly.}
\end{quote}

The District is currently spending considerably more than the minimum amount targeted in the 1994-95 “fiscal framework”. The District has a

\textsuperscript{154} Ex. 4, Tab 90, p. 5

\textsuperscript{155} Ex. 4, Tab 98, pp. 29-30

\textsuperscript{156} Ex. 82, Tab 68
history and a provincial reputation for providing myriad services/programs/supports to students with exceptional needs, using the neighbourhood school model. The maximum inclusion model is costly and the Board is encouraged to do what it can to achieve greater economies with no loss of service to students.\textsuperscript{157}

Dr. Brayne agreed that the recommendation to examine and adjust funding levels extended to SLD students.

[316] In April 1994, the Board asked the Minister for an increase in the District grant to cover the pending salary increases.\textsuperscript{158} The Board understood that the Victoria school district had received a special grant in similar circumstances. The District repeatedly renewed its request and, at a meeting with the Minister that month, reiterated that failing to provide funding for the salary increases would be inequitable.\textsuperscript{159} No additional funding was received from the Ministry.

[317] In an effort to reduce budget expenditures, in April 1994, Dr. Brayne asked Mr. Kelly to ensure that 1994/95 Aide allocations did not exceed “125 plus 2.5” FTE levels. His request was based on his erroneous belief that the Collective Agreement limited the District’s obligations to provide Aide time. By March 1994, the District had allocated Aide time amounting to a total of 137.057 FTE, more than he believed was required by the Collective Agreement.\textsuperscript{160}

[318] The relevant portion of the Collective Agreement states:

\begin{quote}
MAINSTREAMING/INTEGRATION
\end{quote}

\begin{center}
\ldots
\end{center}

\textsuperscript{157} Ex. 4, Tab 99, p. 8, emphasis in original

\textsuperscript{158} Ex. 4, Tab 90, p. 83

\textsuperscript{159} Ex. 4, Tab 90, pp. 30, 80

\textsuperscript{160} Ex. 4, Tab 108, p. 6
h. Special education aide time for High Incidence students with special needs shall be allocated by the School Based Resource Team from the total school allocation determined as follows:

ii. For each High Incidence category student with special needs in an elementary school, a special education aide for two (2) hours per week. This provision does not include the allocation for aides at D.C.1. at Canyon Heights Elementary School and Special District Behaviour Program at Queen Mary Elementary School.

iii. For each High Incidence category student with special needs, who has been identified by a district screening committee as requiring a higher than usual level of support, the assignment of special education aide time to the school allocation shall be increased to the following weekly totals:

- Mildly Mentally Handicapped 7.5 hrs
- Severe Learning Disabled 7.5 hrs
- Severe Behaviour 15 hrs
- Combination of two (2) or more of the above 20 hrs

Where necessary, the District Screening Committee may increase the above weekly totals for individual students.\textsuperscript{161}

[319] Mr. Kelly’s reply to Dr. Brayne explained that the Collective Agreement did not limit the District’s Aide obligations. As noted above, the Collective Agreement linked the allocation of Aide time to the identification of children with special needs. Entitlement to Aide time arose from designation. In September 1993, when the Collective Agreement provisions took effect, 125.0 FTE Aides had already been committed to those students previously designated and since then an additional 14.5 FTE Aides had been allocated to students newly designated.\textsuperscript{162}

\textsuperscript{161} Ex. 4, Tab 82, pp. 37-38

\textsuperscript{162} Ex. 4, Tab 108, pp. 1-5, Ex. 80
Mr. Kelly proposed two possible solutions for dealing with the budgetary difficulty. First, containing Aide allocation within the 125.0 plus 2.5 FTE, or reducing expenditures in other areas of the special education budget to compensate for the costs of additional Aide time. This option required the elimination of emergency Aide hours, confirming the continuing enrolment of special needs students for the following year, instructing school administrators to review the current needs of each designated student, referring for de-listing those students whose current designations were questionable, and reducing or eliminating certain Aide positions included in the 125 FTE allocation but assigned to positions not affected by the provisions of the Collective Agreement.

Second, closing the District Diagnostic Centre (“DC1”), a specialized education setting for SLD children, as discussed below. He suggested that the options be discussed at an executive committee meeting on April 13, 1994. A decision was made to recommend the closure of the DC1 to the Board. The Collective Agreement provisions posed a problem because they were an open-ended obligation that was difficult to budget for. Dr. Brayne testified that the budget could not cover both the Aide obligation and the cost of operating DC1.

The decision to close DC1 is discussed below.

The draft budget was discussed at an April 19, 1994 meeting of the Board. The proposed budget cuts included the elimination of the District’s two diagnostic centres, reduction of district-based specialist consultative support and assistance directed at SLD students (referred to as the elimination of the Elementary Learning Resource Team (“ELRT”)), limits on Aides to 130.0 FTE, and limits on the allocation of school-based specialist personnel (library, learning assistance and counselling) to 1990/91 levels.

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163 Ex. 4, Tab 90, p. 67
164 Ex. 65, p. 24 and Ex. 4, Tab 90, p. 4
On April 26, 1994, the Board met again to discuss the draft 1994/95 budget. The Administrative Memorandum, introducing the draft budget, said:

… The task for each Board in recent years has become increasingly circumscribed, a consequence of severely constrained financial resources and spending ceilings predetermined outside its powers. Within the framework of the School Act, the Board cannot, without prior approval from the Minister, plan to expend more than it expects to receive from the Province and other modest sources. Recent years have also seen incrementally greater prescription by the Minister in how Boards are to spend the funds it receives from the Province, resulting in a palpable erosion of flexibility for the Board in responding to local conditions, circumstances and priorities.165

Dr. Brayne testified that, increasingly, the Ministry provided targeted funds in addition to the block, but restricted a district’s ability to spend them to targeted areas. In addition, costs previously borne by the Ministry were downloaded to districts. He testified that there were more risks in the 1994/95 operating budget because the budget problem was becoming more acute and the budget was increasingly tighter.

The proposed 1994/95 budget projected a $1.5 million deficit in 1993/94 and, conservatively, an additional $2.3 million in 1994/95. The Board also had an accumulated deficit to be repaid. It was aware that it was dealing with two significant financial pressures, cost containment in the coming year and repaying its operating deficit. The Board was warned about the “more than usual risks associated” with the budget.166

Dr. Brayne testified that the District’s share of the block was declining. In 1990/91, the District’s per-student amount was 97.4% of the block, reduced in 1994/95 to 92.7%.167

165 Ex. 4, Tab 90, p. 36, reproduced as in original

166 Ex. 4, Tab 90, p. 9

167 Ex. 4, Tab 90, p. 86
[328] On April 26, 1994, the Board approved the budget. The meeting Minutes reflect the Board’s concerns:

The 1994/95 budget circumstance was discussed extensively by the Board. All Trustees indicated in this discussion that they were adopting the bylaw as it was required by legislation and not because they believed it met the needs of the students. A common theme was that additional grant revenue (such as that which would have been provided as a consequence of the adoption of the Technical Distribution Report) was required to adequately sustain extant programs and services.

[329] All of the cuts were implemented, with the exception of limiting the number of Aides to 130 FTE, which was impossible due to the open-ended terms of the Collective Agreement. The elimination of the DC1 and the redeployment of the ELRT staff are of particular importance to the issues in this case.

[330] At the April 28, 1994, meeting with the Minister referred to earlier, the Minister was given copies of correspondence from the public about the cuts adopted in the April 26, 1994 budget.

[331] Despite the cuts that were made to special education through the closure of the DC1 and the elimination of the ELRT, the District continued to experience financial difficulties in providing Aide time under the Collective Agreement. Dr. Brayne asked Mr. Kelly to suggest strategies to deal with this. The District Screening Committee met in June 1994 and discussed the continuing problem.

[332] On July 18, 1994, Mr. Kelly wrote to Dr. Brayne noting the anticipated problem with Aide hours for 1994/95. The problem was predicted because, as the school year

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168 Ex. 4, Tab 90, pp. 44-45
169 Ex. 4, Tab 90, p. 4
170 Ex. 4, Tab 90, p. 29
171 Ex. 71
began, the Aide hours budgeted for in 1993/94 were fully assigned. There was no contingency to fund Aide hours for students subsequently designated and there was no limit on the District’s obligation in the Collective Agreement. Mr. Kelly also indicated that there were an unprecedented number of students referred for designation in 1993/94. He summarized the problem as follows:

…a finite budget provision could not be reconciled with an infinite number of referrals for designation, without some established agreed-upon upper limit on either the number of designations or the extent of the aide time allocation…no such upper limit is either stated or implied in the Collective Agreement language which describes the mandate of the District Screening Committee.  

[333] Mr. Kelly’s memo outlines the efforts of the District’s representatives on the District Screening Committee to reduce the hours allocated, and proposes options to deal with the problem in the coming year. Strategies considered included advising the NVTA that the District had already reached its funding limit and a proportionate number of special needs students needed to be delisted so the District could stay within its funding. Each student in the District was reviewed and some were delisted. Principals were strongly encouraged to delist students where possible and asked to exercise all possible control over the inflow of new referrals for designation and requests for additional Aide time. In particular, they were asked to limit Aide time beyond the mandatory two hours provided for in the Collective Agreement. School-based teams, which included principals, were able to exercise control on requests for Aide time. Dr. Brayne acknowledged that he wanted to manage the problem and to explore the possibility of a cap on Aide time because of the unlimited liability created by the provision in the Collective Agreement; however, he denied any attempt to do so by not providing services to which students were entitled. In addition, attempts were made to find the money to fund Aide time elsewhere in the budget.

172 Ex. 71, p. 2
[334] In December 1994, the Ministry conducted a special education audit of the District’s programs. It was not an audit of service delivery, but to ensure the District’s compliance with the Ministry’s funding requirements. According to Ms. Roch, while auditing financial compliance, the audit team might comment on services or other practices. In this case, the auditor commented that the District had integrated SLD students into the regular classroom at the elementary school level. 173

[335] At about this time the TDG released its report. Mr. Gage acknowledged that, if the TDG’s recommendations had been implemented, the District would have received approximately $1.5 million more funding in 1994/95 than it had received since the implementation of block funding. 174 Although increased funds would mainly have been for the operations and maintenance functions, they were not targeted and could have been spent in other programs.

[336] Dr. Brayne outlined the significant findings of the TDG Report to the Board:

The Report and its recommendations and “redistributive consequences” are bound to be controversial in that the application of the recommendations would result in a significant redistribution of the provincial “block”. For many Districts (N=48), implementation of the recommended changes would result in reductions to their “blocks”. Nevertheless, the Report of the Technical Distribution Group recommends implementation of the recommended changes for the 1994/95. 175

[337] The District repeatedly and unsuccessfully asked the Ministry to implement the TDG Report’s recommendations. 176 They were not implemented until 1996/97 and then only in part.

173 Ex. 82, Tab 75, pp. 3-5
174 Ex. 4, Tab 81, p. 65
175 Ex. 4, Tab 90, pp. 93-95, emphasis in original
176 Ex. 4, Tab 90, pp. 29-30 and 81
[338] In February 1995, the Chair requested the Ministry’s approval of the $1.7 million deficit projected for 1994/95 and a meeting to discuss how it could be retired. On April 26, 1995, the Minister responded that, before considering the request, he needed to know the reasons for it and the District’s plans for its retirement. He also stated that there had been no approval for the 1993/94 excess deficit.

[339] After the May 1995 Board discussion, the Chair wrote to the Minister, explained how the 1993/94 deficit had arisen, requested approval for the overage, and indicated that it been retired in the final 1994/95 operating budget. With respect to the 1995/96 fiscal year, the Chair again requested approval of a 1994/95 deficit of at least $1.7 million. The Chair renewed the request that the TDG Report be implemented, sought forgiveness of the $1.7 million deficit, or deferment of the obligation to retire it to 1996/97 and subsequent fiscal years. The Board again offered to meet with the Minister to discuss options.

[340] The audited financial statements for 1994/95 show an operating deficit of $2.6 million.

**The 1995/96 Operating Year**

[341] In March 1995, the Minister informed the District of its share of the Provincial block for 1995/96 and, in April 1995, the Board directed District staff to prepare the first draft of the budget.

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177 Ex. 4, Tab 130, p. 12
178 Ex. 4, Tab 130, p. 11
179 Ex. 4, Tab 130, pp. 14-15
180 Ex. 4, Tab 166, p. 5
[342] Also in March, the BAC delivered its final report to the Board setting out the critical 1995/96 budgetary issues and making specific recommendations. The BAC had unsuccessfully lobbied the Minister to implement the TDG Report.\footnote{181}

[343] In April 1995, the BAC and the Chair met with the Minister to discuss the impact of the Ministry’s failure to implement the TDG Report. The District representatives indicated that it was not possible for them to make expenditures equal revenue based on 1995/96 projections.\footnote{182} The District had already written to the Minister about the 1994/95 operating deficit, expected to be at least $1.7 million.

[344] On May 9, 1995, the Board discussed the draft 1995/96 budget. If it was required to retire the accumulated deficit of approximately $1.7 million, the projected deficit would be over $3.2 million. It decided to submit a budget which did not provide for the retirement of the 1994/95 deficit. The Chair wrote to the Minister and asked that he do one of three things: accept the recommendation of the TDG, forgive the deficit, or defer the repayment of the deficit to later years.\footnote{183}

[345] In June 1995, the Minister responded to the various letters from the Board and indicated that the Government had delayed implementation of the TDG Report because of opposition to it. Furthermore, changes to the funding allocation system were expected to be implemented in 1996/97. He concluded that the District must balance its budget in 1995/96 and offered the services of Ministry staff to assist in considering opportunities for cost containment.\footnote{184}

\footnote{181}{Ex. 4, Tab 128, pp. 2-21}
\footnote{182}{Ex. 4, Tab 128, pp. 27-31}
\footnote{183}{Ex. 4, Tab. 130, pp. 14-15}
\footnote{184}{Ex. 4, Tab 133, p. 2}
[346] On June 15, 1995, the Board accepted the Minister’s offer of assistance but advised that it had exhausted all legitimate possibilities for spending reduction. In July 1995, the Minister wrote to the Board about the 1994/95 deficit and approved an increase in the 1993/94 deficit to $1,121,187, on condition that it be retired from the 1994/95 operating budget. The Minister stated that a request needed to be made for approval of the resulting 1994/95 operating deficit, outlining where spending exceeded the budget and what reductions in service had been made to address the pressures.

[347] On August 1, 1995, the Minister wrote to the Board outlining the Ministry’s suggestions for budget reductions in four areas: programs where the District was spending more per pupil than districts of similar size, such as library; spending on continuing education programs greater than revenue; spending in other instructional programs; and opportunities for revenue from the instructional cafeteria program.

[348] Dr. Brayne testified that the Board reviewed the Ministry’s suggestions, none of which was helpful either due to constraints in the Collective Agreement or errors in the Ministry’s analysis. The Ministry made no other suggestions. On August 17, 1995, the Board responded to the Minister, repeating the request for assistance from the Ministry. Dr. Brayne testified that Ministry representatives never came to the District.

[349] On September 14, 1995, the Board wrote to the Minister urgently seeking Ministry assistance to deal with the deficit. The Board again proposed that the deficit either be forgiven, its retirement deferred, or that the Ministry implement the TDG Report. On the same day, the Minister wrote to the District approving an operating deficit of $1.7

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185 Ex. 4, Tab 134, p. 1
186 Ex. 4, Tab. 135
187 Ex. 82, Tab 81
188 Ex. 4, Tab. 136
189 Ex. 4, Tab 138, pp. 1-2
million for the 1994/95 fiscal year, to be retired over the next two fiscal years, with a minimum of $300,000 to be retired in 1995/96. The Minister stated that this would give the Board an opportunity to review the impact of proposed changes to the funding allocation system slated for 1996/97.  

[350] Dr. Brayne testified that the urgency of the requests to the Minister was increasing because the Board realized that it was going to incur a deficit in excess of that approved. No assistance was forthcoming from the Ministry and the Board was frustrated. The audited financial statements for 1994/95 show an actual deficit of over $2.6 million, significantly over the $1.7 million that had been approved. On September 28, 1995, the Board requested approval for an additional deficit deferral of $933,754. On October 10, 1995, the Minister approved the overage, provided that the Board detail the reasons for it and that $500,000 of it be retired in 1995/96.

[351] The Board asked Dr. Brayne to revisit the 1995/96 budget to reduce expenditures and increase revenues to permit the retirement of $500,000 as required by the Ministry. A Budget Reduction Committee was established to find the $500,000 and, during the course of its work, its mandate was expanded to look at containing costs in the 1995/96 operating year to budgeted levels.

[352] In December 1995, the Budget Reduction Committee prepared a report for discussion at the Board meeting on December 12. The report reviewed possibilities for both decreasing spending and increasing revenue, and unanimously concluded that the

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190 Ex. 4, Tab 139
191 Ex. 4, Tab 140
192 Ex. 4, Tab 141, p. 2
193 Ex. 4, Tab 141, p. 3
194 Ex. 4, Tab 143, pp. 5-19
problem was not the expenditures, which could not be reduced any further, but inadequate revenue.

[353] Subsequently, the Board provided the Minister with its “detailed reasons” for the cumulative operating deficit.\textsuperscript{195} It noted that the main areas of cost overruns were: (1) teacher salaries, in part due to increased enrolment, the adherence to a strict class-size clause in the Collective Agreement, the long-term replacement of ill or suspended teachers, and substitute teacher costs; (2) instructional supplies, in particular the rising cost of paper; (3) learning assistance costs, due to learning assistance staffing levels stipulated in the Collective Agreement; (4) the HILC program, and the open-ended requirement to provide Aide time; and (5) plant maintenance – tradespeople, unavoidable maintenance, and repairs to buildings. In addition, the Chair indicated that the District had experienced a shortfall in revenue from its continuing education programs.

[354] The Budget Reduction Committee’s report was discussed by the Board again in early January 1996 and formally presented on January 9 when the Board considered possible ways to generate revenue and to reduce expenditures. The unanimous conclusion of the Committee, and the Board, was that the possibilities could not be implemented that year. Expenditures remaining within the Board’s budget were not discretionary. The Committee said that:

\dots It believes that the problem is not with the Board’s expenditures. The problem cannot be solved by reducing expenditures any further. These expenditures are required to meet its mandate. Furthermore, these expenditures are at the absolute minimum to meet its mandate. The problem lies with the inadequate revenue provided to the Board to accomplish its mandate. The conditions which caused a $2.6 million dollar shortfall in the 1994/95 fiscal year remain unchanged\dots The unanimous conclusion of the Committee was that there simply are not

\textsuperscript{195} Ex. 82, Tab 84
sufficient grants available to the Board for it to meet its mandate of providing educational programs for students.\textsuperscript{196}

[355] The Committee also identified the significant risks associated with ongoing deficit budgets, and recommended that the Board forewarn the Minister, and the community, about its financial dilemma. The Committee suggested that the Board prepare a conservative forecast, of the June 30, 1996 year-end position for conversion into a Final Operating Budget for Board approval and submission to the Minister in early February 1996. The Committee recognized that the Final Operating Budget would not be balanced, and would not allow for retirement of the 1994/95 operating deficit.\textsuperscript{197}

[356] On January 9, 1996, the Board approved the Committee’s recommendations and adopted resolutions that the Chair notify the Minister of the Board’s budget dilemma occasioned by inadequate revenue; the urgent and repeated requests for participation by the Ministry in solving the dilemma; the Board’s case for redress of the inequitable distribution of revenue to districts; and the Board’s immediate need for assistance. The Board also resolved to advise other educational partners of its budget dilemma and issue a press release.\textsuperscript{198}

[357] The press release issued at the end of the 1995/96 operating year said:

The board contends that a mistake was made when the current block funding formula was implemented. A government appointed committee of Education Finance experts, including several from the Ministry of Education itself, exposed this mistake in a report they made in December 1993. North Vancouver has been short changed by the Ministry’s own criteria, $1.5 million per year – by over $10 million in seven years. Subsequent changes to the formula have not corrected the error.\textsuperscript{199}

\textsuperscript{196} Ex. 4, Tab 146, p. 15
\textsuperscript{197} Ex. 4, Tab 143, p.19
\textsuperscript{198} Ex. 4, Tab 147, pp. 5-6
\textsuperscript{199} in draft form, Ex. 4, Tab 10
Following its meeting, the Board advised the Minister that it could not submit a balanced budget as it was required to do by the School Act. Furthermore, it was not able, with the funds it received, to repay its accumulated operating deficit. As a result, it was not able to contain its current expenditures within its share of the Provincial block it received or the revenue that it generated.

The Appointment of the Trustee

At that time, the District had an accumulated debt of $2.6 million, a forecasted deficit for 1995/96 of $2.3 million, and the possibility of a further $4.0 million deficit in 1996/97 if no adjustments were made in expenditures and revenues. In February of 1996, the Ministry fired the Board and replaced it with an Official Trustee, Robert Smith. Mr. Smith’s mandate was to:

…prepare a final written report recommending to the Minister a series of policy changes necessary to restore the fiscal reliability of School District No. 44.\textsuperscript{200}

To meet his mandate in the timeframe allowed, Mr. Smith retained KPMG to do a series of benchmark studies comparing the District’s expenditures to seven other Provincial districts. On March 31, 1996, Mr. Smith provided his final report to the Minister. It concluded, in part, that:

The financial challenges faced by the District exist due to a Ministry of Education funding distribution formula which has inherent inequities in its structure….A more equitable funding base is essential…The school district currently has the second lowest funding of the five lower mainland Districts used in our comparisons. If the District had been funded at the overall average of these Districts it would have received an additional $1.3 million in 1995/96. As further evidence of inequity, the independent Technical Distribution Group Report (1993) recommended alternative funding formulae that would have given the District an additional $1.5 million annually starting in 1993/94. I have discussed the funding

\textsuperscript{200} Ex. 4, Tab 150, p. 5
shortfall with Ministry officials and I am satisfied that they understand and accept that anomalies in the current formula have had a negative impact on the North Vancouver School District.

The District should be funded in a fair and reasonable manner. This has not been the case over the past several years. If the funding formula had been adjusted in 1993/94, as recommended by the Technical Distribution Group Report, the current financial challenge would be more manageable. On a basis of fairness and equity, I have concluded that the Ministry must provide additional monies as part of the solution to the District’s financial crisis.201

[361] Mr. Smith also made findings regarding the District’s expenditures. He found a pattern of expenditures that he believed was no longer appropriate in an era of public sector fiscal restraint. The amount spent by District in Function 1, Instruction, was the highest of the comparable districts because of the highest ratio of staff to students.

[362] With respect to Function 4, District and School-based Administration, he found that the District had more principals and vice-principals per 1000 students than comparable districts. He concluded that the District had a tradition of smaller schools, resulting in a larger number of schools with fewer students. Dr. Brayne testified that the School Act required there to be a principal for each school and most schools also had a vice-principal.

[363] With respect to Function 5, Operations and Maintenance, Mr. Smith found that the District spent significantly less than comparable districts. Dr. Brayne testified that this was because the District had been moving funds from Operations and Maintenance to Instruction. District executive salaries started lower and ended higher than the comparable district average.

[364] With respect to teacher salaries, compared to eight nearby metropolitan districts, the District’s top salary range was higher, but not its entry level salaries. Dr. Brayne

201 Ex. 4, Tab 150, pp. 5-6
testified that he believed that the District’s salary differences were historical, dating back to its first collective agreement in 1988.

[365] Mr. Smith found the District’s Collective Agreement was more generous in dealing with the impact on class size of integrating special needs students into the classroom than comparable districts, and was the only one which included a term providing specific allowances for Aide time.

[366] He also made suggestions for revenue enhancement and expenditure reduction including increasing the revenue from the Outdoor School. It charged students fees but was also supported by District funds. The District contribution to the Outdoor School for 1993/94 was $369,000 and in 1994/95 was $242,000. Mr. Smith recommended fee increases.  

The 1996/97 Operating Year

[367] Following the Trustee’s report, the Minister approved a deficit for 1995/96 and the District planned a budget for 1996/97 in which expenditures matched revenue. Dr. Brayne testified that the Trustee’s report was fully implemented by the District with minor exceptions. The Ministry, the Board and the Trustee met and developed a ten-year deficit retirement plan. The District has not operated with a deficit since then.

[368] The Ministry moved to a simplified education funding system or, as Mr. Gage described it, an incremental funding system, in 1995/96, implementing, in part, the recommendations of the TDG Report. Rather than grossing up costs from 1989/90 levels, which was cumbersome, at least with respect to wages, funding was based on

202 Ex. 4, Tab 150, pp. 34-35
203 Ex. 100
204 Ex. 82, Tab 76
actual costs. In addition, in part as a result of the Trustee’s report, changes were made to funding for Operations and Maintenance. Funding for districts was allocated in four areas: general operating grants including core grants and specific district grants; targeted grants; capital support grants; and developmental grants. The core grant allocated a standard amount of money per student, per school and per district to provide funds for essential education programs such as libraries, teachers, and classroom supplies. In addition, specific district grants recognized the difference in costs faced by districts to deliver the same level of service. Transportation costs are an example.

**Overall Conclusion about the District’s Budget Difficulties**

[369] The District’s budget shortfall, the cumulative nature of the deficit, and the pressure these factors caused, required significant program cuts. Dr. Brayne indicated that the Board made large reductions every year since 1991/92. It reduced expenditures, repaid a portion of the prior year’s deficit, and had not received adequate funds to meet actual costs. The cumulative effect resulted in a financial crisis for the Board which also faced some unfunded costs during the period. For example, bargained salary increases were not recognized in the Provincial block, and the District was required to pay for retired teachers’ pensions and the costs of insurance, costs previously paid by the Ministry.

[370] I accept the evidence of the District’s witnesses that its financial difficulties throughout the 1990s arose, in large part, from under-funding by the Ministry. This is supported Official Trustee’s finding. As a consequence, from 1991 onwards, cuts were made in program areas including special education. If the District had been funded equitably, it would have been able to maintain services for special education students.

**The Decision to Close the Diagnostic Centre and Cuts to the ELRT**

[371] As noted above, funding for the DC1 was eliminated in 1994/95 and the members of the ELRT were redeployed. There had also been earlier cuts to the ELRT. I now outline the decisions in that regard in more detail.
The DC1 had operated since 1976. In 1994/95, its final year of operation, it cost the District $292,500. It provided service to approximately 60 students a year. Dr. Brayne testified that the program was well-established and well-respected. Dr. Brayne acknowledged that without the 1994/95 funding crisis, the District would not have closed the DC1.

The first documentation appearing in the District’s records about the closure is Mr. Kelly’s memorandum prepared for Dr. Brayne on April 12, 1994. He was responding to Dr. Brayne’s memorandum directing him to ensure that the District’s Aide time did not exceed that required in the Collective Agreement. In fact, Dr. Brayne was in error; the Collective Agreement had no specified limit on Aide time.

Mr. Kelly’s response proposed two options, one of which was to close the DC1. He suggested that the options be discussed at the District’s Executive Committee meeting on April 13, 1994.

The Executive Committee consisted of Dr. Brayne, the assistant superintendents, the secretary-treasurer, the director of personnel, a principal representing each of the elementary and secondary schools, an accountant, and a data processing manager. At the meeting, the Committee suggested closing the Diagnostic Centres (one provided assistance in English, the other in French). The Committee concluded that, because of the open-ended obligation for Aide time, the services provided by the Diagnostic Centres could be provided in the neighbourhood school through intensified school-based resources.

Dr. Brayne testified that Mr. Kelly was the person on the Executive Committee who had expertise about the impact of the closure on SLD students. He believed that Mr.

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205 Ex. 80

206 Ex. 4, Tab 108, p. 6
Kelly consulted with the District principal or supervisor of special education. Dr. Brayne admitted that when the decision was made, he did not know how many students would be affected.

[377] In addition to the District’s financial pressures, Dr. Brayne testified that he also considered the philosophy of inclusion resulting from the 1993 Review. He expected that if Ministry resources were made available in the future, they would be to support inclusion. Hence, in light of the District’s budget challenges, it was unsustainable to have two service delivery models for special learners.

[378] Dr. Brayne acknowledged that neither his memo to Mr. Kelly, nor Mr. Kelly’s response, mentioned the philosophy of inclusion as a basis for the recommendation to close the DC1. Dr. Brayne testified that his memo was an instruction to “a person who was reporting to me and was responsible for special education to take whatever efforts he could to cap expenditures. We were under fiscal duress.”

[379] By the April 19, 1994 Board meeting, the proposal to close the Diagnostic Centres was included in the draft budget for consideration by the Board.207 The next day, Dr. Brayne advised the District’s principals that the Board had approved the draft budget and would consider the formal budget by-law on April 26, 1994. The recommendation for the closure was accepted and by April 26, 1994, the budget by-law eliminated funding for the Diagnostic Centres.208

[380] On April 26, 1994, Dr. Brayne asked Mr. Kelly and Jay Merilees, the District’s Coordinator of Student Services, to provide him with background information to address specific questions that might be asked about the closure. They said:


207 Ex. 4, Tab 113 and Tab 114

208 Ex. 4, Tab 115
…With the closure of the Diagnostic Centre, individualized programming and instruction for the students normally referred to the program will now have to take place at the home school. This places an additional emphasis on:

- the specialization of skills for the classroom teacher
- an expanded role and specialization of the Learning Assistance teacher
- the careful utilization of special education aide allocations
- the co-ordinative role of the School Based Resource Team
- a potentially more structured involvement of parents and/or tutors in a student’s individualized program.

These additional emphases in the home school will necessitate a more detailed District program of in-service for classroom teachers, specialist teachers, administrators and parents.

It is too early to know precisely how the needs of high incidence students will be addressed in the absence of the Diagnostic Centre. If it is possible to re-assign the specialist personnel affected in such a way as to maintain a service while realizing the required budget reduction we will do so.209

[381] Dr. Brayne acknowledged that there was no precise plan for how to serve these students after it closed. In fact, it appears that the decision was made without any plan in place.

[382] Dr. Brayne acknowledged that the decision also affected students who were on the waiting list and those who might qualify the next year. The number of affected children was not known when the decision was made. In May 1994, Mr. Kelly gave Dr. Brayne the waiting list numbers and the number eligible the following year. He believed that 183 students would be affected.210 However, the District’s documents do not reflect the

209 Ex. 4, Tab 116, emphasis in original
210 Ex. 4, Tab 120
impact on those children who, after having attended the DC1, were being followed up in their individual classrooms by DC1 staff.

[383] Also in May, the NVTA asked to present a brief to the Board regarding the 1994/95 operating budget and the cuts in services for SLD students.

[384] While both Dr. Brayne and Mr. Kelly said in their evidence that the closure of DC1 was, in part, based on the philosophy of inclusion, I am not persuaded that it was a consideration.

[385] I contrast Dr. Brayne’s evidence in direct with that in cross-examination where he acknowledged that the District did not close the DC1 to conform to the inclusion philosophy; they closed it for financial reasons. On the other hand, he also testified that the DC1 was a pull-out program in which students were taken away from their neighbourhood school. He agreed that the 1985 Manual required that there be a range of options for SLD students but testified that it did not mandate a particular service delivery model. The settings could vary and could be in the neighbourhood school. He admitted that, without DC1, the range of options available to SLD students was reduced. He also acknowledged that, according to the 1985 Manual, LACs were not intended for SLD students.

[386] I conclude, based on the evidence, the concurrent memoranda, and the speed at which the decision was made, that the sole reason for the closure was financial. The option of the closure was first suggested by Mr. Kelly on April 12, 1994 and two weeks later, his suggestion, which had now become a recommendation, was approved by the Board.

[387] I am also satisfied that, when the decision was made, not only did the District not know the number of children affected, it had no plan in place to provide services to those children in September of 1994.
Parents who expressed concern about the closure to the Board were told to present their concerns to the Ministry. Dr. Brayne recalled staff lobbying against the closure and the NVTA unsuccessfully grieved both it and the elimination of the ELRT. The North Vancouver Chapter of the LDAC presented a brief to the Board regarding the 1994/95 budget cuts to the elementary school services for students with learning disabilities. In addition, in April, May and June 1994, a number of parents, including Ms. Moore, wrote letters to the Board, the Minister, and the Premier about the closure. Dr. Brayne did not recall responding to the correspondence that was directed to him. In any event, no answering correspondence was produced by the District.

Ms. Roch was aware of the existence of the DC1 as a specialized setting which provided services to SLD students. She was also aware that it had been closed and that staff and parents in the District were concerned. Ms. Roch confirmed it was the type of program the 1985 Manual contemplated.

In May 1994, the Minister wrote to the Chair regarding the correspondence he had received about the Board’s decision to eliminate the DC1. He referred to increases in Provincial funding in 1994/95 for children with severe behaviour problems and for training of teachers and teachers’ assistants in the integration of students with special needs. Dr. Brayne testified that, in his view, the District came up with an alternative to ensure that SLD students continued to receive appropriate service after the DC1 closed, and that it was in place in September of 1994. The services intended to replace the DC1 and the ELRT are outlined below.

\[\text{Ex. 70}\]

\[\text{Ex. 72}\]

\[\text{Ex. 69}\]
[391] On May 24, 1994, Rochelle Watts, a District psychologist, wrote to Dr. Shirley McBride, the Ministry’s Director of Special Education, advising her of the “massive” cuts the District was making to services in special education:

North Vancouver School District has recently announced it is cutting 1½ million dollars from its budget, one million of this money being taken from special education. The Elementary Learning Resource team (school psychologists) is being eliminated as well as the English diagnostic centre and the French diagnostic centre. All these cuts are elementary services. The four psychologists are Brian Ward, Lorna Bennett, Mary Tennant, and myself.

Hundreds of faxes and telephone calls have been done by parents and teachers to the Ministry of Education, the North Vancouver MLA’s and school trustees/senior administration. North Vancouver is reducing services for elementary learning disabled students from 10.6 teachers (June 92) to one teacher in September 1994 (one district psychologist servicing 33 elementary schools). A sheet describing these reductions is enclosed with this letter. I am also enclosing a letter from our North Vancouver Teachers’ President to the Chairperson of our school trustees.

You may already know about the proposed cuts but my colleagues and I wanted to make sure you knew of this “massive cutback” in elementary L.D. services….

[392] Ms. Watts enclosed a summary of the changes in services for SLD students from 1991/92 to 1994/95. The changes noted in Ms. Watts’ letter were not disputed by the District.

[393] Ms. Roch testified that the Minister’s letter dated June 13, 1994 was typical of his response to parents who wrote to him expressing concern. In it, he indicated that he would be asking Ministry staff to review the accountability systems that were in place to ensure that children had access to the services that they needed. Ms. Roch testified that the accountability systems referred to were Ministry audits, the district’s annual reporting

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214 Ex. 2, Tab 55

215 Ex. 72, Package 4
obligation, and the school accreditation process. The Minister also indicated that he had offered assistance to the District to look for alternatives to the DC1 to ensure that students continued to receive appropriate service.

[394] In September 1994, Ministry staff contacted Mr. Merilees who confirmed that the decision to close DC1 was based on fiscal considerations. The documentary record revealed that the District told the Ministry that it did not have a plan to replace the DC1 with programs in each school. The District was planning an in-service package to enhance teachers’ ability to provide classroom-based interventions for students with learning difficulties or disabilities.  

[395] The Ministry did a special education audit of the District in December 1994, discussed above. Ms. Roch testified that the Ministry did not act to ensure that a range of services was left in place.

[396] It was not until the end of June, 1994, more than two months after the decision to close the DC1, that Dr. Brayne asked Mr. Merilees and Mr. Kelly to develop a policy document to set out the District’s plan for addressing the learning needs of SLD students, in the absence of DC1, for the 1994/95 school year.  

The policy document was to be discussed on August 25, 1994 and implemented that September. Dr. Brayne allocated $4,000 to development of the plan and $40,000 for designing an in-service training program that was planned to enable classroom teachers and Aides to provide the necessary instruction. The $40,000 was taken from additional targeted funding that the Ministry made available after the 1993 Review to support school districts in their inclusion efforts. The training was planned for the fall and winter of the 1994/95 so nothing was in place in September when schools opened, other than what the schools already provided.

216 Ex. 85, Tab 9
217 Ex. 4, Tab 122
[397] Mr. Merilees prepared a draft of the policy document entitled: Student Services School Reorganization 1994-1995. It was based on the primacy of the classroom as the best and least restrictive environment for teaching all children. The document, on the first page, notes that “[t]he need to reorganize sprung (sic) quickly from the School Board’s decision to eliminate the Diagnostic Centre and the Elementary Learning Resource Team as district programs.”

[398] The final policy document was prepared by Mr. Merilees and Mr. Kelly. It explained that the combined effect of three recent developments in the District had important implications for service delivery to students with learning disabilities: the implementation of the District Screening Committee and the significant increase in designations; the closure of the Diagnostic Centre programs and the reduction of District Student Services staff due to continued financial restraints; and the restructuring of the Student Services Department. The classroom and LAC teachers, not all of whom had the necessary skills, were to deliver special education services. All children would be integrated into the regular class. It stated:

….The philosophical framework that will be used to refine a delivery service for “Student Services School” will be based on the notion of the “primacy of the classroom” as being the best and least restrictive environment for teaching children. This is not a new concept, but is one that bears revisiting, especially through the lens of special needs children. Children are children and all have the right to be included in the primary unit of schools, the classroom, whatever their learning needs are.

[399] It recognized that this would be a major role refinement for some teachers and would involve a major skill acquisition for others. In-service training would be required. The philosophy said:

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218 Ex. 4, Tab 85
219 Ex. 4, Tab 88
220 Ex. 8, Tab 85, p. 2, reproduced as written
The L.A.C. teacher will be the primary resource person to the classroom teacher in his or her efforts to teach students with learning disabilities, and this may require a major role refinement for some and a major skill acquisition for others. In inclusive schools, the classroom teacher bears the responsibility for the teaching of all students assigned to the classroom and this may require a major shift in perspective in addition to acquiring skills and strategies not currently part of his or her repertoire. District Learning Resource personnel will need to acquire greater expertise across a broader spectrum of disabilities in order to better support the inclusionary aspect of neighbourhood schools. Special Education Aides will require assistance and guidance as to how best to support the teacher’s educational plan for each student and throughout all of this, some principals may feel the need to assume a more direct coordinating role within the teams at his or her school to ensure that an effective learning environment can exist for all students for whom he or she is responsible.

[400] In response to the need for in-service training, the District offered a series of training courses through 1994/95. The first was not offered until October 1994 and they were optional.

[401] In 1998, the District retained Donald Chapman, a retired special education expert, to review its special education services. He reported in December 1998 that SLD students were underserved in the District, as there were too few placement options open to them. He recommended that settings like the DC1 be considered:

Data from teachers and parents indicate that this group of students is at present, underserved in the schools of the District. Both parents and staff felt that a wider range of options for service delivery would better serve these students.

Students with learning disabilities typically require a high degree of structure in their learning environment and require direct instruction in order to acquire basic skills. Intensive instruction may need to be provided in alternate settings for short periods of time during the day or for periods of time in the school year.

221 Ex. 4, Tab 88, p. 11, emphasis in original

222 Ex. 4, Tab 86
The inclusive schools philosophy allows for options to instruction both within and outside of the regular class. Students who require intensive instruction may need the support of a resource room (defined as a pull-out option for up to 50% of the day) for small group or one to one instruction. At a district level, short term placement such as the Literacy Centre or a previous service such as the Diagnostic Centre are certainly within the framework of inclusion as defined by the Ministry of Education. Expansion of this kind of centre to serve additional students or establishment of new centres are options for consideration.

Staff providing specialized instruction and support need to have specialized training, whether these are professional or para-professional staff…

### The District’s Special Education Expenditures

[402] In each year between 1991/92 and 1994/95, the District spent more in the HILC program than the Ministry provided, as follows:

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<td>Ministry Funding</td>
<td>3,082,674</td>
<td>3,248,227</td>
<td>4,106,099</td>
<td>4,186,650</td>
</tr>
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<td>The District’s Expenditures</td>
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<td>5,147,609</td>
<td>5,004,454</td>
<td>4,191,408²²⁴</td>
</tr>
</tbody>
</table>

[403] Between 1993/94 and 1994/95, the District reduced expenditures for HILC students by $1.491 million. Dr. Brayne agreed in cross-examination that between these two years there was a highly disproportionate reduction to the budget for HILC students

²²³ Ex. 73 (excerpt) and Ex. 85, Tab 62, pp. 110-111

²²⁴ Ex. 78
compared to other programs. The District did not have a policy to ensure that special needs children were not disproportionately affected by budget cuts.

[404] In his report the Official Trustee, indicated that special education service had been significantly reduced starting in 1992/93. The cuts included: 5.6 Teachers and 4 Aides in the Diagnostic Centres; the Coordinator of Volunteer Tutors Program; a Psychologist; 0.4 FTE Behaviour Resource Program Teacher; two elementary school resource room teachers; and a student services staff teacher.

JEFFREY MOORE’S ACADEMIC HISTORY

[405] I now consider Jeffrey Moore’s academic history. It must be considered in the context of the events outlined in the preceding pages. Jeffrey was a student during these key years in which there were significant changes to the policies with respect to SLD children, significant changes in the way education was funded, and significant cuts to the special needs programs in the District.

Braemar Elementary School

[406] Jeffrey began his public school education in September 1991 at Braemar, his neighbourhood school. He remained there until June 1995, the end of his Grade 3 year. Because the services provided to Jeffrey between 1991 and 1995 form the basis of the individual complaints of discrimination, I propose to review his progress in elementary school on a school-year by school-year basis.

[407] The Braemar staff who were involved with Jeffrey throughout his time there were Ms. Tennant, a District psychologist, and Ms. Waigh, a learning assistance teacher.

Kindergarten: September 1991-June 1992

[408] Because of his December birth date, Jeffrey was four years old when he started Kindergarten. He was the second youngest child in his class.
Jeffrey was one of 22 children in Kathy Ritchie’s class. Nancy Lee, an educational aide, assisted her. Neither Ms. Ritchie nor Ms. Lee testified. Jeffrey attended Kindergarten five days a week, for 2.5 hours a day, with a 20 minute recess. Kindergarten is a pre-academic program which emphasizes socialization and sharing. Children are introduced to concepts such as left to right directionality, and sounds and symbols in preparation for reading.

Jeffrey’s parents received his first report card in November 1991. It did not alert them to any areas of concern. Ms. Ritchie wrote that she was pleased with Jeffrey’s progress in all areas of his development. He co-operated well with other children and enjoyed building, dramatic play and outside playtime. Jeffrey was learning to print his name, enjoyed using the library and listening to stories.

In February 1992, Barbara Waigh, the LAC teacher at Braemar, administered the Jansky de Hirsch Screening Index (“Index”) to all Kindergarten students. The District was the only district in British Columbia which used the Index at that time. It was a test to identify students who might have difficulty in acquiring literacy skills but did not identify specific learning disabilities. Students scoring under 50 were considered at risk; Jeffrey scored 40. Ms. Waigh described Jeffrey as “willing” and “somewhat vague” during the test. His score was the lowest in the class in letter naming and, with one other child, the lowest in the class in sentence memory. He was one of four in his class identified as being at risk.

The Index over-screens students; that is, it identifies more children as potentially at risk for reading difficulties than those who actually develop them. In addition, the Index is not “normed” for age but is based on school grade. Normed tests are ones which have been given to many children of different ages and determine a child’s standing relative to

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225 Ex. 2, Tab 1, pp. 3-5
226 Ex 2, Tab 1, pp. 1-2
others of the same age. Because the Index is not normed for age, Jeffrey’s score was compared to that of a child born in January 1986, who would be almost a year older at the time of testing. The experts generally agreed that the more exposure a child has to pre-literacy tools, including language and print, the greater the likely impact on the Index results. Dr. Siegel said that in Kindergarten, being compared to a child 10 or 11 months older could be significant, especially for boys who, generally, acquire reading skills more slowly than girls.

[413] Ms. Waigh said that she would have been more concerned about Jeffrey’s score if he had been born earlier in 1986. While I accept her evidence in that regard, it was only partially borne out by the results in Jeffrey’s class. The two students who scored the highest on the Index were both born in January 1986, but several students with later birthdays did very well.227

[414] Jeffrey’s low score on the Index was discussed with his parents who were told that he needed to be observed for developmental delays. Jeffrey’s second report card in March 1992 did not indicate that there were any concerns about his development or performance.228 Ms. Ritchie noted that he had become much more outgoing, had made many friends, and enjoyed books. She was pleased with the reading he did at home, he was ready to learn letter names, and might benefit from various alphabet books. Jeffrey read from memory and used picture clues to assist him. He counted to 11, enjoyed blocks, sorting and other math games, and was working on forming numbers. The only caution was that he sometimes appeared to be a little lost at group times.

227 Ex. 2, Tab 1, p. 2
228 Ex. 2, Tab 1, pp. 6-9
The District’s documentary record reveals that at a parent/teacher conference in March 1992, Ms. Moore was worried about Jeffrey’s placement for the following year. The teacher (it is not clear which one) noted that Jeffrey’s confidence needed building.  

Shortly after Jeffrey’s report card was sent home, Ms. Ritchie referred Jeffrey to the ELRT. It was composed of District professionals with expertise in identifying and remediating SLD students, and worked primarily with elementary students whom a classroom teacher identified as requiring evaluation because of behavioural issues, disabilities, or possible learning disabilities. Their services were available on a District-wide basis both to administer the psycho-educational tests necessary to identify such children, and supply consulting services to classroom teachers and parents.

In referring Jeffrey to the ELRT, Ms. Ritchie said that she was concerned about Jeffrey’s classroom performance, his score on the Index, and his grade placement for the following year. She said the Moores were aware of her concerns but not that she wondered about possible learning difficulties. Mr. and Ms. Moore were considering having Jeffrey repeat kindergarten at Braemar, or elsewhere, then returning to Braemar for Grade 1. Ms. Ritchie indicated that Jeffrey was a polite, well-liked boy, who was patient and calm, and came from a very loving and supportive family.

Ms. Ritchie said that she had tried working one-on-one with Jeffrey to help him learn numbers. She sought assistance in assessing whether Jeffrey had retrieval problems, learning difficulties or was “just young”.

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229 Ex. 4, Tab 16, p. 21

230 Ex.2, Tab 1, pp.10-12. The witnesses inconsistently referred to this as the School Based Resource Team.

231 Ex. 2, Tab 1, p. 10
The ELRT met with the Moores on March 26, 1992. The District attendees included Ms. Ritchie, Ms. Waigh, Ms. Tennant, Ms. Naomi Serrano, the school counsellor, and the school nurse.

The Moores were concerned that Jeffrey did not seem to be making progress in learning letters and numbers. Ms. Ritchie and the ELRT strongly believed that holding Jeffrey back, while his friends moved on, would negatively affect his self-esteem. The Moores were assured that it was quite common for children to lag behind in Kindergarten and to catch up later. The Moores were persuaded that Jeffrey should advance to Grade 1 at Braemar.

As a result of the ELRT meeting, Jeffrey was observed in his classroom by Ms. Serrano and Ms. Tennant, although there are no records of their observations. Jeffrey also received 15 minutes of individual assistance, on average three times a week, with Ms. Lee, the classroom aide. Ms. Lee used multi-sensory techniques such as tracing letters in sand to enhance Jeffrey’s memory for letters, letter sounds and sound/symbol correlations. Ms. Waigh and Ms. Tennant testified that the 15 minute time period was chosen because anything longer would exceed a five year old’s attention span. Dr. Siegel testified that, at the time, it was unusual for an individual aide to provide time to kindergarten children.

Ms. Waigh testified that, following the ELRT meeting, she believed that she administered a Jansky de Hirsch Diagnostic Assessment, to follow up on Jeffrey’s score on the Index. If it was performed, it is not in the District’s records, nor is there any other reference to it. As a result, I think it is unlikely that a follow up assessment was performed. The ELRT suggested that Ms. Ritchie spend more individual time with Jeffrey in the classroom, reviewing the lessons and concepts being taught and that Jeffrey’s progress be monitored in Grade 1 to determine if further intervention was required.
In June 1992, Jeffrey’s final Kindergarten report card stated that he had progressed in all areas of his development. He accepted and completed assignments willingly but was somewhat anxious and perhaps built barriers when asked to work with letters or numbers. Ms. Ritchie indicated that he needed a lot of encouragement to build his confidence in his ability to succeed with abstract symbols. Jeffrey liked to sit and discuss or ‘read’ (quoted from original) the pictures in a book with a friend or listen to someone read at book-time. He copied words and made random letters when encouraged to write. He generally worked from left to right, but occasionally did the reverse. She recommended continued exposure to alphabet and number books and games throughout the summer.

Despite the positive tone of the report cards, it is not generally disputed that Jeffrey made poor progress in acquiring pre-literacy skills in Kindergarten.

There was some indication that his self-esteem began to suffer in Kindergarten. Mr. Moore testified that, early in the school year, he and his wife noticed that Jeffrey seemed to be losing his confidence. Jeffrey told his parents that he was not clever, a comment repeated in Ms. Ritchie’s referral to the ELRT. Ms. Ritchie’s referral further observed that he was “very aware and sensitive to his abilities (or lack of)” in more academic settings. Jeffrey was finding it very difficult to recognize letters and numbers; after many days of practise and a variety of approaches he had learned to recognize the number “2”. The Moores’ evidence, and Ms. Ritchie’s ELRT referral, indicated that Jeffrey had wet his pants in the library when asked to identify the letter “c”. Ms. Ritchie wrote that this graphically demonstrated Jeffrey’s anxiety.

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232 Ex. 2, Tab 1, pp. 14-16

233 Ex. 2, Tab 1, p. 12
[426] Mr. Moore testified that they were extremely concerned towards the end of Kindergarten because Jeffrey was developing painful headaches, sometimes accompanied by vomiting.

[427] Mr. and Ms. Moore followed the advice of the ELRT, and Jeffrey advanced to Grade 1. Mr. Moore testified that he and his wife decided to keep Jeffrey at Braemar because of the quality of the teaching staff, the previous involvement of the ELRT, and their belief that all these professionals had Jeffrey’s best interests at heart.

Grade 1: September 1992-June 1993

[428] In Grade 1, Jeffrey was taught by Ms. Haug and Ms. Lowenthal (who job shared) in a class of 26 students. Neither testified. Ms. Waigh testified that she and his teachers monitored Jeffrey’s progress from the start of Grade 1. The District’s records do not indicate that any special arrangements were made for him at the start of Grade 1.

[429] Mr. Moore testified that, at first, Jeffrey did not adjust very well to Grade 1. His parents noticed that his self-confidence continued to decline and he did not seem to value his own opinions. He seemed to lose his assertiveness and suffered from headaches. They were very worried about his inability to recognize letters. Mr. Moore testified that his teachers were concerned about his anxiety surrounding school work. Despite his anxiety, Jeffrey did not exhibit behaviour problems in the classroom and Ms. Tennant and Ms. Waigh described him as happy.

[430] Jeffrey received his first Grade 1 report card in November 1992.\footnote{Ex. 2, Tab 2, pp. 1-2} It indicated that, at times, Jeffrey appeared somewhat overwhelmed by what was expected of him. He needed support when facing new challenges, but responded well to positive encouragement. He found it difficult to concentrate in large groups. He was in the early
stages of reading and writing development and had begun to recognize a few of the letter names and sounds he had been exposed to. He could, in some cases, hear a sound in a word and reproduce it orally, but was not yet able to match it with the corresponding symbol. Jeffrey was placing letters in random order in his journal to depict meaning without a sound/symbol correspondence. He was working hard to learn to form letters correctly and was becoming more aware of line placement and spacing. Jeffrey was mainly relying on memory when “reading” books in class. He understood left to right directionality and approximated a match to the words as he finger pointed while rote reading.

[431] The concern continued about Jeffrey’s learning difficulties and, as a result, on January 11, 1993, his teachers again referred him to the ELRT. They noted that Jeffrey was making very slow progress learning letters and sounds and was very poor at counting and recognizing numbers. They had tried teaching Jeffrey letters slowly using pictures, sounds, repetition, phonics, whole-language, and visual aids and tracing. Jeffrey’s parents were aware of his problems and very supportive.

[432] Shortly after the ELRT meeting on January 28, 1993, Jeffrey started attending the LAC to work one-on-one with Ms. Waigh three times a week for 30-minute sessions. An assessment by Ms. Tennant was scheduled for early May 1993.

[433] Jeffrey’s work in the LAC was primarily in phonics. According to the 1985 Manual, the LAC was intended to provide assistance for students with mild to moderate learning problems, not those with SLDs. Ms. Waigh testified that Jeffrey was the only Grade 1 student who attended the LAC and that, unlike others, he received individual assistance rather than group help. Dr. Siegel testified that it was fairly unusual for students to be referred for LAC assistance in Grade 1. Further, Dr. Siegel testified that it was unusual that Jeffrey received phonics instruction because the then prevailing

235 Ex. 2, Tab 2, p. 5
philosophy for reading instruction was the whole-language approach and there was no systematic instruction in phonics.

[434] Dr. Barbara Bateman explained that proponents of the whole-language approach believe that reading is acquired naturally, in the same way that speech is, and that any kind of systematic, direct instruction in decoding is inappropriate. Proponents of the whole-language approach favour putting a child in a literature-rich environment with opportunity to explore print, interact with books and observe others reading. Ms. Roch testified that in the early or middle 1990s, the Ministry supported the whole-language approach to teaching literacy skills. I heard much evidence about the debate regarding the efficacy of the whole-language approach and its unsuitability as a philosophy for SLD students. Dr. Bateman was adamant that it is inappropriate for children with dyslexia. Ms. Stubson, Jeffrey’s teacher in Grades 4 and 5, testified that the whole-language approach to teaching reading is particularly difficult for children with dyslexia. I accept their evidence in that regard. However, it is not necessary for me to decide that issue in Jeffrey’s case because, while he may have been exposed to the whole-language approach in the classroom, he received phonics instruction and learned decoding strategies in the LAC.

[435] Mr. Moore testified that he did not notice any major progress as a result of Jeffrey’s LAC attendance.

[436] Jeffrey received his next report card, presumably, in March. It indicated that he was comfortable and happy in the classroom. He managed best with one-on-one or small group instruction and when the task was short and varied. He was experiencing more success in reviewing letters and their sounds with individual instruction and he was beginning to put three-letter words together and read them back. When writing, Jeffrey used letters in random order to depict meaning although, with close direction, he could
use some sound/symbol relationships. Jeffrey relied on memory to “read” pattern books and took clues from pictures. He was able to recognize some words by sight.  

[437] Ms. Waigh provided an LAC insert to the report card. Jeffrey was working on sound/symbol correlations and recognition of a group of consonants and the vowels “a” and “o”, and encoding and decoding one-syllable words using those letters. Jeffrey was able to recognize, name, and give sounds for and print those letters, and to write words using them, if they were sounded out very slowly for him. Ms. Waigh provided Jeffrey with materials that focused on the sound symbol/correlation and the repetition of patterns in words. Ms. Waigh wrote that Jeffrey had difficulty sequencing sounds to decode words but was improving steadily with practice. She set out a plan for learning the remaining consonants and vowels and asked his parents to practice with him at home. At the hearing, she testified that Jeffrey lacked the fluency to decode words quickly.

[438] Shortly after Jeffrey started attending the LAC, he began receiving tutoring from Dee Marchand, a Braemar volunteer tutor trained to work with students who had reading disabilities. Ms. Marchand worked with Jeffrey twice a week for 40-minute sessions in the LAC under Ms. Waigh’s supervision on sight reading programs, concentrating on high frequency sight words. In addition, Ms. Waigh testified that she worked with Jeffrey’s teachers to modify his classroom program to reinforce the work he was doing in the LAC.

[439] Jeffrey’s teachers continued to be concerned that he was not familiar with more than a few letter names and sounds and had not retained any sight words except for a few in predictable pattern books. He was not trying to make a sound/symbol match in his writing. On March 25, 1993, Jeffrey was again referred to the ELRT. His teachers

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236 Ex. 2, Tab 2, p. 3
237 Ex. 2, Tab 2, p. 4
238 Ex. 2, Tab 2, p. 6
asked for diagnostic tests to help them determine if Jeffrey’s lag in development was age-related or if there was a more specific problem.

[440] Jeffrey’s classroom teachers were reporting less classroom progress in their ELRT referrals than Ms. Waigh was reporting regarding his work in LAC. When questioned, Ms. Waigh testified that Jeffrey performed better in the LAC where he was receiving individual attention and was not distracted by the classroom activities.

[441] On April 8, 1993, the ELRT met to discuss Jeffrey. Staff concluded that Ms. Tennant would observe and work with Jeffrey on April 14, 1993 in his classroom and would follow-up with a number of tests. Jeffrey was tested in May 1993 and Ms. Tennant prepared a report describing the tests and the results. The key portions of her report say:

**REASON FOR REFERRAL**

School is concerned with Jeffrey’s difficulty in retaining sight words, letters and sounds.

...

**Murphy-Durrel Pre-reading Inventory**

Jeffrey knew most of the lower case letter names and sounds but had difficulty printing letter sounds dictated by the examiner. This activity required him to retrieve the visual letter form from memory. Retrieval of symbols is very difficult for Jeffrey.

**Peabody Picture Vocabulary Test – Revise: Form M**

The...[t]est is a multiple choice test designed to evaluate a child’s receptive knowledge of vocabulary...[it] is untimed and requires no reading ability...Jeffrey’s ability to understand words that he hears is in the high average range or at the 73rd percentile. Jeffrey appears to be above average in his ability to understand and use words.

**Woodcock Johnson Visual Auditory Learning Tasks**

This measures a child’s ability in symbolic learning... From the beginning Jeffrey had difficulty with the abstract words such as and, on, is. Jeffrey did reasonably well when only a few symbols were presented but as more and more words were added Jeffrey forgot the ones he had learned earlier. His ability to remember and read the symbols was less than would be
expected of a child his age. His performance on this task showed weak ability for this form of short-term learning.

**Beery Test of Visual-Motor Integration**

[the test] is a perceptual-motor ability test that requires a child to copy up to 24 geometric forms arranged in order of increasing difficulty... Jeffrey’s score on the Beery was at the 93 percentile indicating excellent ability to coordinate his visual and fine-motor skills.

**Watson Diagnostic Mathematics Test-Primary Form B-Part 1**

... Jeffrey had difficulty with the retrieval of numbers required in simple computational tasks. He counted on his fingers and found this task difficult.

**Discussion:**

The assessment demonstrated that Jeffrey has excellent visual-motor skills when copying from a visual form and very good receptive language. However, when he doesn’t have both the visual and auditory he experiences difficulty with retrieving words, letters, and numbers from memory. It would appear Jeffrey has a specific learning difficulty which affects his ability to read, write, spell and compute arithmetic operations. It should be noted that Jeffrey’s birthday is in December and he is young for his second year in Primary.

He has been given specific help in the learning assistance centre with Mrs. Jackson and a tutor and his progress will be monitored closely to see if his lack of progress is developmental or a symbol-retrieval difficulty. 239

[442] Ms. Tennant recommended that:

1. Jeffrey continue with the Edmark Sight Reading Program and beginning readers.

2. Jeffrey be given a structured multi-sensory phonics approach to reading such as the Orton-Gillingham Program or the “Super Reading” Program.

239 Ex. 2, Tab 2, pp. 8-10, emphasis in original
3. a meeting be held in September with his new class teacher and the LAC teacher to plan his program for the 93/94 school year.240

[443] At the bottom of the report, Mr. Bryn Roberts, Braemar’s principal, wrote “factors show, but he is too young to do a full assessment”.241 It is not disputed that Ms. Tennant did not complete a full psycho-educational assessment. The missing piece was an IQ test. Ms. Tennant testified that she did not administer it because its reliability/validity factors were questionable at his age. Pursuant to the 1985 Manual, a full psycho-educational assessment is required before a student is designated as SLD and receives supplemental funding for services. Both Dr. Bateman and Dr. Fiedorowicz testified that a full psycho-educational assessment could have been done at this time. Dr. Siegel agreed that an IQ test can be administered at any age but did not think it would have assisted in determining whether Jeffrey had a learning disability or was just young.

[444] The Moores met with the ELRT on May 25, 1993 to discuss Ms. Tennant’s report and Jeffrey’s progress. The ELRT members agreed that Jeffrey was too young for a full psycho-educational assessment. Further, an IQ score would not have provided additional information that would assist in formulating Jeffrey’s education program or identifying a specific learning disability. Ms. Tennant testified that she was unable to “tease out” whether Jeffrey’s slow progress was a developmental delay or a symbol retrieval difficulty. She said that it was not uncommon for Grade 1 students, especially boys, to be slower at acquiring reading skills.

[445] Jeffrey’s June 1993 report card242 indicated that he was working well on his modified program and was feeling more confident as the sound/symbol relationships began to have more meaning for him.

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240 Ex. 2, Tab 2, p. 10
241 Ex. 2, Tab 2, p. 10
242 Ex. 2, Tab 2, p. 11
[446] In her June LAC report, Ms. Waigh expressed satisfaction at his progress. He had worked on sound/symbol correlations, using phonetic skills to decode words, building a sight word vocabulary of about 20 high frequency words, using context clues for meaning, and reading for literal comprehension. Ms. Waigh wrote that they had continued to focus on a combination of phonics skills and sight word vocabulary to improve reading fluency and comprehension. Jeffrey’s short term retention of auditory material was weak, however, so phonics was difficult for him; he needed the skill to decode unfamiliar words. Jeffrey had more success with the visual presentation of words and was compensating by getting clues from pictures when he read. Ms. Waigh recommended some summer activities for Jeffrey so that he did not lose the skills he had gained during the year.243 She testified that given lots of time, Jeffrey could break a three-letter word into its sounds and write the corresponding symbols.

[447] At the end of Grade 1, Jeffrey had made progress but it was slow and he continued to read below grade level.

[448] Following the school’s recommendation, and at their own expense, the Moores hired Deirdre Bell, a trained Orton-Gillingham tutor, to work with Jeffrey that summer. Both Ms. Waigh and Ms. Tennant indicated that they met with Ms. Bell to discuss the work Jeffrey had been doing at Braemar and the summer tutoring plan. Ms. Bell also observed Ms. Marchand working with Jeffrey.244

[449] Orton-Gillingham is a multi-sensory, phonics-based approach to teaching reading; it requires individual instruction and was not then offered by the District. To qualify as a certified Orton-Gillingham tutor requires a private course but not a teacher’s certificate. Dr. Siegel testified that she did not know of any school district using Orton-Gillingham in the early 1990s.

243 Ex. 2, Tab 2, p. 12

244 Ex. 4, Tab 37, p. 17
Ms. Waigh testified that Ms. Tennant’s recommendation of a structured multi-sensory approach to teaching reading, like that used in the Orton-Gillingham program, engages auditory, visual, tactile and kinaesthetic methods to reinforce the sound/symbol correlation. Such an approach was intended to be very repetitive and controlled with each concept taught building on the previous one.

Grade 2: September 1993 - June 1994

[451] In Grade 2, Jeffrey was taught by Susan Bate and Debbie Tatham (who job shared) in a class of 25 to 27 students. Neither teacher testified. Early in the school year, Jeffrey’s Grade 1 teachers, his new Grade 2 teachers, Ms. Tennant, Ms. Waigh, the principal, the counsellor, and the school nurse met to discuss Jeffrey’s difficulties. Ms. Waigh testified that she had a copy of Ms. Bell’s progress report for Jeffrey’s summer work, which showed that he had made some progress.

[452] Jeffrey continued to work with Ms. Waigh in the LAC on spelling, phonics skills and recognizing sight words. He attended the LAC three times a week for 30-minutes of one-on-one instruction. He also started working with a reader with controlled, very repetitive words. In the classroom, he worked with a vocabulary booklet of words he could use in his writing. He was provided with journal story starter lines, either the beginning of a sentence or a sentence to give him an idea of what to write. Oral quizzes in class and in the LAC were given so that he did not have to read the question and write the answer. Ms. Marchand continued to work with him for two 40-minute sessions per week. In the classroom, he was one of the students who received volunteer parental assistance.

[453] Jeffrey received his first Grade 2 report card in November 1993. It indicated that he was well-liked and was becoming more comfortable with initiating conversation with his teachers and peers. During lessons and group discussions, he had difficulty focusing on the material, was easily distracted, and needed frequent reminders to listen. He rarely participated in oral lessons and discussions. At times, he was able to settle down to work independently; at others, he needed encouragement to begin. His teachers believed that
organization of his work materials could help him to start quickly. His written work was based on an independent program. He was writing more often in his journal but most of his work showed a picture with one written line. He tried to spell words on his own and his ability to identify the initial consonant or vowel sound was improving. He was progressing in math. He had difficulty focusing when using the classroom text and most of the information he absorbed came through class discussion. He was developing well in art and gym.\textsuperscript{245}

[454] In her accompanying LAC report, Ms. Waigh said that Jeffrey was working on the sound/symbol correlation for short vowels and consonants, decoding and encoding one syllable words with short vowels and building a sight word vocabulary of high frequency words. They were following an integrated language approach using a phonics program, sight word flash cards, and a language pattern reader to teach and reinforce skills. Jeffrey’s short term retention of auditory material was weak and phonics continued to be difficult for him. He was able to sound out most letters and all short vowels to print a word and was blending sounds to read whole words. He had more success with the visual presentation of words and taking clues from pictures. He continued with a carefully sequenced, highly repetitive, sight word approach. He had mastered a sight vocabulary of approximately 50 words.\textsuperscript{246}

[455] Ms. Waigh also noted that Jeffrey’s skills were still below grade level but his gains were commendable and he was encouraged by his success. When asked to explain this at the hearing, she said that she meant that he continued to be able to do more things independently.

[456] His parents testified that Jeffrey’s headaches worsened. As a result, on January 27, 1994, they took him to see Dr. Roland, a neurologist, who concluded that addressing

\textsuperscript{245} Ex. 2, Tab 3, p.2

\textsuperscript{246} Ex. 2, Tab 3, p. 4
Jeffrey’s learning disabilities could alleviate his headaches. In her January 31, 1994 report, Dr. Roland said:

…Jeffrey’s headaches are consistent with childhood migraine. I reassured the parents that his neurological examination was entirely normal…It appears that Jeffrey has been under significant stress related to learning difficulties. I suspect that addressing the learning difficulties adequately will result in improvement of the headaches thus, I recommend that Jeffrey have psychoeducational assessment performed.  

[457] Jeffrey’s parents took immediate steps to arrange a psycho-educational assessment through North Shore Health, and provided a copy of Dr. Roland’s report to Braemar in mid-February 1994. Ms. Waigh testified that, prior to receiving the report, she had not known of Jeffrey’s headaches. She believed that, had other staff known of them, she would have been advised.

[458] On February 8, 1994, his Grade 2 teachers again referred Jeffrey to the ELRT. The teachers expressed concern about immature behaviour, extremely low academic skills in all subjects, inability to work on grade level material, and lack of focus and comprehension skills. They indicated that he needed one-on-one instruction. They expressed the need for the development of an alternate program and they asked whether DC1 was an option. It is of note that this was the fourth time, in three successive school years, that Jeffrey’s teachers expressed concern about his skills acquisition, and sought help in assessing him.

[459] DC1 was a specialized facility where small groups of SLD students could receive intensive services and individualized assistance. They left their neighbourhood school and attended DC1 classes for 2 to 4 months, with the average stay being 3 months. Classes were offered to Grades 3 and 4 combined, Grades 5 and 6 combined, and Grade

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247 Ex. 2, Tab 3, p. 7

248 Ex. 2, Tab 38

249 Ex. 2, Tab 3, p.8
7. Ms. Waigh described it as a “pullout” program. DC1 employed three learning resource teachers, with expertise in remediating SLD students. The teacher-student ratio was very small as they worked with groups of six children. DC1 provided remediation in reading, math, and social studies, and regular participation in the rest of the school curriculum.

Following DC1 attendance, and for a period of up to two years, a student’s progress could be followed by the DC1 specialists, who would attend the classroom and help the classroom teacher to implement a program designed for the student. 40 to 60 children attended DC1 each year. Ms. Waigh agreed in cross-examination that, at any point in the school year, an additional 60 students could be followed up by DC1 staff. Ms. Waigh agreed that the DC1’s intensive program and small groups would have been very helpful to Jeffrey.

[460] On March 10, 1994, the ELRT met with Jeffrey’s parents to discuss his progress. It was decided that Ms. Tennant would conduct a full psycho-educational assessment. Ms. Waigh testified that there were two reasons for conducting the assessment at that time. First, Braemar had provided as many interventions as it could and Jeffrey was still having difficulty, and he was now old enough that testing would be fairly accurate. Second, there was the option of DC1 attendance which required that a psycho-educational assessment be completed. Ms. Moore testified that this was the first time she had heard of the DC1 as an option for Jeffrey and that Ms. Tennant and Ms. Waigh told the Moores that he would benefit from it.

[461] Ms. Tennant acknowledged that the ELRT had a copy of Dr. Roland’s report prior to the psycho-educational assessment but disagreed that it was performed as a result of the report. However, the timing of the psycho-educational assessment, immediately following the school’s receipt of Dr. Roland’s report, and the fact that an assessment was not previously planned, leads me to conclude that Dr. Roland’s report precipitated it.

[462] As outlined above, the 1985 Manual required a psycho-educational assessment before Jeffrey could be designated as SLD. With a designation, the District would get additional Ministry funding for Jeffrey’s educational program. Designation as SLD was also required for a student to attend DC1 or to be assigned an Aide.
In March, Jeffrey’s second Grade 2 report card indicated that there had been many improvements. His written work was easier to read and he was working faster and able to accomplish more. However, he had limited ability to focus during large group activities and he became frustrated and confused about what was required of him. If a lesson was short, and very structured, he followed directions well. His reading vocabulary was improving and he was using decoding skills to read unfamiliar words. His sight vocabulary had improved and during structured reading lessons he would participate in activities when his reading material was suitable. For example, he was able to describe a character in his book from the pictures and vocabulary.

In her accompanying LAC insert, Ms. Waigh indicated that Jeffrey was working on silent “e” words and was being taught rules to assist him in deciphering diphthongs. They continued to work in phonics on pluralizing words and on initial and final consonant blends. Jeffrey had built up a sight vocabulary of 100 words and he had made noticeable improvement in his ability to sound out and blend four- and five-letter words. Ms. Waigh gave evidence that Jeffrey was not fluent in reading, as he was slow, but he was able to sound out words like “fast” and then blend the sounds together to come up with the word.

Ms. Tennant conducted the psycho-educational assessment on April 1, 1994, when Jeffrey was seven. She testified that a series of tests were administered, including an IQ test, which was then appropriate because of his age. She prepared a report of her findings, which was typed on April 22. She summarized the results of her 1993 testing in which she concluded that Jeffrey had good receptive and expressive language but extreme difficulty with learning the alphabet code and retaining letters and sounds. He had no phonemic awareness and needed to be taught all the necessary word attack skills. After the 1994 testing she concluded:

250 Ex. 2, Tab 3, p. 9
251 Ex. 2, Tab 3, p. 10
...On the day of testing Jeffrey was functioning in the average range of ability in both the verbal and non-verbal subtests. Academic testing reveals he is not working at grade level in reading and math. The acquisition of basic skills has been very difficult for Jeffrey because of a symbol retrieval difficulty which has caused him considerable anxiety and stress. He has seen Dr. E. Rowland, (sic) a pediatric (sic) neurologist, because of frequent headaches and vomiting.

Dr. Rowland requested a psycho-educational assessment and an educational intervention plan to alleviate the significant stress related to the learning difficulties. Jeffrey has benefited from the LAC program at the school and from the private tutoring of an Orton Gillingham tutor. However, progress is still slow and Jeffrey will require intensive remediation in the future to help remediate his learning difficulty.\textsuperscript{252}

\textsuperscript{[466]} Ms. Tennant concluded that Jeffrey needed more intensive remediation than he had been receiving. She recommended that he continue with LAC and tutor support and that the District Designation Committee consider him for the DC1 Program. She said that a meeting should be held with the Moores to discuss her report and the intervention plan.

\textsuperscript{[467]} She testified that his performance had improved since his Grade 1 assessment. He knew most of the consonant and short vowel sounds and was able to decode three-letter words. He was also using more phonics skills.\textsuperscript{253}

\textsuperscript{[468]} Ms. Waigh was questioned about why Ms. Tennant’s testing showed that Jeffrey was only able to blend three-letter words, and her LAC reports showed more progress. She said that he was possibly anxious with Ms. Tennant, whom he did not know as well, and that Ms. Tennant was only measuring what he was able to do on one day whereas her measurement was ongoing. Based on the expert evidence I heard, inconsistent testing results are indicative of dyslexia.

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\textsuperscript{252} Ex. 2, Tab 3, p. 14

\textsuperscript{253} Ex. 2, Tab 3, p. 13
On April 19, 1994, following the psycho-educational assessment, Ms. Tennant prepared a learning intervention plan for Jeffrey. She recommended strategies to help him with his classroom work and in the LAC. They included: working on the McCracken Phonics program with the rest of his class, providing him with the first three or four sentences of a story to assist him with journal writing, having the alphabet and number line pasted on his desk, continuing with the Edmark spelling program in the classroom and in the LAC, having him start on the second part of the Cove reading program, and introducing the first pre-primer of the Focus reading program and accompanying workbook. Jeffrey was to continue in the LAC, three days a week for 30 minutes a day, and to receive volunteer tutor support for two 40-minute sessions a week.

Jeffrey could not attend DC1 because the District closed it before Jeffrey entered Grade 3. Instead, his parents enrolled him in Kenneth Gordon School (“KGS”), a private school specializing in teaching children with learning disabilities.

I now turn to the controversy surrounding Jeffrey’s attendance at KGS.

The Meeting Following the Psycho-educational Assessment

Following Ms. Tennant’s completion of the report from Jeffrey’s psycho-educational assessment, a meeting was held to discuss it and the options for Jeffrey. Ms. Tennant, Ms. Waigh, Mr. Roberts, and one or both of Jeffrey’s classroom teachers attended on behalf of the District. Both of Jeffrey’s parents attended. The witnesses differ both as to when the meeting occurred and what was said.

In assessing the credibility of witnesses, the B.C. Court of Appeal has said that “the real truth of the story of a witness …must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as

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254 Ex. 2, Tab 3, p. 15
reasonable in that place and in those conditions”\textsuperscript{255}. In addition, the following non-exhaustive list of factors has been considered by the Tribunal in assessing the credibility of witnesses: their motives, their powers of observation, their relationship to the parties, the internal consistency of their evidence, and inconsistencies and contradictions in relation to other witnesses’ evidence.\textsuperscript{256} It is with these factors in mind that I now turn to the evidence.

\textbf{A. The Moores’ Evidence}

[474] The Moores testified that they were advised that the DC1 would be closed due to financial difficulties at a meeting with the ELRT called to discuss the results of Jeffrey’s psycho-educational assessment (the “Meeting”). They were not certain of the date of the Meeting, but place it between April 22 and 26, 1994 because Ms. Tennant’s report was typed on April 22 and they had a copy of the report at the Meeting, and Ms. Moore wrote to the District protesting the closure on April 26. They say that they were told that the District could not comply with Ms. Tennant’s recommendation to have Jeffrey attend the DC1 because of the closure, and that the intensive remediation Jeffrey needed would only be available at KGS. KGS provides intensive educational services specifically designed to meet the needs of SLD students in small classes with a low teacher/student ratio. Students get daily, highly-structured sessions based on the Orton-Gillingham method. It costs approximately $10,000 per year.

[475] The Moores testified that they were shocked and disappointed about the DC1 closing because they had looked forward hopefully to Jeffrey attending there. On April 26, Ms. Moore wrote to the District, and others, protesting the DC1 closure of which she

\textsuperscript{255} \textit{Faryna v. Chorny}, [1952] 2 D.L.R. 354 at p. 357

had just learned. She also called Barbara McLellan, a District school trustee, and her MLA, protesting the closure and attended an education forum in North Vancouver where she questioned the Ministry about it.

[476] The Moores say that they arranged for Jeffrey to attend KGS as a result of what they were told at the Meeting. As discussed below, Jeffrey’s attendance at KGS was delayed a year because enrolment was full in 1994/95.

B. The District’s Evidence

[477] Prior to the hearing, both Ms. Tennant and Ms. Waigh swore affidavits which contain a number of identical paragraphs, including the following:

I make it my practice to outline a range of options to assist parents in making an informed decision regarding the educational needs of their children. In accordance with that standard practice, I met with Michelle Moore a couple of weeks after the Report was issued to discuss the findings and recommendations contained in Jeffrey’s Psycho-educational Assessment of April, 1994. In Jeffrey’s case, the range of options which were discussed at the meeting included attending Kenneth Gordon and enrollment in the DC-1 program. However, at no time did I advise Michelle Moore that Kenneth Gordon or the DC-1 Program were the only options available for providing the intensive remediation necessary for Jeffrey.

[478] As the report was typed on April 22, this would put the date of the Meeting about May 5. In their evidence, both Ms. Tennant and Ms. Waigh corrected their affidavits and testified that the Meeting occurred within two weeks of April 22, 1994. Ms. Waigh placed the Meeting within that time frame because it was the SBRT’s usual practice to get a copy of Ms. Tennant’s report along with suggested dates for a meeting. The Moores would be given a copy of the report at the meeting.

257 Ex. 2, Tab 3, p. 17

258 Ex. 2, Tab 27, para. 8 and Tab 28, para. 12
Ms. Tennant and Ms. Waigh contend that they did not advise the Moores that KGS was the only option open to them. The District maintains that, at the Meeting, staff did not know that the DC1 was to be closed. They say that the range of options discussed included both DC1 and KGS.

Ms. Waigh specifically denied that she told the Moores that KGS was the only option available. She said that she was not familiar enough with KGS to know that. When cross-examined about other available options, Ms. Waigh testified that they would include Aide time of two hours per day, subject to an increase if that proved to be insufficient.

Ms. Waigh testified that she did not know at the Meeting that the DC1 was closing. She had heard rumours but it was not a certainty, and they all felt that it would not happen. She said that she did not actually believe that it would close until it did in September 1994.

Ms. Tennant did not recall rumours or speculation about the DC1 closing prior to the Meeting. She testified that they discussed whether Jeffrey could attend DC1, his Aide time, continuing with the Orton-Gillingham tutoring, other options for tutoring, and other programs that were available. She believed that she raised the option of KGS. She suggested KGS as an option because, commonly, parents ask for all available options and she outlines both private and public ones. She was familiar with KGS because of her experience. Ms. Tennant did not recall saying that KGS was the only option and believed that she outlined a range of options. She recalled that the Moores were very concerned.

Mr. Roberts testified that no one at the Meeting told the Moores that the only option available to them was KGS. In fact, he testified that KGS was not discussed at the Meeting.

The District did not produce any notes taken at the Meeting. This is unusual because notes were taken at other meetings of the ELRT involving Jeffrey.

In determining what occurred at the Meeting, I have considered the evidence in the context of the following undisputed events and dates:
April 1, 1994: Ms. Tennant conducted her assessment of Jeffrey and submitted her report for typing.

April 12, 1994: District staff proposed closing the DC1 as part of the budget discussions for 1994-95. 259

April 19, 1994: the Board considered a draft budget which proposed the DC1 closure. 260

April 22, 1994: Jeffrey’s psycho-educational report was typed. 261

April 26, 1994: the District passed its budget bylaw, incorporating the closure of DC1. 262

April 26, 1994: Ms. Moore wrote to the District protesting the closure about which she had just learned. 263

[486] Ms. Tennant acknowledged that District staff were aware of the rumours about the DC1 closing but hoped that it would not happen. It would have been irresponsible for her not to mention at least the possibility of its closure. Further, by April 26, 1994, the closure was much more than a rumour. Both Ms. Tennant and Ms. Waigh acknowledged that the decision was controversial and met with great public and staff disapproval and protest. This was expressed at meetings of the Board on April 19 and April 26. Parents wrote in protest to the District, the Minister and the Premier. 264

[487] The NVTA filed a grievance about the closure. 265 In addition to the closure, the cuts to the ELRT directly impacted Ms. Tennant and affected services for SLD students.
Psychologists were realigned so that there was only the equivalent of one full-time psychologist for the District. Both she and Ms. Waigh worked with District students and staff who would be most affected by the closure. In fact, Ms. Tennant was directly affected by the cuts to the ELRT. She was assigned to Braemar. In my view, it is unlikely that Ms. Waigh and Ms. Tennant would have been unaware of these events, and the controversy surrounding them.

[488] On April 20, 2004, school principals were provided with a copy of the materials reviewed by the Board at the April 19 public meeting which proposed the closure of the District’s diagnostic centres and the reduction of the ELRT. The principals were advised that the Board had approved the draft budget and would consider the formal budget by-law on April 26. Mr. Roberts did not remember reading the notice on April 20. He thought it might have sat with other unread faxes for a few days. He testified that he did not attend either of the two Board meetings.

[489] Mr. Roberts testified that he attended the Meeting. He did not recall the exact date but believed that it was after April 26, either the end of April or the beginning of May. If he is right about the date, the Meeting was after the April 19 Board meeting at which the proposed budget was discussed. It was after April 20, the date he received the fax referred to above. It was after the “few days” in which he said the fax remained unread. Finally, it was also after the Board adopted its budget by-law on April 26.

[490] In light of this, I do not accept that the DC1 option was discussed at the Meeting and the option of attending KGS was not. I also note that Mr. Roberts’ ability to recall details of the Meeting is surprising when contrasted with his inability to specifically recall the details of any other ELRT meeting he attended.

[491] Ms. Waigh stated that she did not know of the closure on the date of the Meeting. This contradicts her evidence that she would have known that the DC1 was closing at

266 Ex. 4, Tab 114
least the day after the Board made the decision (which would have been either April 20, after it was adopted in principle, or April 27, after the formal by-law was adopted).

[492] Ms. Tennant had difficulty remembering the details about the closure. Her evidence was that the Meeting occurred around May 5, about two weeks after her report was typed. However, by that date, Ms. Waigh had already written a letter in support of Jeffrey attending KGS.  

[493] Ms. Tennant agreed that she and other District specialists were concerned about the closure; some staff lobbied against it. She expressed concern to her District principal and other school administrators that, without DC1, there was nothing to offer in terms of intensive remediation and that the closure would disproportionately affect some of the District’s most vulnerable students. She also admitted, after being pressed in cross-examination, that the DC1 was the only place in the District where Jeffrey could receive the intensive intervention he needed and, in light of its closure, the only intensive services for Jeffrey were at KGS, and that she informed the Moores of this. All the District could offer Jeffrey was continued LAC, extra tutoring, and Aide time in a modified program. Ms. Tennant did not consider the LAC or the assistance of an Aide to be intensive remediation.

[494] Most tellingly, Ms. Tennant also agreed that the following note accurately reflected her conversation, some years later, with a Revenue Canada officer who contacted her with respect to the Moores’ income tax deduction of Jeffrey’s KGS fees:

...Oct 27, 98 Mary Tennant called back, she is a certified school Psychologist for North Vancouver, she saw this child back in 1994 when he attended Braemar School. She advised that he is one of the worst cases she had ever seen. They attempted to keep the child within the school system and use the Orton-Gillingham method to help him. In 1995 he had

\[267\] Ex. 2, Tab 3, pp. 18-19

\[268\] Ex. 2, Tab 55
shown very little improvement and as a result she recommended that he attend Kenneth Gordon. She could not put this in writing because she works for the Vancouver School system and it would not have been appropriate.269

[495] Finally, it is uncontroverted that Ms. Moore knew that the DC1 was closing on April 26, the date she wrote her letter of protest. It is highly unlikely that District employees, directly involved in the provision of services to SLD students, would be unaware of a decision of that significance when Ms. Moore was. It is also inconceivable that, knowing of the DC1 closure as she clearly did by April 26, Ms. Moore would not have questioned them if the option was discussed at the Meeting. Even if the District staff were not certain of the closure, I find it likely that, as professionals, they would have brought the possibility of the closure to the Moores’ attention. In short, I conclude that sending Jeffrey to the DC1 could not have been an option, regardless of whether the meeting was held on April 26 or thereafter. The decision had been made by then that the DC1 would be closed.

[496] Moreover, the Moores had been hopeful at the news that Jeffrey could attend the DC1. If it were still an option, there would be no reason to discuss an expensive private school, which they could not afford.

[497] Jeffrey’s psycho-educational assessment and its recommendation that he attend the DC1, occurred during April 1994, a critical time period when the District’s financial problems reached a crisis. As discussed above, the District proposed closing the DC1, and reached its final decision, in a two-week period, with no plan in place to provide alternative services.270 As of April or early May, it did not have a philosophical framework for its decision, or a range of options for affected SLD students or even know how many students were affected. KGS was the only known alternative to intensive

269 Ex. 2, Tab 33, p.1
270 Ex. 4, Tab 116
remediation at DC1. While District witnesses said that there were other options discussed with the Moores at the Meeting, the one option they testified about was an increase in Aide time and no one suggested that an increase in it was equivalent to intensive remediation.

[498] In all the circumstances, I find that the Moores’ evidence is more credible. Their evidence was internally consistent, consistent with all the parties’ actions following the Meeting, and consistent with the preponderance of probabilities. I conclude that it is not in accordance with the preponderance of probabilities that the District would have discussed DC1 as an option for Jeffrey whether the Meeting was held on April 26 or thereafter. After the April 26, 1994 decision, DC1 was no longer an option. As a result, I find that the Meeting occurred after Ms. Tennant’s report was prepared and before Ms. Moore wrote to the District on April 26, 1994. I also find that the Moores were advised at the Meeting that Ms. Tennant’s recommendation that Jeffrey attend the DC1 was not an option because of the pending closure, and that KGS was the only alternative that would provide the intense remediation that Jeffrey required.

Events Following the Meeting

[499] On May 5, following the Meeting, Ms. Waigh wrote to KGS to support Jeffrey’s application to attend there. She enclosed his psycho-educational assessment, his intervention plan, and the letter the District had received from Dr. Roland. She said:

… [Jeffrey] was referred to the Learning Assistance Centre in Spring of grade one because he was significantly behind his classmates in all aspects of his learning.

Since that time, his parents have provided an Orton-Gillingham tutor, he has received phonics instruction in the LAC three times a week, he has worked with a volunteer school tutor on the Edmark reading program twice a week and significant modifications have been made to his classroom assignments.

While Jeffrey has made good progress, he continues to work considerably below grade level. A recent assessment indicates he is functioning in the average range of ability in both verbal and non-verbal subtests but is having difficulty acquiring the basic skills due to a symbol retrieval
problem. He is a very pleasant, hard-working child and I feel would be an ideal candidate for the program you offer.\textsuperscript{271}

[500] On May 13, Ms. Bate, one of Jeffrey’s Grade 2 teachers, also wrote in support of his application:

Jeffrey]...is having some obvious difficulties with the grade level material. He is unable to read Social Studies and Science texts, grade level readers, and other relevant reading material. He is currently using a series of readers during silent reading time that are written with a very basic sight vocabulary. Jeffrey applies the phonics skills he has learned in the Learning Assistance Center to sound out each word in isolation.

Jeffrey’s writing skills are also well below grade level. At times, he refers to the alphabet before printing a letter and some of his letters and numbers are reversed. He began using sentences in January of this year, and he needs to sound out each word he writes. Because of this slow process, Jeffrey is very reluctant to write anything in class.

Jeffrey has been able to keep up in Math fairly well. He often needs some one-on-one help to get started and focused. He has some difficulty with more complex concepts such as borrowing in two digit subtraction. He finds counters and number lines helpful when adding and subtracting.

During lessons and discussions, Jeffrey finds it difficult to listen attentively. However, we are seeing improvements in his ability to focus as he matures.

At this point in time, we are concerned about Jeffrey’s self-esteem. He is a kind, friendly student and he has many friends. He is becoming increasingly aware of his difficulties in the classroom, and the fact that most of the assignments are modified for him is also becoming more obvious.\textsuperscript{272}

[501] On May 9, 1994, after Ms. Tennant’s psycho-educational assessment, Jeffrey was referred to the District Screening Committee for consideration for SLD designation.\textsuperscript{273} In

\textsuperscript{271} Ex. 2, Tab 3, pp. 18-19
\textsuperscript{272} Ex. 2, Tab 3, p.23
\textsuperscript{273} Ex. 2, Tab 3, pp. 20-21
her referral form, Ms. Waigh indicated that Jeffrey had a late birthday and that his parents considered having him repeat Kindergarten but decided against it. She described the interventions that had been tried to that point. When describing his academic progress, Ms. Waigh noted that he was weak in all subject areas, decoding, encoding, comprehension and math concepts and that he was significantly below all of his classmates. She indicated that Jeffrey had poor listening skills and a short attention span. She described him as a willing participant in the LAC but said that he was easily distracted in the classroom, lacked confidence and was aware of his difficulties. She described his behaviour as being “quite young”, quiet, pleasant and friendly. She advised the District Screening Committee that Jeffrey experienced periodic migraines for which he was under a doctor’s care. She described Jeffrey as a shy boy who was not a risk taker but said that he was starting to ask a teacher for help.

[502] On May 10, 1994, Mr. Merilees acknowledged receipt of Jeffrey’s referral for designation and indicated that the District Screening Committee would respond to it as soon as possible within the 30 calendar days prescribed by the Collective Agreement. The Committee had approximately six District representatives who rotated. Among them were a school psychologist, a LAC teacher, a board member, and the head of Student Services.

[503] On May 31, 1994, Ms. Tennant wrote a note to Mr. Kelly, in advance of the Committee meeting. She expressed her real concern because Jeffrey would enter Grade 3 in the fall. She indicated that she had spoken to Ms. Waigh who reported:

...Jeff knows about 30 sight words consistently. He has learned more in the Edmark Sight reading program but he doesn’t recognize them when they are presented in different reading contexts. Consequently his sight vocabulary is inconsistent on a day to day basis. He has learned some word attack skills & he uses them to access the sight words but this isn’t always successful.

274 Ex. 2, Tab 3, p. 22
He is presently reading in the Focus reading series. He has read Work and Play the first pre-primer in the Grade one program & is now on the second pre-primer Big and Little.275

[504] In her evidence, Ms. Waigh agreed with the content of Ms. Tennant’s note. She testified that, by the time Jeffrey left Braemar, at the end of Grade 3, he was able to recognize some words outside the Edmark context.

[505] In June 1994, at the end of Grade 2, Jeffrey was designated as SLD.276 He was allocated two hours of weekly Aide time, the minimum required by the Collective Agreement.

[506] In his June 1994 report card, Jeffrey’s teachers said that he had continued to show progress and emotional growth. His attention span had increased and he was listening and focusing better. He was applying his phonics skills to his writing making it more readable.277 The final LAC insert indicated that Jeffrey had progressed in decoding words and was feeling more comfortable asking for help if he was unsure. He had enough sight words, and was getting fluent enough, that a reader with very highly-controlled vocabulary and predictable words was introduced, so that they could start working on his comprehension. Ms. Waigh indicated that Jeffrey relied heavily on his ability to sound out words and was getting more fluent.278 In her evidence, she said that he had learned some decoding skills, left-to-right sequencing, the sound/symbol correlation and the blending of up to five letter words and he was using those skills. She acknowledged that he was doing it more slowly than his classmates but more fluently than he had previously. The fifth Primary Phonics workbook was sent home for Jeffrey to work on in the

275 Ex. 2, Tab 3, p.25, emphasis in original
276 Ex. 2, Tab 3, p. 26
277 Ex. 2, Tab 3, p. 27
278 Ex. 2, Tab 3, p. 28
summer. Ms. Waigh testified that she believed that his reading level was approximately a year behind that of his classmates.

[507] Ms. Bell’s Orton-Gillingham tutoring reports for Grade 2 also indicated that Jeffrey was making progress throughout the year. All of his teachers at Braemar reported that Jeffrey was happy and working hard.

Grade 3: September 1994 - June 1995

[508] Jeffrey did not attend KGS for Grade 3 because the school was full. He returned to Braemar as one of 26 students in Ms. Ray’s Grade 3 class. Ms. Ray testified at the hearing.

[509] While in Grade 3, he continued to receive individual assistance in the LAC, thrice-weekly, for 30 minutes. Ms. Marchand also continued to provide two 40-minute periods of individual assistance in the LAC. This support was the same as he had received in Grade 2.

[510] Because of his SLD designation, Jeffrey also received assistance from Aide Kristie Green, for four 40-minute sessions a week. This was more than the two hours allocated by the District Screening Committee because Ms. Green had further time available.

[511] Ms. Green, a 1977 graduate from Capilano College with a diploma in Early Childhood Education, had been an Aide in the District since 1990. She primarily worked with Jeffrey in the classroom. Jeffrey began working on a series of workbooks called *Explode the Code*, which emphasized repetition. He also worked on *Focus* readers and *Target Spelling 180*, a spelling and phonics program. Ms. Waigh testified that Jeffrey could blend sounds together to form words but needed to work on his comprehension.

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279 Ex. 2, Tab 6, pp. 3-12
280 Ex. 2, Tab 9
Rather than sounding out each word separately and getting no meaning from what he was reading, they wanted to work on the real purpose of reading – getting meaning from text.

[512] Jeffrey received his first Grade 3 report card in November 1994. Ms. Ray stated that Jeffrey was reading daily to an Aide and developing an expanding sight vocabulary. He related his story ideas to an adult and, with their guidance, wrote the stories. He received assistance in proofreading his work and then carefully and accurately copied a final version. He was making steady progress working with assistance through an individual spelling program. He formed his printed letters correctly and was developing an excellent handwriting style and used the lines appropriately.\(^{281}\) His achievements in academic subjects were not within the widely held expectations for his age group but he was making good progress on his individual education plan. Ms. Waigh’s LAC insert indicated that Jeffrey was starting to work on reading comprehension, speed, and accuracy.\(^{282}\)

[513] On November 24, 1994, an Intervention Plan was prepared.\(^{283}\) Although it indicated that Ms. Green was to work with Jeffrey in math and social studies, both she and Ms. Ray testified that she also worked with him on reading.

[514] Ms. Waigh testified that she spoke to Ms. Ray throughout Jeffrey’s Grade 3 year and was told that Jeffrey’s headaches had subsided and that the Moores were confident that he would be going to KGS for Grade 4. Further, at their request, no additional pressure was being put on him; he should be maintained with the services that he was receiving. Ms. Ray testified that, early in the school year, Ms. Moore told her that Jeffrey would be leaving Braemar and attending KGS in Grade 4 and that she was to “maintain him”; Ms. Moore did not want him pushed beyond his comfort level. Ms. Moore testified

\(^{281}\) Ex. 2, Tab 4, p. 5

\(^{282}\) Ex. 2, Tab 4, p. 1

\(^{283}\) Ex. 2, Tab 4, pp. 2-3
that she asked Ms. Ray not to embarrass Jeffrey in front of the class and that she
understood that Ms. Ray might not be able to teach him anything. She requested that Ms.
Ray and Ms. Waigh not push him with too many hours of homework.

[515] Ms. Waigh testified that Braemar could not seek more Aide time for Jeffrey until
demonstrating that the original allocation was insufficient after a two or three month trial.
She said that the Moores had asked them not to go beyond the supports that he already
had. When asked about this in her evidence, Ms. Ray said that even if she had concluded
that Jeffrey required more assistance, by the time she requested it, and it was approved, it
would not have been implemented until he was in Grade 4. She did not make such a
request.

[516] Although Ms. Ray testified that she spent a lot of time assisting Jeffrey
individually, I conclude that this is unlikely. Ms. Green’s time with Jeffrey was primarily
spent in the hall outside the classroom. Ms. Ray also had 25 other students in her class.
That, together with the time he spent in LAC with Ms. Waigh and Ms. Marchand, the
time he spent in music, physical education, computers, art and library, left very little time
in which Ms. Ray could work with him individually.

[517] On February 7, 1995, Ms. Ray completed a pre-referral form for KGS. It
confirmed Jeffrey’s serious lack of progress in reading and spelling and his poor self-
esteeem. It painted a very bleak picture of Jeffrey’s progress. She said that he could only
become actively involved in school-related assignments, projects, books or other tasks
when working on “a highly modified program”. His difficulties were “too great” to work
without individual instruction from an adult. He could not work on independent work if
it varied “even minutely from the instruction” and could not attack unfamiliar words. He
did not possess a reasonable sight vocabulary, he was “too busy decoding” to read at even
a basic level, he could not find his own spelling mistakes, he was very conscious of his
learning difficulties and sensitive about peer approval, and he was at the bottom of the class.\(^{284}\)

[518] Ms. Ray wrote that reading was required throughout the academic day and that Jeffrey was unable to read with speed and fluency and had little comprehension when reading a story to himself. Ms. Waigh confirmed that decoding took so much energy for Jeffrey that he was not getting a lot of meaning from the text.

[519] Ms. Ray testified that she based her KGS referral letter on Jeffrey’s work in the first term in Grade 3 and that he exhibited significant improvement in the latter part of the grade. For the following reasons, I found that evidence inconsistent with the District’s records and other parts of Ms. Ray’s evidence.

[520] The referral was completed in February 1995. It is difficult to understand why a teacher would not provide current information about a student’s abilities, particularly in a reference letter to be relied on by a specialist school. If, as she testified, she spent a lot of individual time with Jeffrey, she would have had current information about his progress. If not, she could have sought it from Ms. Green, Ms. Waigh, or Ms. Marchand.

[521] Further, the Moores were not told of a significant improvement that occurred in the last term of Grade 3. It was not reflected in the final report card. If such a significant improvement had occurred, I would have expected the Moores, and possibly KGS, to have been advised of it. In the spring of 1995, Ms. Waigh wrote another referral letter for Jeffrey, and repeated her opinion that he was an ideal candidate but she made no reference to any significant improvement. Such an improvement is also inconsistent with Ms. Ray’s evidence that, by the end of Grade 3, Jeffrey was significantly below grade level. Finally, her evidence is inconsistent with the results of the testing that was done by KGS at the start of Grade 4. Ms. Stubson, Jeffrey’s Grade 4 teacher, described him as essentially a non-reader on entering Grade 4. Although I accept that his results may have

\(^{284}\) Ex. 2, Tab 4, pp. 9-14
been affected by the fact that he was not tutored in the summer between Grades 3 and 4 and the stress of starting a new school, there is nothing in the evidence that supports that such a breakthrough occurred. Based on this evidence, I conclude that Ms. Ray’s February 7, 1995 referral to KGS accurately describes Jeffrey’s progress to that point.

[522] In March 1995, the Moores received Jeffrey’s second Grade 3 report card. It indicated that Jeffrey was beginning to read books at his level during independent reading time, was working on increasing his sight vocabulary and was able to generate ideas for his stories more quickly because his confidence was increasing. Ms. Ray described steady progress in spelling with work on word recognition exercises, puzzles, word scrambles, using words in sentences and generating more words with the same beginning or ending sounds. He had completed a research booklet with the assistance of an Aide. Ms. Ray wrote that his achievement in language arts and math was not yet within the widely held expectations of his age range.\textsuperscript{285}

[523] Ms. Waigh’s LAC insert indicated that they were continuing to review skills and were starting to work on letters that might represent more than one sound. They continued to work on his decoding skills. Jeffrey knew all the consonants and short vowel sounds, the long vowel sounds of words with a silent ‘e’ and double vowels. He was still not as fluent in reading as expected. He was willing to write his ideas down but often omitted vowels in his writing. It could be read because it was phonetically correct.\textsuperscript{286}

[524] In Jeffrey’s June 1995 report card, Ms. Ray said that Jeffrey responded well to suggestions made by his teachers or fellow students to help his learning. He was working daily with an Aide on a reading and spelling program. He was improving in decoding and comprehension skills on material he read at his level. He listened carefully when a

\textsuperscript{285} Ex. 2, Tab 4, p. 7

\textsuperscript{286} Ex. 2, Tab 4, p. 8
teacher read material to him and was able to understand most of the material. He was working on recognizing complete sentences and using correct punctuation. He had started to use more vowels when spelling words.\textsuperscript{287} Ms. Waigh’s LAC insert indicated that they were working on the same skills and on fluency and comprehension. Decoding allowed him to read the word off the page, comprehension allowed him to understand it.\textsuperscript{288} By the end of Grade 3, Ms. Waigh testified that Jeffrey was at the early/mid Grade 2 level, significantly below grade level.

**Kenneth Gordon School – Grades 4-7**

[525] Jeffrey attended KGS from Grade 4 to Grade 7.

[526] Counsel for the Ministry and the District objected to the introduction of a video tape about KGS. After argument, I ruled that, pursuant to what was then s. 35(3) of the Code, it was necessary and appropriate for me to review the video and to admit it into evidence.\textsuperscript{289} The video depicted classroom teaching techniques employed at KGS. To the extent the videotape contained opinions expressed by experts about the prevalence of dyslexia in the population, or comments from parents comparing KGS to the public school system, I have disregarded them.

[527] KGS is an independent school that specializes in teaching SLD students. As an independent school, it receives some funding from the Ministry, conditional on it meeting Ministry standards. The Ministry inspects independent schools to ensure compliance with the *Independent School Act*.\textsuperscript{290} The review does not extend to the program level.

\textsuperscript{287} Ex. 2, Tab. 4, p. 16

\textsuperscript{288} Ex. 2, Tab 4, p. 17

\textsuperscript{289} Ex. 6

\textsuperscript{290} S.B.C. 1989, c. 51, RSBC 1996, c. 216
Elaine Stubson, Jeffrey’s teacher in Grades 4 and 5, testified. KGS provides tutoring in a multi-sensory approach to remedial reading, using a modified Orton-Gillingham program. The program is individualized. Each student works at their own level measured against a baseline set after testing the student, reviewing information from their psycho-educational assessment, and academic results from their prior school. Skills are built step-by-step and a child is not expected to do work that has not been taught.

Each student receives one hour of individual language tutoring daily, based on the Orton-Gillingham method. The school uses auditory, visual and kinaesthetic techniques, each reinforcing the other, to teach reading skills. Ms. Stubson testified that one-hour tutoring sessions, which focused on a single concept and represented a child’s maximum attention span, were considered the most effective. KGS discouraged using private tutors.

KGS classroom instruction follows the Provincial curriculum with materials adapted to a student’s individual needs. They emphasize language arts and mathematics, the subjects in which SLD students have the most difficulty. The teacher/student ratio is slightly less than 3 to 1 and class sizes are kept small to ensure that each student receives individual attention. KGS teachers are all BC certified and have Orton-Gillingham training. Tutors are also trained in Orton-Gillingham. Computer use is a necessary skill and hand-held spell-checkers are available.

Testing is often done orally and time extensions are granted to allow students to complete Provincial testing. Ms. Stubson testified that students generally arrive at KGS with low self-esteem as a result of the failure they have experienced. At KGS they discover that they can learn. Trust develops between the teachers, tutors and students and, because they are working at their own level, they experience success. KGS’s goal is to integrate students back into the public school system within two years. On average, students stay at KGS for three years. Half of their students return to a public school.

Ms. Stubson confirmed that a psycho-educational assessment is required for admission to KGS and students must be diagnosed with a SLD or dyslexia, be of at least average intelligence, and their learning disability must be their primary problem.
Each student at KGS has an IEP which is prepared in the fall, after the teacher and tutor have spent about a month with them. It sets out the individual learning priorities and how they are to be achieved. The plan is usually for a year or longer. All plans have math and reading components, and they are updated and reviewed before report cards are sent home to ensure that goals are being met.

Ms. Stubson described Jeffrey’s learning disability as severe. When he arrived at KGS, in September 1995, he was quiet and withdrawn. He sat at the back of the class, hoping not to be seen. He was at the beginning Grade 1 level in reading, essentially a non-reader. He did not know all the letters of the alphabet and could not put them together in blends. When tested in math, Jeffrey was not quite at the Grade 2 level. Ms. Stubson testified that the Moores understood the severity of Jeffrey’s problems and cooperated with the school. They ensured that his homework was completed.

Ms. Stubson said that the KGS teaching methods worked for Jeffrey. He was slower than other students but was hard-working, willing and did his best. She described how his confidence grew. He made friends easily and excelled in physical education. He was reading at a Grade 5 level, and was at grade level in math, when he left KGS after Grade 7.

Ms. Stubson and Jeffrey’s tutor prepared an IEP for him in September 1995. Their first emphasis was on reading skill and fluency in blending. Jeffrey’s report card at the end of Grade 4 indicated that his performance was satisfactory. His ability to name the letters of the alphabet and to read numbers had improved, but he continued to have difficulty with retrieval. His skill at phonogram blending was relatively undeveloped. He had extreme difficulty writing from dictation. His memory for auditory sequences

291 Ex. 2, Tab 10, p. 14-16
was short. His writing was neat but slow. He was described by his tutor as a pleasant and conscientious student.²⁹²

[537] At the end of Grade 7, in June 1999, due to the severity of his disability, staff at KGS did not recommend that Jeffrey return to the public school system. In the Transition Team meeting which occurred towards the end of Grade 7, his teachers and tutors listed Jeffrey’s strengths and needs together with the modifications he would require going into high school. They suggested that modifications would be required in his high school program including: accept phonetic spelling, use of spell checker, time extensions for assignments and tests, scribes on tests as necessary, provide oral and written instructions for assignments, books on tape when possible, request materials/outline prior to school start, peer note-taker for math also if available, allow for hand-held tape recorder in class. They further suggested that he be exempted from the requirement to learn a second language and that he be taught in small groups or a resource room where possible.²⁹³ Based on the recommendations of KGS staff, the Moores decided that Jeffrey would not return to the public school system for high school, but would attend Fraser Academy, a private school which offered an intensive program similar to that offered at KGS. Ms. Moore testified that she checked what was available at their local public school and spoke to other parents of dyslexic children. The Moores decided to follow the recommendation of the KGS staff.

Fraser Academy – Grade 8 onward

[538] Jeffrey began Grade 8 in September 1999 at Fraser Academy. He was still a student there when he testified. He qualified for, and received, a tuition bursary, based on financial need.

²⁹² Ex. 2, Tab 10, pp. 34-38
²⁹³ Ex. 2, Tab 13, p. 2
Fraser Academy is an independent school which specializes in teaching children with learning disabilities in Grades 2-12. Eleanor Nesling, head of Fraser Academy, testified that there is little demand for a Grade 1 class because students who attend Fraser Academy have already been identified as SLD and it is rare for a child to be identified before Grade 1.

The ratio of staff to students is approximately 3 to 1. Classes have no more than eight students and often fewer. Fraser Academy offers intensive services based on the Orton-Gillingham method. The school follows the Provincial curriculum and graduates write the Grade 12 Provincial exams. The school day starts at 8:00 a.m. and consists of nine 40-minute periods, one of which is individualized tutoring. Teachers are available for an hour at the end of each day to assist students. Classroom work is structured and based on a multi-sensory approach to literacy.

To attend Fraser Academy, a student must have a current psycho-educational assessment and have dyslexia or another language-based learning disability. Their primary difficulty cannot be attention deficit or a behavioural disorder. A student ready to move back into the public system is urged to do so.

Once a year, Fraser Academy students are tested using a standard test series. Based on a further psycho-educational assessment in Grade 11, Fraser Academy might ask the Ministry to accommodate the student by giving them extra time, or the assistance of a scribe during the Provincial exams. The Ministry decides whether that is appropriate.

Grade 8: September 1999 – June 2000

At the start of Grade 8, in September 1999, Jeffrey was given the Gates MacGinitie Reading Test. The results indicated that he was in the 1st percentile with a
Grade equivalent of 2.5. Ms. Nesling explained that Jeffrey was unable to complete the test, which is timed.294

[544] In December 1999, Jeffrey received his first Fraser Academy report card. His tutor indicated that he was independently reading a book at the Grade 4.2 level (two months into Grade 4). Ms. Nesling testified that this was his independent reading level, not his instructional level. She also indicated that it was likely that the book was at the highest level that he could read independently. He was working at reading comprehension exercises at a Grade 5.7 level.295

[545] In March 2000, Jeffrey’s second report card was sent home. He was reading independently at a Grade 4.7 level and was working at reading comprehension exercises at a Grade 5.9 level. By June 30, 2000, the end of Grade 8, he was reading independently at a Grade 6.3 level and was successfully doing reading comprehension exercises at a Grade 5.7-5.9 level.296

**Grade 9: September 2000 – June 2001**

[546] In December 2000, Jeffrey received his first Grade 9 report card. He was reading independently at a Grade 4.8 level and had completed reading comprehension exercises at a Grade 6.3 level.297 By March 2001, his report card said that his independent reading level was at the Grade 4.8 level and he was doing reading comprehension exercises at a 6.3-6.7 level, with teacher assistance.298

294 Ex. 12
295 Ex. 2, Tab 15, pp. 65-74
296 Ex. 2, Tab 15, pp. 75-84
297 Ex. 2, Tab 16, pp. 12-21
298 Ex. 2, Tab 16, p. 22-32
On June 29, 2001, Jeffrey received his final Grade 9 report card. It indicated that he continued to read independently at a Grade 4.8 level and did work at reading comprehension exercises at a grade 6.7-6.9 level with some teacher assistance. Ms. Nesling testified that, at the end of Grade 9, Jeffrey continued to be significantly below his grade level in reading, writing, and spelling. His math skills were at grade level or slightly behind.

Jeffrey was in Grade 10 at Fraser Academy when he testified. Ms. Nesling believed that Jeffrey was not ready to return to the public school program. To do so, he would require specific accommodations, including computer assistance with reading texts, advance notice of tests, a scribe, longer times to write exams, and access to a spell-checker.

EXPERT EVIDENCE

I now consider the expert evidence, dealing with evidence about the skills testing done at the end of Grade 8, summarizing the evidence about learning disabilities and dyslexia, and about the sufficiency of the services that Jeffrey received while at Braemar. I conclude with expert evidence about the Ministry’s policies.

I heard evidence from four experts: Dr. Fiedorowicz, a Psychologist; Dr. Bateman, a Professor and Consultant in special education; and Drs. Perry and Siegel, both Professors in the Faculty of Education at UBC.

Grade 8 Testing

In June 2000, at the end of Grade 8, Dr. Fiedorowicz completed a psycho-educational assessment of Jeffrey. She testified that an assessment begins with a detailed

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Ex. 2, Tab 16, pp. 33-43
review of the student’s background information including: the early history; medical and family status; academic history; success rate; earlier interventions; and previous evaluations. The review is followed by a series of tests designed to examine intellectual and cognitive abilities: verbal; non-verbal; visual; spatial; problem-solving or concept formation; memory; and attention span. Then the assessor looks at the student’s academic performance in reading and its various sub-skills, recognition of sounds, phonetic knowledge, word recognition, paragraph-reading comprehension, spelling, and written expression – this assesses how well the student can put thoughts into words. The assessor also reviews the student’s computational and problem skills in mathematics, study skills, and emotional/behavioural aspects.

[552] The purpose of the psycho-educational assessment is to diagnose whether a student has a specific learning disability or if there are other things that could account for academic under-achievement. Having identified the problem, the assessment should provide recommendations which, typically, include placement recommendations, curriculum modifications, and other accommodations for the student.

[553] Dr. Fiedorowicz’s goal in assessing Jeffrey was to comprehensively understand his cognitive capabilities and to make recommendations for remediation and accommodation. Although her primary work with respect to individuals with learning disabilities is clinical, she also has a research interest. She focuses on diagnostics, treatment and intervention, and has developed specific strategies for cognitive rehabilitation and remedial interventions using computer technology.

[554] Dr. Fiedorowicz reviewed Jeffrey’s records from Braemar, KGS and Fraser Academy, including the referral forms. She reviewed the reports from his private tutor. She also reviewed his medical records, and prior psychological and educational assessments. She interviewed Jeffrey, his parents, his Fraser Academy teachers, and his former principal at KGS. She administered a series of standardized tests, made
behavioural observations, formed clinical impressions in working with Jeffrey, and prepared a report detailing her findings.\textsuperscript{300}

[555] Based on his IQ test, Dr. Fiedorowicz concluded that Jeffrey had average intellectual abilities. However, his ability to process visual-perceptual information was very, very slow, about three levels below average which resulted in a huge discrepancy between his intellectual capabilities and his processing speed. He was below average on distractibility, or his ability to focus, and had a memory or retrieval problem.

[556] On reading tests measuring word recognition, Jeffrey performed at a Grade 5 level. On reading tests measuring comprehension, he performed at a Grade 7.6 level. Although he was able to read and comprehend at those levels, the rate at which he read was exceptionally slow. He read and re-read a word using phonetic skills to decipher what he was reading. His fluency was slow and he used his finger to help him keep on track. In spelling, he performed at a Grade 3 level. Dr. Fiedorowicz testified that it took him almost three hours longer than the standard time to complete the tests.

[557] Dr. Fiedorowicz described reading as a recognition process and spelling as a recall process. Her report notes that it is not uncommon for spelling to lag behind reading when remedial intervention is based on the Orton-Gillingham method, with an emphasis on phonetics.

[558] Jeffrey was at a Grade 6 level in mathematics both in computation and problem-solving. He had developed effective study habits.

[559] Jeffrey completed questionnaires and was interviewed to determine his emotional/behavioural status. No significant emotional difficulties were discovered. He was shy and quiet at times but was a fairly emotionally well-adjusted young adolescent.

\textsuperscript{300} Ex. 8
Dr. Fiedorowicz concluded that Jeffrey has a severe learning disability due to specific cognitive deficits which interfere with his ability to learn at an average rate with typical teaching approaches. His learning disabilities were evident from a very young age, he had had the benefit of specialized programs and interventions but he had ongoing difficulties. There were significant specific areas of deficit with some significant areas of improvement. The ongoing deficits included phonemic awareness, his information processing speed, sequencing, difficulties with right/left discrimination, difficulties with speech/sound discrimination, and difficulties with symbol manipulation. He also had difficulties with attention, concentration, and delayed memory functions. These were the underlying deficits that contributed to his learning disability in reading, spelling, written expression and mathematics. Given sufficient time, he could read and comprehend, but his reading speed was extremely slow.

Many of the tests administered were norm-referenced. She stated that there can be tremendous variation in what the tests are measuring, so a tester had to be sure what the test focused on. For example, the *WRAT*, or *Wide Range Achievement Test*, is widely used by neuro-psychologists and researchers because it has good norms and it is updated regularly but it measures word recognition – the ability to read a list of words in isolation.

In cross-examination, Dr. Fiedorowicz emphasized that Jeffrey’s reading comprehension level had improved dramatically from the beginning of his school years at KGS, through his testing at Fraser Academy, to her testing in June 2000. What needed to be worked on was the speed of his reading or automaticity.

Dr. Fiedorowicz’s report recommended that Jeffrey remain in a program specifically for students with learning difficulties where he would have appropriate remedial supports and accommodations. Specialized programming geared to his individual strengths and weaknesses was critical to his success. Given the severity of his learning disabilities, Dr. Fiedorowicz believed that Jeffrey needed maximum supports, both remedial interventions and accommodations. Accommodation alone would not have been enough. She recommended ongoing remedial intervention to continue improving his weaker skills. She suggested remedial programs that he might benefit from and made
accommodation recommendations to help him cope with the demands of a high-school program. Jeffrey’s processing remained very, very slow, partly because he needed more time, and partly because he was not a risk-taker and did not like to make mistakes. She encouraged him to make mistakes.

[564] Dr. Fiedorowicz testified that Jeffrey had developed a decoding strategy that works. He needed to try and improve his processing speed through training, but also through the comprehension of predictability and other strategies. Another way of addressing the time it takes to decode a paragraph or a page is through accommodation. For example, if a history chapter takes a long time to read, it could be recorded so that he could listen and follow along and learn the content more quickly, or it could be scanned into a computer and the computer could read it to him.

The Expert Evidence With Respect to Learning Disabilities and Dyslexia

[565] Drs. Fiedorowicz, Bateman, and Perry all testified, or wrote, about the lack of an unequivocal, universally-accepted definition of learning disabilities. They agreed that the term refers to a variety of disorders that are distinct, lifelong, neurological conditions which vary in how they manifest themselves, are combined, and in their severity. They make it inordinately difficult for some students, despite average or above-average intelligence, to learn in certain areas. Commonly, those areas are reading, including decoding and comprehension; mathematics, including math facts and reasoning; listening comprehension; and written and oral expression.

[566] Dr. Fiedorowicz testified that, over the last 20 years, and particularly in the last ten, researchers have discovered a strong neuro-biological basis for learning disabilities and a genetic or familial component. More recently, both she and Dr. Bateman agreed that genetic research has identified some chromosomes that are related to specific reading disabilities.

[567] People whose learning difficulties are primarily the result of visual, hearing or motor disabilities, generalized intellectual impairment, emotional disturbance, or cultural disadvantage are excluded from those with learning disabilities.
Dyslexia refers to a specific subset of learning disability; a disability in the development of language arts including reading, spelling, and written expression. Often other cognitive deficits are associated with dyslexia, such as difficulty with right/left discrimination, sequencing and phonemic awareness.

Dr. Bateman testified that the signs of dyslexia include slow, laboured decoding; that is, figuring out the words. She said that experts now know that phonological deficits are either part of the deficit, or the core deficit, in students with dyslexia. There are at least two types of dyslexia, visual or rapid-naming deficit, and auditory or phonological deficit. They may be combined. Dyslexia can vary in severity; however, the term is usually reserved for moderate to severe cases.

The experts agreed that the ability to read is central to accessing knowledge. Dr. Fiedorowicz described the reading process as complex and being made up of different components including: accuracy, speed, integration of information, and comprehension. If a child is spending too much time decoding or identifying letters, then they have difficulty with comprehension. If they become more efficient in decoding, then comprehension can increase. She said that there were other ways to help a student focus on comprehension, such as teaching comprehension strategies consistent with predictability, making sense of the text, using general background information, and their critical thinking skills. Dr. Bateman testified that, to be a truly fluent reader, students need to be able to decode so automatically that they do not have to think about it.

Can learning disabilities and dyslexia be cured?

Drs. Fiedorowicz, Bateman and Siegel all agreed that if learning disabilities are identified early, and intensive supports provided, their effects can be mitigated and some aspects of the disability can be overcome. Dr. Bateman testified that most professionals working in the field believe that, with proper, intensive, early, consistent, and ongoing instruction, dyslexia can be overcome so that a student becomes perfectly functional in reading and writing. Dr. Siegel agreed that it is important to identify early and provide appropriate remediation to those with reading disabilities but noted that while dyslexia is
remediable, it is not curable. Drs. Siegel and Perry testified that some students with dyslexia will need continuing support and, even after intensive remediation, read more slowly as adults and have difficulty understanding and remembering what they have read.

*What are the effects of failure to identify and remediate?*

[572] Failure to identify and remediate dyslexia has consequences to both the student and the education system.

**A. Consequences to the Student**

[573] There was general agreement among all of the experts about the significant, long-term consequences on a student as a result of unremediated learning disabilities. Some of the effects are academic; some are social. The academic effects include significant delays and gaps in basic skills, like literacy skills, which interfere with the acquisition of basic content in other subject areas; delays in fluency and automaticity resulting in severe repercussions on future reading ability; and an inability to acquire knowledge in other subject areas like science and social studies as the necessity for reading increases as a student moves through school. In addition, SLD students are at risk for early school drop-out.

[574] The social effects include repeated failure in school resulting in significant emotional difficulties and diminished self-esteem, and having to work at jobs below one’s intellectual potential because of skill gaps. Dr. Bateman noted that children of normal intellect are very aware of their deficits relative to their peers and become sensitive that they cannot read out loud, for example. Individuals may cover up their learning disability or act out, becoming aggressive, and may become involved with the law. Dr. Siegel testified that these deficits, in turn, can lead to an erosion of self-esteem
and serious long term consequences which have been said to include unemployment, incarceration, depression and higher rates of suicide.

[575] Drs. Siegel and Bateman both testified about work done in the mid-1980s by Professor Keith E. Stanovich about the “Matthew effect”. They agreed with Dr. Stanovich’s theory that the academically rich get richer and the poor get poorer. Students without early reading skills develop a chain of negative consequences which includes: delay in automaticity; severe repercussions for future reading ability; severe repercussions for cognitive development; impaired vocabulary; impaired concept development; and impaired syntactic knowledge. This is particularly true, Dr. Siegel said, in the area of vocabulary because, after the age of six or seven, the new words we acquire are from reading. All of the knowledge children gain from reading is not available to a non-reader and a cumulative information deficit develops.

[576] To avoid the consequences of the “Matthew Effect”, educators must identify and remediate early.

[577] Dr. Siegel had researched the importance of phonological awareness to reading ability with Professor Stanovich at the Ontario Institute for Studies in Education at the University of Toronto. She agreed with Dr. Stanovich’s conclusion that phonological awareness and skill at spelling-to-sound mapping must be in place early in a child’s development, because of a chain of escalating negative side effects if it is not. Dr. Stanovich’s research concluded that large differences in reading practice begin to emerge as early as the middle of the first year of a child’s schooling, and the best approach is to

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301 Ex. 47
302 Ex. 47, pp. 364, 381
303 Ex. 47, p. 394
304 Ex. 47, pp. 363-364
identify early and provide appropriate remediation. Dr. Siegel stated that the focus needs to be broader than phonological awareness, although that is very important.

B. Consequences to the Education System

[578] Drs. Bateman, Fiedorowicz and Perry described the costs to the education system. They agreed that the longer intervention is delayed, the greater its intensity and duration needs to be which results in a greater drain on the education system’s resources.

[579] Dr. Siegel agreed that early intervention is the most cost effective. More resources are required later to make up for the lack in the early years. This conclusion formed part of the 1999 Review which she co-authored.

[580] These conclusions were also accepted by Ms. Roch, on behalf of the Ministry, and echoed by Dr. Overgaard. Dr. Overgaard testified that intensive, effective interventions cost more in the short-term but the long-term benefits are closely related to the successful implementation of inclusive education.

What do children with learning disabilities and dyslexia require?

[581] All of the experts agreed that children with reading disabilities need to be identified early and provided with appropriate remediation. Dr. Bateman testified that there was virtually complete consensus in the field of special education on this point. Dr. Fiedorowicz testified that the earlier that a student is identified as having a learning disability, and provided with intensive support, the greater the likelihood of mitigating the effects of the disability and overcoming some of the more serious consequences. She testified that research back to the early 1980s indicated the importance of early identification and intensive remediation.

[582] Drs. Fiedorowicz and Bateman prefer to identify children in Kindergarten. Opportunities to screen for students at risk then include observation by the classroom teacher. Dr. Fiedorowicz testified that students’ intellectual ability can be measured by relatively simple screening tools to determine if the student’s difficulty results from a
global intellectual deficiency. She described the use of teacher checklists, for example, can a student tell their right from their left? Dr. Perry said that a classroom teacher can ask a student to segment three-letter words and identify the beginning sound, the end sound, and how many sounds are in a word. Dr. Bateman believed that assessment instruments, tests, and measures are important in diagnosing if a student has a learning disability but clinical experience and judgement after working with a student can also identify those at risk.

[583] There are also screening tools for use in Kindergarten. Dr. Bateman testified that tests, like the Index, identify students who may be at risk for reading problems and, while they may over-screen, there is no harm in providing interventions to any student having difficulty. Dr. Perry testified that, especially in the area of phonological processing, there are tools which can be used in Kindergarten or Grade 1 to determine whether a student is likely to have difficulty acquiring reading skills. She said that experts agree that educators should be using those tools to identify students so they can provide them with interventions as soon as possible. She acknowledged that relying on these tools will likely identify between 20 and 25% of Kindergarten or Grade 1 students at risk for reading difficulties. Not all will in fact go on to develop them, but all will benefit from explicit instruction, and many intervention programs target that bottom 20 to 25%.

[584] The experts agreed that early identification must be followed by early intervention.

[585] The 1996 Ministry paper, Early Intervention of Learning Difficulties, stated:

The importance of early intervention as a means of helping to ensure the academic success of all students cannot be overstated. A report prepared for the Organisation for Economic Co-operation and Development (Clarifying Report, 1995) put it this way:

Special instruction for under-achievers, especially at the beginning of primary education should be regarded...as a first-class investment....It become[s] progressively more costly to deal with the difficulties of [students with low achievement]
since, as they move “up” from class to class, compensatory programmes tend to have less and less effect….Investment in compensatory education should be seen, therefore, not as a charge on educational budgets but as a deferred gain.\textsuperscript{305}

[586] Dr. Siegel also described the need for early intervention in the 1999 Review. In particular:

...Early intervention during the first years of schooling can reduce or even prevent problems. Research (Keating & Hertzman, 1999) has demonstrated that children who feel valued, successful and safe in their early years will be less likely to engage in behaviour that is harmful to themselves and/or others. This research showed that for every education-related dollar we spend during a child’s early years we save many dollars in the health care and justice systems.\textsuperscript{306}

[587] Dr. Perry’s report explained that early intervention means intervening as soon as it is recognized that a student is having a problem, typically early in a child’s schooling or before they enter school. It may also mean that intervention happens promptly, at a later stage in a child’s schooling, when they first experience problems.

[588] Dr. Bateman testified that early remediation usually means in Kindergarten. In her report she said:

Early intervention with dyslexics, that is during kindergarten and first grade perhaps continuing into second grade, is extremely important in that effort, time and resources invested early are more effective than the same investment later. Furthermore, meaningful early intervention can avoid most or all of the negative effects of poor reading left uncorrected, i.e., damage to self concept and an ever-widening information deficit.\textsuperscript{307}

\textsuperscript{305} Ex. 85, Tab 20, p. 9

\textsuperscript{306} Ex. 2, Tab 37, p. 29

\textsuperscript{307} Ex. 25
[589] Dr. Fiedorowicz testified that the extent of the intervention, and the nature of the supports that are required, will depend on the severity of the learning disability. Dr. Fiedorowicz states in her report:

Typically, within the education system, there should be a range of services offered to meet the needs of individuals with learning disabilities. Some individuals have relatively mild disabilities, and therefore remedial strategies, accommodations, and modifications can be provided within the context of the regular classroom. However, for those individuals who have moderate to severe learning disabilities, more intensive intervention is required. One-on-one or small group sessions for part of the day, with integration into the regular classroom for the rest of the day is appropriate for some students, but for others, it is necessary to have special classes designed specifically for students with learning disabilities which the student attends for the majority of the time. For students with severe learning disabilities, it may be necessary to have a separate setting devoted to learning disabilities, such as a program or school specializing in learning disabilities.\(^{308}\)

[590] She believed that a continuum of services was important ranging from classroom modification; to additional assistance from the teacher, or a learning assistant or special education teacher; to one-on-one supports outside the classroom in a resource room or a special class; and to placement in a special program for SLD students for the entire school day. If a child has a SLD, designated through a psycho-educational assessment, or if other supports are not working, they may require a special program with structure and individual assistance on a one-on-one basis with remedial intervention for their specific area of deficit, and support in other subject areas. Dr. Fiedorowicz also recommended that the student be taught strategies to deal with their learning disability, for example, taped materials or materials scanned into a computer, or dictating oral responses to tests. Accommodations are also important as the student gets older.

[591] Dr. Fiedorowicz acknowledged that there was continuing debate about the integration of SLD students into regular classrooms. She did not advocate separate

\(^{308}\) Ex. 8, Part II, p. 4
schools for teaching SLD students. The critical issue for her was the level of supports provided whether in a separate program, within a public school, or in a separate school.

[592] Dr. Fiedorowicz testified that there is no general consensus about what intensive remediation means but, based on her experience, and a review of the literature about maximizing learning, she believed that remediation should be for a minimum of 30 minutes daily. The student’s progress should be monitored and, if they continue to fall behind grade-level expectations, then the intensity should be increased by extending the remedial instruction.

[593] Dr. Siegel agreed that there was no consensus in the field as to what constituted effective early intervention or remediation of children with reading disabilities. The current debate involves the extent to which phonological awareness training as opposed to visual perceptual training should be used. She first knew of phonemic awareness being used to teach students to read in 1996 or 1997 with Launch into Reading Success, an intensive early intervention program of daily 30-minute lessons. She agreed however that Reading Recovery, an early intervention program, was introduced in Ontario in 1988 and it involved 30 minutes of daily, one-on-one, tutoring for Grade 1 students. She also acknowledged that she was familiar with Professor Joseph K. Torgeson’s work and his view of the three things that are necessary to prevent reading failure in young children: the right kind and quality of instruction; the right level of intensity; and the right children at the right time.\(^{309}\) Intensity may mean smaller teacher/student ratios. Dr. Torgeson believed that identification and prevention should begin in Kindergarten for maximum benefit with the more severely learning-disabled student requiring more intense and ongoing services.\(^{310}\)

\(^{309}\) Ex. 51, p. 3

\(^{310}\) Ex. 51, pp. 4 - 5
In a 1995 article, Dr. Siegel cited an extensive body of research indicating a strong relationship between phonemic awareness and learning to read. In particular, she cited a study by Lindamood and Lindamood in 1973. They developed a phonemic awareness program called the *Lindamood Auditory Conceptualization Program* with tests for phonological awareness and a remediation program.

Rather than commit to remediation for a specific duration, Dr. Bateman proposed starting with a time frame and, if there was no improvement, gradually increasing the time. More important to her was the use of phonemic awareness training as a part of the remediation.

Dr. Bateman testified that the place in which a child is taught to read is not critical to success, what happens in the setting is. Based on the literature, she believed that, for dyslexic students, manageable class size and limited auditory and visual distractions were important. She emphasized instructional flexibility so that if one method did not work, another could be tried. In addition, Dr. Bateman recommended collecting information about a student’s skills and recording changes throughout the intervention.

*What was known about the role of phonemes in reading disabilities and when?*

Dr. Bateman testified that it is critical that early intervention for reading difficulties deals with phonemic awareness, an element of phonological processing. She explained that phonological processing encompasses three elements: The first is awareness of the word as a unit. If you are able to count the number of words in a sentence then you are phonologically aware. The second is the recognition of the syllables within words. Some of the multi-sensory reading programs, like Orton-Gillingham, work on recognition of syllables within the word. The third, and key, element of phonological processing is phonemic awareness, the ability to identify and respond to the sound in a word. Dr. Bateman gave as an example, the word ‘cut’, by changing the middle ‘uh’ sound to ‘ah’, you get the word ‘cat’. ‘Uh’ and ‘ah’ are phonemes; the smallest unit in which a change can be made resulting in a change in the meaning of a word.
Drs. Bateman and Perry testified about the substantial body of research linking dyslexia to a student’s awareness of how sounds in the English language can be joined to form words, and their ability to both blend and segment those sounds. To read, students need to master the alphabetic principle, the link between the orthography, or the symbol, and the sound that it makes. In all alphabetic languages including English, graphemes, or letters, are used to stand for phonemes or sounds. Most children learn phonemic awareness by osmosis. The deficit that many students with dyslexia have is that they cannot, without explicit instruction, deal with phonemes. They have difficulty breaking down a word into its component sounds or phonemes and manipulating the sounds in words. To do so, they need specific teaching as soon as their problem becomes apparent.

In Dr. Bateman’s view, phonemic awareness should be taught in Kindergarten. Dr. Bateman explained that children with SLDs have difficulty relating the written word to the sound without knowing the sound first. Dr. Siegel did not, in essence, disagree with Dr. Bateman’s evidence. Dr. Siegel said that you must know the language in which you are learning to read, so the recognition of sounds comes first.

Dr. Fiedorowicz testified that research academics now know that, for reading-disabled students, the greatest success in the early stages of reading is with highly structured programs that have a phonemic component and progress by steps. Early intervention strategies should include phonetic analysis, decoding, and phonemic awareness.

In the fall of 1986, Dr. Stanovich reported:

Evidence is mounting that the primary specific mechanism that enables early reading success is phonological awareness: conscious access to the phonemic level of the speech stream and some ability to cognitively manipulate representations at this level. …phonological awareness stands out as the most potent predictor. …a growing body of data does exist indicating that variation in phonological awareness is causally related to the early development of reading skill…It is apparently important that the
prerequisite phonological awareness and skill at spelling-to-sound mapping be in place early in the child’s development because their absence can initiate a causal chain of escalating negative side effects.\textsuperscript{311}

[602] Dr. Bateman testified that once a child is able to identify the individual sounds in a word, they can benefit from phonics. Without phonemic awareness, children fall progressively further behind, and exhibit slow, laboured, inaccurate decoding and never develop the fluency necessary for pleasant, meaningful, and comfortable reading to acquire information. They stay at the learning-to-read stage rather than moving to the reading-to-learn stage by late Grade 3 or early Grade 4. She said that dyslexic students benefit from a systematic, sequential, mastery-based, synthetic, phonics program.

[603] Dr. Bateman disagreed with the District that the techniques for teaching phonemic awareness have only recently become known to the general education community. She and her colleagues were aware of it, as a cause of reading difficulty, by the late 1950s. Phonemic awareness programs had been available for many years. She did acknowledge that much research was done with respect to teaching dyslexic children in the 1990s and, although programs were available earlier, they were not nearly as widely used as they should have been.

[604] Dr. Bateman described the work done by the National Institute of Child and Human Development (“NICHD”) in the United States which coordinates over 100 studies dealing with various aspects of reading disabilities. Beginning in the mid-1990s, it published some of its findings. In a 1996 article, based on earlier research, it reported that the best predictor for future reading disabilities is a combination of performance on measures of phonemic awareness, rapid naming of letters, numbers and objects, and print awareness.\textsuperscript{312} The article indicated that converging research demonstrated that deficits in phonemic awareness are fundamental to reading disabilities and children with such

\textsuperscript{311} Ex. 47, pp. 362-64

\textsuperscript{312} Ex. 26, p. 36
disabilities need explicit instruction in it. Children lacking phonemic awareness must be taught how to blend and segment sounds. Dr. Bateman testified that the information and studies on which the NICHD article was based were available before 1996.

[605] Dr. Bateman testified about, and Dr. Siegel was familiar with and cited, earlier studies on the benefit of phonemic awareness training for beginning readers in Kindergarten or very early in Grade 1. Dr. Siegel agreed they were consistent with the NICHD report. Dr. Bateman testified that recognizing phonemes is taught directly in the most effective programs for children with reading difficulties. The Alconen Program was available as early as 1963. In the 1970s, the *Lindamood Auditory Discrimination in Depth* program was developed and was used in Canada by Dr. Steven Trutch, in a clinical setting, in the late 1970s or early 1980s. In 1991, Dr. Trutch published *The Missing Parts of Whole Language*, in which he explained the phonemic process and its role in reading disabilities.

[606] Drs. Bateman, Siegel and Perry all testified that Torgeson and Bryan developed the *Test for Phonological Awareness*, TOPA, in 1994. Dr. Bateman said that it gained popularity over the Jansky de Hirsch Index and was first used for screening in B.C. in 1996 or 1997. The District started using it at about that time.

[607] The District began an early intervention phonemic awareness program in 1997. Dr. Siegel was not aware of any B.C. school district which had done so earlier. Teachers’ colleges did not teach that phonemic awareness was important for children with symbol retrieval difficulties. She testified that during Jeffrey’s time at Braemar, there was no consensus among educators about the best practices for teaching those with reading disabilities, nor when remediation should start. Dr. Siegel testified that academics were in favour of early intervention in Kindergarten or Grade 1 or 2.

313 Ex. 48, 49 and 50.
314 Ex. 27
The Whole-Language Approach to Teaching Reading for Dyslexic Children

[608] Dr. Bateman testified that longitudinal studies indicate that systematic phonics instruction results in more favourable outcomes for reading skill than does the whole-language approach, which emphasizes context. She considered whole-language as a philosophy of education not a methodology of teaching and said its proponents believe that reading is acquired naturally, in the same way as speech, and that any kind of systematic direct instruction in decoding is inappropriate. They favour putting a child in a literature-rich environment with opportunities to explore print, to interact with books, and to see adults enjoying reading and actively reading as part of their everyday lives. It is completely indirect and she believes it to be moderately successful for up to 70 per cent of children. For the approximately 30 per cent of students who need help in learning to read, in her view, whole-language has not been effective.

[609] Dr. Bateman testified that the whole-language approach is not a viable option in special education and in particular with dyslexic children. Asking a dyslexic child to look at the beginning and end of a word and to try and guess it will not work. Dr. Bateman testified that, in her opinion, the most harmful method of teaching reading to dyslexic students is asking them to rely on context more than is appropriate. It builds a tolerance for inaccuracy in reading which becomes more problematic as a student advances in school and the ability to read precisely and accurately becomes critical to understanding.

[610] Dr. Siegel testified that the whole-language approach was used in both special and general education classrooms in B.C. She acknowledged that, about 1991, the Canadian Psychological Association circulated a position paper on beginning reading to all Canadian Ministries of Education, pointing out the harmful impact of whole-language reading instruction for at-risk children. Dr. Siegel agreed that children with severe reading problems do not benefit from whole-language as much as they do from code-based instruction but she testified that there is still debate in the field about it.

[611] In 1991, Dr. Siegel gave a speech citing research that concluded that whole-language programs to teach reading are no more successful than traditional programs and,
in the case of children with learning problems, considerably less so. She testified that, even as of the date of her evidence, there is little or no emphasis on phonological awareness and phonics for teaching reading skills in faculties of education.

Conclusions on the expert evidence

[612] Having reviewed all of the expert evidence, and the journal articles filed as exhibits, I reach the following conclusions:

a. Learning disabilities is a broad term encompassing a number of conditions which vary in their impact and severity;

b. Dyslexia is a specific type of learning disability affecting the acquisition of language arts including reading, spelling and written expression in children of otherwise average, or above average intelligence;

c. Depending on the severity of a child’s learning disability, the supports required vary. As a result, a range of services is necessary from a modified program within the classroom to full-time placement in a special program for SLD students;

d. Children with dyslexia are less likely to succeed in a whole-language approach to teaching reading;

e. If learning disabilities can be identified early, and appropriate supports provided, their severe negative consequences, which are both academic and social, can be mitigated;

f. SLD students require intensive supports;

g. Screening tools are available for use in Kindergarten and Grade 1 to identify students who may be at risk for developing reading difficulties. While they may over screen, it is preferable to be over-inclusive with remedial instruction at this stage;

h. Teacher observation, checklists, and some simple testing may be enough for an experienced teacher to identify children at risk for reading difficulties;

i. Early intervention is more economic and efficient, and it can avoid the “Matthew effect” in which academic deficits are cumulative;

j. There is a cost to both the student and the service provider from failing to intervene early;
k. One of the core deficits for dyslexic children is a lack of phonemic awareness; an inability to identify the sounds in a word;

l. Children without phonemic awareness require specific instruction to acquire the skill; and

m. There was much work done on the role of phonemic awareness in learning to read in academic circles in the 1980s and early 1990s, with some much earlier work. The role of phonemic awareness has not been taught generally in teacher training in British Columbia.

The Expert Evidence on whether Jeffrey’s needs were met

[613] Before reviewing the experts’ opinions on whether the District met Jeffrey’s needs, it is useful to summarize the supports and accommodations that he did receive.

[614] In Kindergarten, after Jeffrey was identified as at risk for reading difficulties by the Index, and his teacher’s concerns, Jeffrey was referred to the ELRT in March 1992. Following the March 26 ELRT meeting, and for the balance of the year, the classroom aide spent 15 minutes with Jeffrey, one-on-one, thrice-weekly.

[615] Jeffrey started Grade 1 with no specific supports. In January 1993, he was referred to the ELRT and shortly thereafter began attending the LAC thrice-weekly for 30-minute one-on-one sessions. Soon thereafter he began twice-weekly 40-minute one-on-one sessions with the volunteer tutor.

[616] In March 1993, Jeffrey was again referred to the ELRT and in May 1993, Ms. Tennant administered tests and made recommendations including that Jeffrey have a structured multi-sensory approach to reading. His parents hired an Orton-Gillingham instructor to work with him in the summer between Grades 1 and 2. No additional supports were provided in his Grade 1 year.

[617] In September 1993, no additional supports were provided but Jeffrey’s classroom program was modified for him. In February 1994, Jeffrey’s Grade 2 teachers referred him to the ELRT which agreed that Ms. Tennant would do a full psycho-educational assessment. As a result of the April 1994 assessment, Ms. Tennant recommended that
Jeffrey continue with the same level of assistance in the LAC and with the volunteer tutor and that the District Screening Committee consider him for the DC1 program.

[618] Following her assessment, Ms. Tennant prepared a learning intervention plan for Jeffrey which included modifications and strategies to assist him in the classroom.

[619] Jeffrey did not attend DC1 because it was closed. In Grade 3, in addition to assistance in the LAC and the volunteer tutor, Jeffrey was assigned an Aide for four, 40-minute sessions a week.

*Dr. Fiedorowicz’s Evidence*

[620] Dr. Fiedorowicz testified that Jeffrey’s needs were not met at Braemar. She commended his teachers in Kindergarten and Grades 1 and 2 for identifying his learning difficulties but it was not until the middle of Grade 1 that he began attending the LAC. In her opinion, Jeffrey did not receive supports soon enough and those he received in Grades 1 and 2 were insufficient because in both Grades 2 and 3, Ms. Waigh said that Jeffrey would be an ideal candidate for specialized placement.

[621] In Dr. Fiedorowicz’s opinion, the time between the recognition of the problem and the intervention was too long to meet Jeffrey’s needs. He responded very well once he had the supports he needed. Dr. Fiedorowicz believed that a period of intensive assistance, like attending the DC1 in Grade 1, would have had an early, positive impact. At least his struggles would have been minimized. As it was, he suffered for four years without the level of support he required. By Grade 4, Dr. Fiedorowicz felt that the DC1 would not have been as useful.

[622] Dr. Fiedorowicz testified that the thrice-weekly, 15 minutes of assistance that Jeffrey received in Kindergarten was not sufficiently intensive in light of Jeffrey’s difficulties and how long it took him to learn the number 2. She would have provided 45 minutes of assistance a day. She indicated that, regardless of whether Jeffrey had a learning disability or a developmental delay, he would have benefited from more intervention at that time.
Dr. Fiedorowicz testified that it was not until near the end of Grade 1 that Jeffrey was seen by Ms. Tennant for an intervention plan. Ms. Tennant administered tests but did not do a full assessment. Dr. Fiedorowicz disagreed that Jeffrey was then too young for a full assessment. She said that either the school should have done it or advised his parents to have it done privately. Indications of the severity of Jeffrey’s problem were there as early as Kindergarten. An assessment in Grade 1 would have given a clearer indication of his cognitive abilities. In addition, a full assessment might have discovered a family history of learning disabilities, suggesting that Jeffrey’s delay was not developmental. Dr. Fiedorowicz would have done an assessment certainly by January of Grade 1.

Dr. Fiedorowicz considered the April 1994 assessment, and the conclusion that Jeffrey would require intensive remediation for his learning difficulty. She opined that it should have been done sooner, and that the level of supports should have been more intensive over longer periods of time. She also testified that there was a gap in the level of supports he was given. She saw a pattern of increased supports but, in her view, looking at the red flags that existed, too little support was offered and it was not soon enough.

She described KGS as a total milieu environment for students with learning disabilities. The staff specialized in dealing with SLD students academically and emotionally. They provided intensive and structured supports. There was specific remedial intervention to deal with Jeffrey’s particular problems. In her view, both KGS and Fraser Academy were consistent with the placement that she recommended for Jeffrey.

Dr. Fiedorowicz acknowledged that the initial KGS test results could have been impacted by the fact that Jeffrey was not tutored in the summer between Grades 3 and 4 and the stress of starting at a new school.
[627] Dr. Bateman reviewed Jeffrey’s records from Kindergarten to Grade 8, with particular emphasis up to Grade 3. She concluded that he did not receive adequate, sufficient, or perhaps any, instruction in phonemic awareness but was started directly in phonics.

[628] She testified that there were warnings about Jeffrey’s difficulties in Kindergarten including his performance on the Index. In her view, that was a very definite indicator that further assessment, and probably intervention, was appropriate. She indicated that in his later writing, Jeffrey put letters in random sequence; an indicator of a lack of phonemic awareness. His spelling difficulties, omission of vowels, and the inconsistency in recognizing sight words if shown in a different context were also indicators. During the Index testing, the only letter Jeffrey identified correctly was “c”; the same letter that he was subsequently unable to identify in the library.

[629] She testified that Jeffrey should have been further assessed in Kindergarten by a trained, qualified person, looking specifically at phonemic awareness or phonological processing. Intensive, focused phonemic instruction should have begun, and direct work in phonics should have been delayed, until he had a better foundation in phonemic awareness. The thrice-weekly, 15 minutes of assistance he received in Kindergarten was not sufficient. In her view, the proof of that insufficiency was that it was not effective. She suggested that he should have received daily instruction in phonemic awareness in blocks of time geared to his particular circumstances and then, if it was not effective, it should have been increased.

[630] Dr. Bateman testified that Orton-Gillingham is not a phonemic awareness program. It has a phonological awareness component, involving the clapping out of syllables, but is phonics based. She noted that Jeffrey’s phonemic difficulties were referred to in Ms. Tennant’s Grade 2 psycho-educational report which incorporated the findings from her earlier Grade 1 testing that Jeffrey had no phonemic awareness and needed to be taught all the necessary word attack skills. Dr. Bateman testified that, as a result, Ms. Tennant knew by mid-Grade 1 that phonemic awareness was a core disability
but the programs she recommended were phonics programs. Dr. Bateman said that, by mid-Grade 2, the prime time for phonemic awareness training had passed.

[631] In her opinion, with a phonological deficit this serious appearing in February of Jeffrey’s Kindergarten year, there should have been very intensive remediation monitored for success. Objective data about his performance was essential. The fact that he was not designated as SLD until the end of Grade 2 was not consistent with early intervention.

[632] When shown the LAC enclosure to Jeffrey’s second Grade 1 report card, Dr. Bateman disagreed that Jeffrey was taught blending and sounding skills. She said it was phonics, dealing with the relationship between the sound and the symbol or the phoneme and the grapheme. In her view, if Jeffrey had had the phonemic awareness training that he needed, his work in the LAC would have been excellent phonics. However, he did not have the prerequisite to benefit from it.

[633] Dr. Bateman commented that, at the end of Grade 3, Jeffrey was reading between a pre-primer and mid-Grade 1 level. He had some sight vocabulary, but it was inconsistent. His decoding was extremely laboured, he struggled with some sounds, and he was, in her view, very close to a non-reader. She testified that he has had to work much harder than he would have had to if given phonemic instruction. He may not ever reach the level of ease, comfort and enjoyment in literacy that he would have reached had he gotten off to a firmer start. Jeffrey is still reading at approximately 40-50 words a minute. He still has to put energy into decoding.

**Dr. Siegel’s Evidence**

[634] Dr. Siegel testified that the District did a very good job of identifying Jeffrey’s early difficulties and of attempting to remediate them. It was evident in Kindergarten that he was having significant problems with numbers and letters and in March that year he was referred to the ELRT to assess whether he had retrieval problems or learning difficulties. The intervention provided was 15 minutes, thrice-weekly, with Nancy Lee, a Kindergarten Aide working in his class. Dr. Siegel acknowledged that she did not know Ms. Lee’s qualifications or what she was working on with Jeffrey, apart from the written
records indicating that they were working on letters and numbers. In cross-examination, she acknowledged that they did not indicate work on sounds.

[635] Dr. Siegel agreed, however, that when Jeffrey returned to Braemar for Grade 1, he did not receive any additional remediation or support until after he was referred to the ELRT in January 1993.

[636] In March of Grade 1, Jeffrey was referred for diagnostic tests to determine whether his difficulties were due to his youth or a specific problem. Dr. Siegel agreed that it was evident to his teachers that Jeffrey was having significant problems. She said that the testing occurred much more quickly than the then usual wait time of a year. She believed that the tests administered were very appropriate. In May 1993, Ms. Tennant concluded that Jeffrey had a learning difficulty and prepared an intervention plan. Ms. Tennant also made some other recommendations, including an Orton-Gillingham tutor.

[637] Dr. Siegel agreed with Ms. Tennant’s post-assessment recommendations and testified that administering an IQ test in May 1993 would not have assisted in determining whether Jeffrey had a learning disability or was just young. She acknowledged that an IQ test could have been given but said that it does not compare a child’s specific reading or math skills to that of other children, nor predict how well a child’s reading skills will develop, or the specific nature of the difficulty.

[638] Dr. Siegel acknowledged that she was familiar with the Orton-Gillingham teaching method. Dr. Siegel’s report said that the programs offered at Braemar were equal to the Orton-Gillingham method but, perhaps, less intensive.

[639] Dr. Siegel was referred to the note made on the report from Jeffrey’s testing that “factors show, but he is too young to do full assessment.” She interpreted it as referring to the fact that although an IQ test had not been administered, he got the other aspects of the assessment. Dr. Siegel testified, however, that Ms. Tennant did do an educational assessment which gave Jeffrey access to the LAC. There was no attempt, until the end of Grade 2, to have him designated as SLD for the purposes of additional funding.
Based on her review of Jeffrey’s Grade 1 records, Dr. Siegel testified that he received more remediation than other students with reading problems in public schools at that time, and the quality of assistance was quite good.

The Grade 1 records indicated that Jeffrey continued to struggle with numbers and letters and, by January that year, he still had no real ability to associate sounds with symbols and was referred to the LAC that month. Dr. Siegel agreed that some type of intervention had to be undertaken in Grade 1; she disagreed that it had to be done by January. She testified that children develop at different rates and the expectations about a child just past his sixth birthday and one who is almost seven would be different. It was reasonable to undertake some intervention in the second half of Grade 1 because, without it, the fear is that the child may fall further behind.

Dr. Siegel agreed that, by the end of Grade 1, Jeffrey’s vocabulary of 20 sight words was significantly below that of an average Grade 1 student. However, she said that the records showed progress. In Grade 2, he could sound out most letters and was working on blending and sight words. By November, he had increased his sight words to approximately 50, and by the following March to approximately 100 words. He had started work in a reader. Results were still significantly below expectations for his age. In May 1994, Ms. Tennant recorded that Jeffrey only knew about 30 sight words consistently. His sight vocabulary was inconsistent on a day-to-day basis. Dr. Siegel testified that she did not know what the sight words were and it would have been helpful to have known.

Dr. Siegel testified that the strategies and services provided to Jeffrey were above average and carefully documented. She described what the District did as pre-referral assessment and intervention and said that before a student has an expensive and time-consuming psycho-educational assessment, teachers try other strategies.

Dr. Siegel testified that Jeffrey got services before he was designated as SLD but got no additional services until he was designated late in Grade 2; the services were made available in Grade 3. Initially, Dr. Siegel disagreed that Grade 3 was past the optimal time for intervention. She acknowledged, however, in cross-examination that Dr.
Torgeson’s work indicated that successful remediation is more difficult and costly by Grade 3 and when pressed in cross-examination she agreed that Grade 3 is past the optimal intervention time.

[645] Dr. Siegel testified that April 1994 was very appropriate timing for Jeffrey’s psycho-educational testing because he had been given sufficient time to acquire basic reading skills. If a child is significantly behind in reading, toward the middle or end of Grade 2, it is a cause for concern and it is then appropriate to do an assessment and confirm if the child is behind and, if so, how far.

[646] Dr. Siegel approved of Ms. Tennant’s April 1994 Intervention Plan. She acknowledged in cross-examination that, in addition to phonics instruction, Jeffrey was taught the whole-language approach to reading. He was asked to use context to try and figure out a word.

[647] Dr. Siegel believed that Jeffrey did get early intervention. In Kindergarten and Grade 1, he received one-on-one assistance with his phonological skills, assistance with the sounds of the letters, and also writing letters, vocabulary and learning sight words. This assistance was given before he was designated SLD and amounted to early intervention.

[648] Dr. Siegel testified that the District records of the interventions were very important and helped the communication between the LAC, his classroom teachers, and his parents. She testified that she had some questions when she reviewed the Braemar records, but she did not interview any of his teachers, nor did she speak to Ms. Tennant.

[649] Dr. Siegel agreed that there was evidence in the school records that Jeffrey’s self-esteem suffered. In particular, she agreed that self-esteem and anxiety was mentioned in the ELRT referral in Kindergarten and again in Grade 2. There were indications in Grade 3 that Jeffrey was conscious of his learning difficulties.
Conclusions about the Experts’ Evidence on the Adequacy of the Services

[650] Alone among the experts who testified, Dr. Siegel concluded that Jeffrey received the services he needed at Braemar and that the interventions were of appropriate intensity. Because dyslexia is a lifelong condition, with no cure, she believed that the steps taken by Braemar and the District were sufficient. She also concluded that Jeffrey had received early intervention.

[651] Dr. Siegel agreed in cross-examination that Jeffrey did not receive specific phonemic awareness training. Her report indicates that he received phonics training and phonological awareness training.

[652] Dr. Siegel’s evidence directly contradicts that of the other experts and, in my view, most importantly, that of Ms. Tennant, the District employee who knew Jeffrey, tested him, prepared IEPs for him, and was involved in the accommodation efforts for him during the relevant period. Even though Dr. Siegel was the District’s witness, and had access to the District staff who worked with Jeffrey, she did not speak to any of Jeffrey’s teachers, Ms. Waigh or Ms. Tennant. She based her evidence on a review of Jeffrey’s academic record. Significantly, she indicated that her review gave rise to questions she would have liked to ask District staff. In particular, she would like to have known what sight words Jeffrey knew at various stages in his development.

[653] In my view, Dr. Siegel’s evidence on the adequacy of the interventions must be considered in the context of the other evidence in the case. Most of the specialized assistance Jeffrey received from the District, starting sometime after January 1993 in Grade 1 and to the end of Grade 3, consisted of thrice-weekly, 30-minute one-on-one sessions in the LAC. According to the 1985 and 1995 Manuals, the LAC was never intended for SLD children. The 1997 LAC Review, discussed above, indicated that the LAC was providing services to a significant number of SLD students and that the LACs were having difficulty providing the intensive interventions required.

[654] From her evidence, Dr. Siegel did not appear to be aware of the role or purpose of the LAC. Until directed to the wording in the 1985 and 1995 Manuals during cross-
examination, she did not appear to know that the program was never intended for SLD students.

[655] Dr. Siegel testified that, in her opinion, the services Jeffrey received were sufficient to meet his needs despite the closure of the DC1. This directly contradicted the evidence of Drs. Bateman and Fiedorowicz, and Ms. Tennant. I prefer their evidence, and was particularly persuaded by Ms. Tennant, who testified that Jeffrey could not get sufficiently intense services within the District with the closure of the DC1. As the witness most familiar with Jeffrey’s needs at the time, I find that her evidence was most persuasive on this issue. In addition, Ms. Ray, Jeffrey’s Grade 3 teacher, testified that if she had concluded that Jeffrey needed additional Aide time during Grade 3, it would not have been in place for him before Grade 4.

[656] Dr. Siegel gave her opinion that the closure of the DC1 was entirely consistent with Ministry policy. This is not supported by either the 1985 or 1995 Manuals, which recommend that a range of services be available for SLD students. The closure of the DC1, without the provision of suitably intense services to replace it, is not in accord with that policy. While nothing in the 1985 or 1985 Manuals required the establishment of a particular type of service or mandated a particular delivery method, having a range of services is directed.

[657] Perhaps most tellingly, Dr. Siegel’s opinion on this point is also inconsistent with Dr. Chapman’s 1998 conclusion that SLD children were underserved in the District because it did not provide sufficient placement options to meet the needs of these students.315

[658] Dr. Siegel’s report states that “there was no evidence that Jeffrey made progress” after he left the public school system. Presumably, Dr. Siegel is suggesting that Jeffrey is one of a small group of SLD students who do not respond to interventions. I am most

315 Ex. 85, Tab 62
troubled by that conclusion. It is clear that Jeffrey did improve. His report cards from KGS and Fraser Academy indicate improvement. He testified that he finally understood what was going on when he transferred to KGS. He was in an environment where he could learn. He did learn to read and is functionally literate. He testified that he had recently finished reading *Harry Potter: The Philosopher’s Stone*. Most importantly, he testified that he no longer felt different from the other students. His self-esteem is intact, he looks forward to the future, and is planning a career in physiotherapy.

Moreover, in light of the District’s failure to provide early intervention and a range of services to Jeffrey, I cannot compare his current capabilities with what he might have achieved had earlier and more intensive services had been provided. The expert evidence persuaded me that failure to provide appropriate supports early enough may result in deficits from which a student may never recover or which may cause him to struggle unduly thereafter. For example, I cannot know what impact on Jeffrey’s capabilities more intense services in Kindergarten or early Grade 1, or attending the DC1, and receiving the follow-up afterward would have had. However, I accept the evidence of Drs. Fiedorowicz and Bateman that Jeffrey would have benefited from more intensive remediation earlier and from attending at the DC1. Research, which Dr. Siegel agreed with, clearly demonstrated that if sufficient early supports are lacking, the Matthew Effect may be triggered, and the child may never catch up.\(^{316}\) In any event, Mr. Moore does not have to show that Jeffrey made progress after leaving Braemar to establish discrimination.

As a result, where Dr. Siegel’s evidence about the adequacy of the services Jeffrey received conflicts with that of the other witnesses, and most importantly with the evidence of Ms. Tennant and Drs. Fiedorowicz and Bateman, I prefer their evidence and I

\(^{316}\) Ex. 47
conclude that Jeffrey was not provided with the level of supports that he needed from the District.

The Evidence about the Ministry’s Special Education Policies

*Issues Raised Concerning the Application of the SLD Definitions*

[661] Dr. Perry testified that most scholars agreed that discrepancies in IQ achievement are not useful in a definition of learning disabilities because they do not determine educationally what needs to happen for children. The emphasis on “persistent difficulties” and “discrepancy” in the 1995 Manual focuses on a secondary characteristic of the learning disability – the symptoms, not the source. Dr. Perry recommended the use of multiple and more flexible practices when identifying students with learning disabilities and paying more attention to their processing difficulty, which is the primary characteristic of students with learning disabilities.

[662] Dr. Perry testified that if the education system placed a greater emphasis on processing problems, it would significantly affect how quickly children with learning disabilities are identified. Waiting until there are persistent problems or applying a discrepancy measure results in delays in providing interventions which may be harmful to the child. Dr. Siegel supported this evidence. She testified that the time between the request for Jeffrey’s psycho-educational assessment, and the assessment being completed was relatively short compared to the waits in many districts, which exceed a year. She said that the waits are particularly long for children in the younger grades. She agreed that delays in getting the necessary assessment are entirely inconsistent with early intervention. Some children get intervention prior to the assessment, but there is a lack of consistency across the Province.

[663] Dr. Perry testified that the fact that a psycho-educational assessment is required before designation for supplemental funding, and that it has to be performed by a school
or private psychologist, results in students being wait-listed. Resources just do not allow for early testing.

[664] Dr. Perry also testified that districts inconsistently apply the Ministry’s SLD definition. The use of different assessment tools in different districts may mean that a student meets the criterion in one district, but not in another.

[665] Dr. Perry does not recommend abandoning IQ tests entirely for determining the presence of a learning disability. She believes that there is merit in distinguishing learning disabilities from other kinds of disabilities, such as low cognitive abilities or mental retardation. Abandoning the IQ test may also result in not identifying children who have high IQs and are performing in the average range in classrooms but underperforming in terms of their cognitive abilities.

[666] Dr. Perry’s primary concern with using IQ discrepancy as a measure for determining whether a learning disability exists is that the discrepancies do not show up soon enough for early intervention. While under the Ministry’s definition the discrepancy formula did not apply before Grade 3, teachers were typically encouraged to “wait-and-see” by their school-based team. She agreed that the Ministry’s definition allows for designation well prior to Grade 3, so long as the student demonstrates persistent difficulties. Teachers have difficulty knowing what is meant by persistent. Dr. Perry did not believe that a wait-and-see approach was ever appropriate when a child is having difficulty; if a child is struggling, something needs to be done. Even if the problem is only a developmental delay, it is worth providing short term resources and supports to the child.

[667] Dr. Siegel was critical of using IQ testing to identify SLD students, and advocated for early identification through a series of simple tests. In her report from the 1999 Review, she expressed the view that a full psycho-educational assessment is typically unnecessary. She acknowledged that both the 1985 and 1995 Manuals required a psycho-educational assessment for designation purposes. She also testified that, during the 1999 Review, parents often criticized the shortage of psychologists to perform psycho-educational assessments resulting in long waits in some districts.
[668] Dr. Fiedorowicz testified that most students are referred for psycho-educational assessment in Grades 3 or 4 because students have to demonstrate clearly that they are falling behind at least two grade levels to receive specialized funding and that is difficult to demonstrate before then. In her practice, approximately 10% of the students she tests are in Kindergarten. By Grades 3 or 4, the learning difficulty has been compounded; it is no longer just a specific difficulty, but a difficulty in acquiring knowledge in other subject areas as well, and may be accompanied by emotional issues and a negative attitude toward school and learning.

[669] Overall, Dr. Perry’s opinion was that the definition of learning disabilities, as operationalized in the Province, places too much emphasis on the persistence of difficulties and IQ discrepancy in Grades 3 to 12. Both result in “waiting-and-seeing” and, as a result, very few students are designated in their early years. She acknowledged, in cross-examination, that the wait-and-see attitude does not stem from Ministry policy manuals but rather from classroom and special education teachers who are not aware of the contents of the 1995 Manual.

[670] Dr. Siegel also testified about the predominant philosophy in faculties of education which is the developmental maturation approach: “wait and see”, perhaps the child will grow out of the difficulty. It stems from a philosophy that is opposed to labelling and putting undue stress on a child by exposing them to remediation too early. It is in contrast to an early intervention philosophy.

[671] Dr. Perry referred to the 1995 Manual which specifies the recommended qualifications for a teacher supporting SLD students. These include fulfilling the requirements for learning assistance teachers and having additional university qualifications. Teachers typically acquire such qualifications in their Bachelor of Education degree but Dr. Perry believes that they would need to concentrate in special education in that degree to obtain the necessary training. More often, they would need special university courses. She agreed that the qualifications listed were appropriate but said that they were not always met. Districts had difficulty finding individuals with the required qualifications and hired under-qualified staff, expecting them to gain expertise
afterwards. Many of them are taught by Dr. Perry who is particularly concerned that they are already making decisions about, and providing programming to, learning-disabled students without the necessary expertise.

[672] Dr. Perry also expressed concern that, in many districts, qualified special education teachers are not school-based. Learning assistance programs tend to be school-based but resource teachers have been centralized and are itinerant. As a result, classroom teachers do not have direct access to them and the itinerant teachers cannot give their full attention to a particular population. Rather than giving direct and intensive support to students with learning disabilities, their role is much more one of consultation: advice as opposed to direct support.

[673] LAC programs were never intended to be special education programs. They were intended to be the first line of defence; children would enter learning assistance, be recognized as having a more significant disability and then referred to more specialized services.

[674] Dr. Perry testified that the 1995 Manual acknowledges that SLD students usually need access to specialized programs and services. She believes that direct support and contact with a specialist teacher and explicit and extensive instruction that targets the specific areas of learning difficulty are basic components in an appropriate program for learning-disabled students. She supports inclusion as it is distinguished from integration. Ideally, she would prefer these services to be school-based rather than referring students out to diagnostic centres or remedial centres for intensive support for a short period of time.

[675] Dr. Perry acknowledged that the discrepancy formula in the 1995 Manual did not apply to students until after Grade 3 but described the perception in the field that it is the overriding discrepancy criterion. She also described an inconsistency across districts in interpreting and applying the definition. Dr. Siegel also testified that the 1995 Manual was not uniformly understood and applied amongst school districts, leading to inconsistencies in the treatment of special needs students. She reported that concern in the 1999 Review.
ANALYSIS

[676] I now turn to the analysis of the legal issues presented by the foregoing facts. The issues I must decide are:

3. What is the service in issue and who is responsible for providing it? To define the nature of the service, it is necessary to look at the allegations of discrimination that are made.

4. What is the appropriate test for whether discrimination has been established?

5. Who is the appropriate comparator group?

6. Do the facts support the allegations of individual and systemic discrimination and, if so, what is the appropriate remedy? In deciding this issue, I must consider the Respondents’ arguments of justification.

Defining the service

[677] Discrimination with respect to a service is prohibited under s. 8 of the Code, the relevant parts of which are:

(2) A person must not, without a bona fide and reasonable justification,

   (a) deny a person or class of persons any accommodation, service or facility customarily available to the public, or

   (b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public

because of … physical or mental disability.

[678] There are two areas, albeit interrelated, that need to be explored with respect to the services at issue in this complaint. First, what are the services in issue and, second, who, as between the Ministry and the District, is responsible for what in terms of education in the Province.
What is the Service in Issue?

[679] Mr. Moore submits that the service is public education. He says that both the Ministry and the District are responsible for providing free, universal access to public education. In so doing, they are obliged to provide supports and accommodations to SLD students to allow them to access the benefit of that public education.

[680] The District acknowledges that it is a provider of education services, but appears to argue that the service in question is the disability-related services that were provided to Jeffrey. Its focus is on whether Jeffrey was provided with the same or better disability-related services than other SLD children in the District, and elsewhere in the Province.

[681] The Ministry says that Jeffrey is entitled to an education from the District which, as defined by the *School Act*, means an “organized set of learning activities” that in the opinion of the District is designed to enable him to develop his individual potential and to acquire the knowledge, skills and attitudes necessary to contribute to a healthy society and a prosperous and sustainable economy. The Ministry says that it is not involved directly in the provision of that education. As a result, the Ministry submits that this case is really about the quality of the education that Jeffrey received and, pursuant to the *School Act*, it is the District, not the Ministry, which is responsible for defining its nature and quality. In support of its argument, the Ministry relies on a series of cases in which courts and Tribunals have said that the quality of educational services, and educational policy issues, are best left to the legislatures to decide.

[682] In so arguing, the Ministry purports to limit the service it says it is involved in providing. In effect its argument is that the Ministry provides the money but the District provides the educational services. This mirrors the position that the Ministry took in its judicial review of the Tribunal’s disclosure decision earlier in these proceedings. There, Mr. Justice Shaw was called upon to determine the scope of the complaints that had been referred to the Tribunal for hearing. He said:

…In my opinion, each complaint makes allegations of what can only be described as systemic discrimination in regard to dyslexic children throughout the Province of British Columbia.
From the foregoing I find that the complaint referred to the Human Rights Tribunal includes allegations of province-wide systemic discrimination by the Ministry against dyslexic students…

The Ministry asserts that the issues before the Tribunal involving the Ministry are limited to its funding of School District No. 44 and that it is School District No. 44 which is under the duty to provide appropriate educational programs within the allocated funding. Thus, the Ministry argues that any claim of systemic discrimination must be aimed at School District No. 44, and not the Ministry. I cannot accept this argument. In my opinion it seeks to limit the Ministry’s responsibilities to funding only, whereas the Ministry’s duties and responsibilities are far broader than that.

… [reviewing the provisions of the School Act]

In regard to the powers and duties of School Boards, I particularly note the introductory words to s. 75(1) set out above, which read:

Subject to the other provisions of this Act and the regulations and to any orders of the minister under this Act, …

These words make it quite clear that the powers of the Boards are subject to the other provisions of the Act (including those I have already cited) and to any orders made by the Minister.

Based on all the above provisions of the Schools Act I conclude that the Ministry’s powers extend well beyond the funding of the School Districts. It follows that allegations of discrimination against the Ministry cannot be limited to the use or misuse of the funding power….

The Ministry’s argument is really premised on the proposition that the responsibility to provide educational programs rests solely with the School Boards and that the Ministry’s responsibility is restricted to funding. For reasons which I have already stated, I do not accept this proposition.

The Ministry also argues that the Human Rights Tribunal is exceeding its jurisdiction by inquiring into province-wide systemic discrimination when the real focus of the inquiry is the individual situation of Mr. Moore’s son
vis-à-vis School District No. 44. In light of my finding on the scope of the complaint and on the remedies sought, this argument cannot succeed. 317

[683] Mr. Justice Shaw’s decision was not appealed by the Ministry or the District and is binding on me. I agree with his characterization of the Ministry’s role as broader than just financial.

Is this case analogous to Eldridge or to Auton?

[684] Permeating the parties’ submissions about the service in issue are arguments about whether the facts in this case should be analyzed on the basis of the Supreme Court’s decision in Eldridge v. British Columbia (Attorney General), 318 or on the basis of Auton (Guardian ad Litem of) v. British Columbia (Attorney General). 319 During the course of their arguments, the parties made submissions with respect to the B.C. Court of Appeal’s decision in Auton. 320 When the Supreme Court of Canada released its decision in Auton, the Ministry and the District sought to make submissions on its application. All parties were given an opportunity to do so. Mr. Moore and the LDABC submit that this is a case like Eldridge; the Ministry and the District submit that it is a case like Auton.

[685] I briefly review the facts in both cases and then determine which is more applicable to these complaints.

Eldridge

[686] In Eldridge, the appellants were Deaf and communicated by sign language. They sought a declaration that the failure of the Province to provide sign language interpreters

317 Moore, supra note 2, at paras. 13, 16, 19, 25-28

318 [1997] 3 S.C.R. 624

319 [2004] 3 S.C.R. 657

320 Auton v. British Columbia (Attorney General), 2002 BCCA 538
to assist them in their communication with health care providers violated their s. 15 Charter rights. The government did not provide any health services directly; it paid for them to be delivered by medical health care providers on a fee for service basis. Hospitals were funded through a global lump sum payment that, for the most part, they were free to allocate as they saw fit. Health care providers were reimbursed for specific services provided through the Medical Service Plan. The appellants did not challenge the statutory structure under which health care was provided. Rather, their argument was based on the fact that without sign language interpretation, the difference in their communication meant that they received a lesser quality of medical services and, as a result, did not receive the equal benefit of the law (the entitlement to health services) without discrimination, based on physical disability.

[687] The Court, in accepting the appellants’ argument, said:

This Court has consistently held, then, that discrimination can arise both from the adverse effects of rules of general application as well as from express distinctions flowing from the distribution of benefits. Given this state of affairs, I can think of no principled reason why it should not be possible to establish a claim of discrimination based on the adverse effects of a facially neutral benefit scheme. Section 15(1) expressly states, after all, that “[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination…” (emphasis added). The provision makes no distinction between laws that impose unequal burdens and those that deny equal benefits. If we accept the concept of adverse effect discrimination, it seems inevitable, at least at the s. 15(1) stage of analysis, that the government will be required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services…

The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field…

321 Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, (U.K.), 1982 c.81
It is also a cornerstone of human rights jurisprudence, of course, that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation. The obligation to make reasonable accommodation for those adversely affected by a facially neutral policy or rule extends only to the point of “undue hardship”;

In my view, therefore, the failure of the Medical Services Commission and hospitals to provide sign language interpretation where it is necessary for effective communication constitutes a prima facie violation of the s. 15(1) rights of deaf persons. This failure denies them the equal benefit of the law and discriminates against them in comparison with hearing persons.322

The Court went on to consider whether, under s. 1 of the Charter, the discrimination it had found could be justified, and concluded that it could not. Applying, in part, the analytical framework from R. v. Oakes,323 the Court concluded that:

In summary, I am of the view that the failure to fund sign language interpretation is not a “minimal impairment” of the s. 15(1) rights of deaf persons to equal benefit of the law without discrimination on the basis of their physical disability. The evidence clearly demonstrates that, as a class, deaf persons receive medical services that are inferior to those received by the hearing population. Given the central place of good health in the quality of life of all persons in our society, the provision of substandard medical services to the deaf necessarily diminishes the overall quality of their lives. The government has simply not demonstrated that this unpropitious state of affairs must be tolerated in order to achieve the objective of limiting health care expenditures. Stated differently, the government has not made a “reasonable accommodation” of the appellants’ disability. In the language of this Courts’ human rights jurisprudence, it has not accommodated the appellants’ needs to the point of “undue hardship”;…324

322 Eldridge, supra note 318, at paras. 77-80

323 [1986] 1 S.C.R. 103

324 Eldridge, supra note 318, at para. 94
In *Auton*, the appellants were the parents of autistic children. They brought an action alleging that the Province’s failure to fund applied behavioural therapy for autism violated their children’s s. 15 rights under the *Charter* on the basis of a mental disability.

The Court said:

In order to succeed, the claimants must show unequal treatment under the law – more specifically that they failed to receive a benefit that the law provided, or was saddled with a burden the law did not impose on someone else. The primary and oft-stated goal of s. 15(1) is to combat discrimination and ameliorate the position of disadvantaged groups within society. Its specific promise, however, is confined to benefits and burdens “of the law.”

The specific role of s. 15(1) in achieving this objective is to ensure that when governments choose to enact benefits or burdens, they do so on a non-discriminatory basis. This confines s. 15(1) claims to benefits and burdens imposed by law.

The Court examined whether the benefit claimed by the appellants was one conferred by law and concluded that it was not. The Court said:

…the legislative scheme does not promise that any Canadian will receive funding for all medically required treatment. All that is conferred is core funding for services provided by medical practitioners, with funding for non-core services left to the Province’s discretion. Thus, the benefit here claimed – funding for all medically required services – was not provided for by the law.

The Court distinguished *Eldridge* on the basis that it concerned unequal access to a benefit that the law conferred, and the application of a benefit-granting law in a non-discriminatory fashion, whereas *Auton* concerned access to a benefit that had not been conferred by law. The Court said:

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325 *Auton*, *supra* note 319, at para. 27-28

326 *Auton*, *supra* note 319, at para. 35
Had the situation been different, the petitioners might have attempted to frame their legal action as a claim to the benefit of equal application of the law by the Medical Services Commission. This would not have been a substantive claim for funding for particular medical services, but a procedural claim anchored in the assertion that benefits provided by the law were not distributed in an equal fashion. Such a claim, if made out, would be supported by *Eldridge*, *supra*. The argument would be that the Medical Services Commission violated s. 15(1) by approving non-core services for non-disabled people, while denying equivalent services to autistic children and their families.

Such a claim depends on a prior showing that there is a benefit provided by law….

[693] Having considered the submissions of the parties with respect to *Eldridge* and *Auton*, I conclude that this case is more appropriately analyzed on the basis of *Eldridge*.

[694] It cannot be disputed that education is a service that is made available by the Province to all students. It is also clear that, based on the expert evidence that I accepted, just as the Deaf need sign-language interpretation to allow them to communicate in order to effectively access medical services, SLD students require supports and accommodations in order for them to benefit from the education service that is offered. Without those supports and accommodations they cannot learn to read and, without reading, the core curriculum is inaccessible to them.

[695] I do not agree with either the Ministry’s characterization of the service, which, in my view, unduly limits the service that they are obliged to provide and that a student is entitled to under the *School Act*, or with the District’s characterization of the service, which puts the focus on the accommodations that were made available rather than on the core education services being offered in the District.

327 *Auton*, *supra* note 319, at para. 45-46
In my view, the service in issue must be considered in relation to the stated purpose of the *School Act* and the stated purposes of the *Code*. The purpose of the *School Act* is set out in the preamble which, as revised, reads:

Whereas it is the goal of a democratic society to ensure that all of its members receive an education that enables them to become personally fulfilled and publicly useful, thereby increasing the strength and contributions to the health and stability of that society;

And whereas the purpose of the British Columbia school system is to enable all learners to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society and a prosperous and sustainable economy;…

The broad purposes of the *Code* are set out in s. 3. They are:

(a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;

(b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;

(c) to prevent discrimination prohibited by this *Code*;

(d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this *Code*;

(e) to provide a means of redress for those persons who are discriminated against contrary to this *Code*.

The *Code’s* purposes are to be applied and interpreted in accordance with the Supreme Court of Canada’s repeated and consistent direction that human rights legislation is fundamental or quasi-constitutional and, as such, must be given a broad, liberal and purposive interpretation. As Lamer J. (as he then was) wrote in *Insurance Corp. of British Columbia v. Heerspink*:

When the subject matter of a law is said to be the comprehensive statement of the “human rights” of the people living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others. Therefore, short of that legislature speaking to the contrary in express and unequivocal language in the *Code* or in some
other enactment, it is intended that the Code supersede all other laws when conflict arises.\textsuperscript{328}

[699] Similar sentiments were expressed by the Court in \textit{Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.} ("O’Malley"):  

To begin with, we must consider the nature and purpose of human rights legislation. The preamble to the Ontario Human Rights \textit{Code} provides the guide… There we find enunciated the broad policy of the \textit{Code} and it is this policy which should have effect… Legislation of this type is of a special nature, not quite constitutional but certainly more than ordinary – and it is for the courts to seek out its purpose and give it effect.\textsuperscript{329}

[700] In \textit{Zurich Insurance Co. v. Ontario (Human Rights Commission)}, on behalf of the Supreme Court, Sopinka J. said:

\begin{quote}
Human rights legislation is amongst the most pre-eminent category of legislation…One of the reasons such legislation has been so described is that it is often the final refuge of the disadvantaged and the disenfranchised. As the last protection of the most vulnerable members of society, exceptions to such legislation should be narrowly construed…\textsuperscript{330}
\end{quote}

[701] Finally, in \textit{Robichaud v. Canada (Treasury Board)}, La Forest J. said human rights legislation “must be so interpreted as to advance the broad policy considerations underlying it.”\textsuperscript{331}

[702] The importance of education for all children was discussed by La Forest J. on behalf of the Supreme Court of Canada in \textit{Ross v. New Brunswick School Division No. 15}. His comments are broadly applicable:

\begin{quote}
In discussing the interest of the State in education of its citizens in \textit{Jones, supra}, at p. 296, I stated that “[w]hether one views it from an economic, 
\end{quote}

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\textsuperscript{328} [1982] 2 S.C.R. 145, at pp. 157-158
\textsuperscript{329} [1985] 2 S.C.R. 536, at pp. 546-7
\textsuperscript{331} [1987] 2 S.C.R. 84, at p. 89
}
social, cultural or civic point of view, the education of the young is critically important in our society”. And I adopted at p. 297 much of what was said in the American case of Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), in the following passage, at p. 493:

Today, education is perhaps the most important function of state and local governments...It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.332

[703] The focus of the school system is to enable all students to develop their individual potential and to acquire the knowledge, skills, and attitudes needed to contribute to our society. The policy work of the Ministry, its Ministerial Orders with respect to the provision of services to special needs students, and the provision of separate and categorical funding to provide supports for special needs students, all lead to the conclusion that every student in the Province has a right to access a public education service and that some will need more support in order to meaningfully do so. Access means more than just being able to attend a public school. It means being provided with the necessary supports and accommodations to ensure that the access is meaningful.

[704] The alleged discrimination, the failure to provide necessary and appropriate services to Jeffrey, and other SLD students, is intimately connected to the education delivery system created by the School Act. The provision of education services is not merely a matter for school boards to manage; it is an expression of government policy. The Legislature, in enacting the School Act, created school boards that are independent of the Ministry in some respects, but have delegated responsibility to provide education services and for the implementation of government policy with respect to education.

[705] Thus, while school boards may be autonomous in their day-to-day operations and primarily responsible for the delivery of education services, they act on behalf of the

The government in providing the specific educational services set out in the School Act. The Legislature, upon defining its objective as guaranteeing an educational program “designed to enable learners to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy society and a prosperous and sustainable economy”, cannot evade its obligations under s. 8 of the Code to provide those services without discrimination by establishing school boards to carry out that objective.

[706] The funding arrangements for education are similar to those for hospitals in Eldridge. As with school districts, hospitals were funded through lump sum global payments that they were, for the most part, free to allocate as they saw fit. The Ministry of Health rarely ordered hospitals to provide specific services and when they did, hospitals were generally required to fund the service out of their global budgets. The Ministry also provided, although infrequently, direct funding for specific programs. A direct parallel can be seen to the provision of block funding to the districts. Districts are entitled to allocate their budgets as they see fit, absent specific spending prescriptions like s. 129.1 or s. 125.1 discussed above. Further, when the government orders districts to provide specific services, like the requirement for IEPs, districts fund that requirement out of their global budget. The Ministry does, from time to time, provide specific targeted funds for program initiatives like technology or in-service training grants. In Eldridge, it was the government that was found not to have reasonably accommodated the needs of the Deaf by failing to fund interpretation services.

[707] Based on all of these factors, I conclude that the service at issue in this case is the educational programs offered by the Ministry and the District. Henceforth, I will refer to that program as educational services. I now turn to the issue of who has responsibility for the delivery of that service.

Who is Responsible for the Provision of Educational Services?

[708] Constitutionally, the responsibility for education lies with the Province. Section 93 of the Constitution Act, 1867 confers on Provincial legislatures the exclusive power to
make “laws in relation to education”.333 To meet that responsibility, the British Columbia Legislature enacted the School Act. A brief review of its provisions, which are set out in more detail in the legislative section of this decision, establishes that the Province has chosen, for the most part, a structure for the delivery of education services which assigns responsibility to the Ministry and delegated responsibility to school boards in the districts which they represent. With the very limited exception of referenda, the Province is the sole source of funding for education. In addition, through the provisions of the School Act and the School Regulation, the Ministry controls educational services in a number of ways. In particular the Ministry:

- defines what amounts to an educational program (s. 1);
- determines access and entry to an educational program (s. 2, 3);
- defines the age at which a child must attend school (s. 2, 3);
- requires school boards to provide a mandatory curriculum from Grade 1-12 and sets the requirements for graduation from secondary school;
- provides a parental right of appeal regarding decisions of the school board (s. 11);
- mandates teacher qualifications and defines teachers’ and teachers assistants’ responsibilities (s. 17(1) and 18 (1));
- sets required periods of reporting on student performance and the nature of those reports;
- sets the provincial exams;
- sets out the duties of principals and defines the role of administrative officials within a school district (s. 20);
- sets out the duties of superintendents (s. 22);
- sets out terms and conditions of teachers’ employment (s. 26, 38);

333 U.K., 30 & 31 Victoria, c. 3
• provides that the Minister must approve the opening, closing or re-opening a school permanently or for a specified time (s. 92);

• defines the days of school operation (s. 96);

• requires boards to provide an educational program, free of charge to every school age student resident in its district and enrolled in a school (s. 100);

• sets conditions on the expenditure of proceeds from the disposition of capital assets (s. 118);

• requires that boards’ annual budgets be in the form specified by the minister and sets out criteria for the budgets (s. 124);

• gives the Ministry discretion to pay a special aide grant (s. 131);

• restricts boards’ ability to borrow or expend capital funds without Ministerial pre-approval (s. 158);

• allows the Minister to make orders for the purpose of carrying out any of the Minister’s powers, functions or duties under the Act (s. 182);

• retains the jurisdiction to terminate elected school boards in certain circumstances and authorizes the Lieutenant Governor in Council to appoint an official trustee to conduct the affairs of a school district (s. 186); and

• through its budget instructions, defines the categories of special needs funding and provides additional funds for students designated in these categories.

[709] At the same time, the School Act establishes that it is a school board that has delegated responsibility for:

• delivering an organized set of learning activities that, in its opinion, is designed to enable learners to develop their individual potential and acquire the knowledge, skills and attitudes needed to contribute to a healthy society and a prosperous and sustainable economy (s. 1, s. 94);

• supervision and direction of the educational staff employed by the board (s. 22);

• the general organization, administration, supervision and evaluation of all educational programs (s. 22);

• operation of schools in the district (s. 22); and
• compliance with the accounting and administrative procedures specified by the Minister and keeping a record of board proceedings (s. 23 and the School Regulation).

[710] It is clear that, pursuant to the provisions of the School Act, the Minister has both broad regulation- and order-making powers, and has used those powers to impose requirements on school boards with respect to their delivery of educational services, including special education services. The Special Needs Student Order M150/89 and the Individual Education Plan Order, M638/95 are examples of such orders.

[711] In addition, from time to time, the Legislature has amended the School Act to add provisions dealing with the funding of special education services. Sections 125.1 and 129.1 are examples of such amendments. The Ministry provides legislative, regulatory and policy direction to school boards that are in turn responsible for implementation. With some limited exceptions, the Ministry does not directly provide education programs to students, although it has authority to do so. Education programs are provided at a district and school level by locally elected school boards.

[712] The Ministry has argued that, based on the statutory scheme in the School Act, it is not involved in the provision of special education programs. That obligation, they say, falls to the school boards in the districts, who must provide a “free and appropriate” education to students. The Intervenor has argued that the Ministry cannot avoid its responsibility to provide educational services by delegating that responsibility to school boards.

[713] Reviewing the evidence, it is clear that the Province is in a position to exert considerable control over school boards. Perhaps the most telling evidence of this control is the power of the Lieutenant Governor in Council, under s. 186 of the School Act, to replace a locally elected school board with an official trustee when the locally elected school board is not meeting its responsibilities under the Act. On the recommendation of the Ministry, this power was exercised with respect to the District.

[714] In addition, the Ministry has broad duties to oversee the work of school boards. Ms. Roch acknowledged that responsibility in her evidence and it is set out in the
Education Policy referred to above. In my view, the responsibility for the provision of educational services in BC falls on the Province. The fact that the Province has chosen to fulfil that responsibility by creating a statutory scheme which gives school boards responsibility for the delivery of the service does not change that responsibility. Legislatures have created many public or quasi-public institutions that exercise delegated governmental powers or are responsible for the implementation of government policy. The Medical Services Commission and the individual hospitals discussed in Eldridge are two such examples, as was Douglas College in Douglas (Kwantlen Faculty Assn.) v. Douglas College.334

[715] With that responsibility comes accountability for ensuring that the system, as a whole, does not discriminate against the needs of the special education students that it serves. As set out in Eldridge, “governments are not permitted to escape Charter scrutiny by entering into commercial contracts or other “private” arrangements” and “they should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities.”335 This is equally applicable to government’s responsibilities under the Code.

[716] In the context of this case, government responsibility under the School Act extends to ensuring that sufficient supports are in place for SLD students to access educational services and to benefit from an educational program. The government is further responsible for ensuring that the education system, as a whole, does not discriminate against the needs of SLD students.

[717] In addition, I find that the District, as direct service provider, and in implementing a government program, is responsible for ensuring that sufficient supports and

334 [1990] 3 S.C.R. 570

335 Eldridge, supra note 318, at para. 42
accommodations are in place for SLD students to access the educational services that they deliver.

[718] This definition of the service informs each stage of the analysis that follows.

The Appropriate Test for Determining Whether Discrimination has been Established

[719] Until recently, it was settled that a number of elements must be established, on a balance of probabilities, by a human rights complainant to establish a prima facie case of discrimination under s. 8 of the Code. Mr. Moore relies on that settled case law and submits that the test he must meet is that set out by McIntrye J. in O’Malley:

A prima facie case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant’s favour in the absence of an answer from the respondent.336

[720] Following O’Malley, human rights cases have consistently held that, to establish a prima facie case of discrimination in relation to a service, a complainant must establish, on a balance of probabilities, that:

(a) there is a service or facility generally available to the public;

(b) he or she is a member of a disadvantaged group or groups protected from discrimination under the Code;

(c) he or she was denied the service, or was discriminated against (sometimes referred to as differential treatment) with respect to it; and

(d) membership in the protected group was a factor in the denial or discrimination.

336 O’Malley, supra note 329, at p. 558
[721] Once a complainant established these elements, the evidentiary burden shifted to the respondent to show that membership in the protected group was not a factor in the differential treatment. Throughout, however, the legal burden remained on the complainant to establish a\textit{ prima facie} case of discrimination. If the complainant succeeded, the legal burden shifted to the respondent to establish a defence by showing that it had a\textit{ bona fide} and reasonable justification for its discriminatory conduct.

[722] More recently, the applicable test for establishing \textit{prima facie} discrimination under the\textit{ Code} has been the subject of some debate in the case law in this Province and others. Relying on those new developments, the Ministry and the District submit that, because this case involves government action and allegations of systemic discrimination in the context of broad public policy issues in education, I should apply the Supreme Court of Canada’s discrimination analysis set out in\textit{ Law v. Canada (Minister of Employment and Immigration)} (“\textit{Law}”),\textsuperscript{337} a case involving an allegation of a breach of s. 15 of the \textit{Charter}. The issue that has emerged is whether the s. 15 \textit{Charter} analysis applied in \textit{Law} must be used in determining whether there has been discrimination contrary to the \textit{Code}.

[723] The effective impact of applying the s. 15 \textit{Charter} analysis in a human rights case is to require a complainant to establish, as a part of their \textit{prima facie} case, and before the respondent has to justify the distinction they have made, that there has been an injury to their dignity.

[724] In\textit{ Vancouver Rape Relief Society v. Nixon et al.},\textsuperscript{338} the British Columbia Supreme Court held that the British Columbia Court of Appeal’s decision in\textit{ British Columbia Government and Service Employees’ Union v. British Columbia (Public Service Employee Relations Commission)} (“\textit{Reaney}”)\textsuperscript{339} required the Tribunal to apply the s. 15

\textsuperscript{337} [1999] 1 S.C.R. 497

\textsuperscript{338} [2003] BCJ No. 2899 (BCSC)

\textsuperscript{339} [2002] BCJ No. 1911 (BCAA)
Charter analytical framework in determining whether discrimination had been proven under the Code. Nixon was appealed to the British Columbia Court of Appeal. In a recently released decision, Madame Justice Saunders, the only judge to specifically deal with the issue, distinguished Reaney and said:

However, I disagree with [the learned reviewing judge’s] conclusion that the analytical framework set out in Law v. Canada (Minister of Employment and Immigration) … applies in determining whether the alleged discrimination is established …

The broad application of the Law framework in a case without that governmental overtone is not obvious to me, particularly in light of Meiorin, Grismer and Oak Bay, and considering the issues otherwise referred to in the Tribunal’s decision.340

[725] In my view, the Court of Appeal’s decision in Nixon leaves open the question of whether Law should be applied in a case in which the government is involved. As the respondents in this case are government and the broader public sector, I go on to consider the Law analysis here.

The Section 15 Charter Analysis

[726] The Supreme Court of Canada in Law synthesized the previous Charter equality jurisprudence and provided “a set of guidelines for courts that are called upon to analyze a discrimination claim under the Charter.”341 It set out three broad inquiries to be made. The first concerns whether the law results in differential treatment: Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics or (b) fail to take into account the claimant’s already disadvantaged position in Canadian society resulting in substantially different treatment


341 Law, supra note 337, at para. 5
between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1).

[727] The second considers whether the claimant is subject to differential treatment based on one or more enumerated or analogous grounds. The third considers whether the differential treatment constitutes discrimination in a substantive sense bringing into play the purpose of s. 15(1) in remedying such ills as prejudice, stereotyping and historical disadvantage.\(^{342}\)

[728] In considering and applying those guidelines, the Court said this about their use:

As I stated above, these guidelines should not be seen as a strict test, but rather should be understood as points of reference for a court that is called upon to decide whether a claimant’s right to equality without discrimination under the Charter has been infringed. Inevitably, the guidelines summarized here will need to be supplemented in practice by the explanation of these guidelines in these reasons and those of previous cases, and by a full appreciation of the context surrounding the specific s. 15(1) claim at issue. It goes without saying that as our s. 15 jurisprudence evolves it may well be that further elaborations and modifications will emerge.

**General Approach**

(1) It is inappropriate to attempt to confine analysis under s. 15(1) of the Charter to a fixed and limited formula. A purposive and contextual approach to discrimination analysis is to be preferred, in order to permit the realization of the strong remedial purpose of the equality guarantee, and to avoid the pitfalls of a formalistic or mechanical approach.\(^{343}\)

\(^{342}\) *Law, supra* note 337, at para. 39

\(^{343}\) *Law, supra* note 337, at para. 88
[729] The Court discussed the purpose of the Charter equality guarantee and identified the protection and promotion of human dignity as an overriding concern.\textsuperscript{344} The Court defined human dignity in the context of s. 15:

\begin{quote}
Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society \textit{per se}, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. \textit{Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?}\textsuperscript{345}
\end{quote}

[730] The Court then discussed the comparative approach to the s. 15(1) analysis and the evaluation of the contextual factors that determine whether a law demeans a claimant’s dignity. It identified the appropriate perspective as subjective-objective, that is, “the perspective of a person in circumstances similar to those of the claimant, who is informed of and rationally takes into account the various contextual factors which determine whether an impugned law infringes human dignity…”\textsuperscript{346}

[731] The Court went on to identify four possible contextual factors that, viewed from the subjective-objective perspective, may be relevant to determining whether a claimant’s dignity has been demeaned: pre-existing disadvantage; the relationship between the grounds and the claimant’s characteristics or circumstances; the ameliorative purposes or effects of the law; and the nature of the interest affected.\textsuperscript{347} The list of factors was not closed and not all four would be relevant in every case. Subsequently, in \textit{Gosselin v. Quebec (Attorney General)},\textsuperscript{348} the Supreme Court held that the four factors might overlap

\begin{footnotes}
\textsuperscript{344} Law, supra note 337, at para. 51
\textsuperscript{345} Law, supra note 337, at para. 53
\textsuperscript{346} Law, supra note 337, at para. 61
\textsuperscript{347} Law, supra note 337, at paras. 63-75
\textsuperscript{348} [2002] 4 S.C.R. 429
\end{footnotes}
since they are all designed to highlight the relevant contextual considerations surrounding a challenged distinction.

[732] In canvassing the nature and extent of a claimant’s burden under s. 15(1), the Court in Law emphasized that the framework does not necessarily require a claimant to adduce data to show a violation of his or her dignity. Citing Andrews v. Law Society of British Columbia (“Andrews”) as an example, the Court said that often a court may determine a breach of s. 15(1) on the basis of judicial notice and logical reasoning. There would be equality claims where discrimination would be obvious and those in which a more refined analysis would be required to determine if a distinction actually involved discrimination. The framework does not require that “the claimant prove any matters which cannot reasonably be expected to be within his or her knowledge”.

[733] More recently, in Auton, the Supreme Court said:

...Frameworks thus do not describe discreet linear steps; rather, they serve as a guide to ensure that the language and purpose of s. 15(1) are respected.

Whatever framework is used, an overly technical approach to s. 15(1) is to be avoided. In Andrews, supra, at pp. 168-69 McIntyre J. warned against adopting a narrow, formalistic analytical approach, and stressed the need to look at equality issues substantively and contextually. The Court must look at the reality of the situation and assess whether there has been discriminatory treatment having regard to the purpose of s. 15(1), which is to prevent the perpetuation of pre-existing disadvantage through unequal treatment.

349 [1989] 1 S.C.R. 143
350 Law, supra note 337, at paras. 77-78
351 Law, supra note 337, at para. 80
352 Auton, supra note 319, at para. 24-25
[734] In *Auton* the Supreme Court reinforced the general nature of the framework described in *Law*, saying: “[t]here is no magic in a particular statement of the elements that must be established to prove a claim under s. 15(1). It is the words of the provision that must guide. Different cases will raise different issues… The important thing is to ensure that all the requirements of s. 15(1), as they apply to the case at hand, are met.” 353

As a result, in dealing with a complaint under the *Code*, the Tribunal must ensure that the requirements of s. 8 are met. In this, the guidelines offered by the Supreme Court in *Law* may provide a helpful interpretive framework.

[735] The Tribunal has discussed the effect of the application of the *Law* analysis in a number of cases: see, for example, *Nixon, Waters v. BC Medical Services Plan*, 354 *Barrett v. Cominco Ltd.*, 355 *Hutchinson v. B.C. (Min. of Health)*, 356 *Radek v. Henderson Development (Canada) and Securiguard Services (No. 3)*, 357 and *MacRae v. Interfor (No. 2)*. 358

[736] The *Law* analysis arose in the context of a claim of discrimination seeking equal treatment under a government program. It did not arise in circumstances where the discrimination alleged was a failure to recognize and appropriately accommodate difference. As I outline in my discussion of the appropriate comparator group below, this is an important distinction. However, because, in my view, this is a case in which it makes no difference whether the traditional analysis or the *Law* analysis is applied, it is not necessary for me to explore this difference further. I agree with the statement in *Law*

353 *Auton*, *supra* note 319, at para. 23

354 2003 BCHRT 13

355 2001 BCHRT 46

356 2004 BCHRT 58

357 2005 BCHRT 302

358 2005 BCHRT 462
that it will be a rare case in which differential treatment suffered by a person in a protected group, such as the disabled, will not constitute discrimination in the purposive sense.  

[737] The Supreme Court in Eldridge described the disadvantaged position of the disabled in our society:

It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions;...This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the "equal concern, respect and consideration" that s. 15(1) of the Charter demands. Instead, they have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms; ...One consequence of these attitudes is the persistent social and economic disadvantage faced by the disabled. Statistics indicate that persons with disabilities, in comparison to non-disabled persons, have less education, are more likely to be outside the labour force, face much higher unemployment rates, and are concentrated at the lower end of the pay scale when employed...

[738] It is clear on both a subjective and objective basis that Jeffrey, who suffers from dyslexia, a serious learning disability, and other disabled students like him, are in a historically disadvantaged group that is vulnerable both because they are young and because they are disabled. Dyslexia is a severe impediment to learning. Children with dyslexia are not intellectually impaired; they are of average or above-average intelligence. However, dyslexic students who do not receive adequate appropriate interventions and supports to address their disability suffer discrimination in a substantive

359 Law, supra note 337, at para. 110

360 Eldridge, supra note 318, at para. 56
sense. They are unable to access the benefit of the educational services provided by the Ministry and the districts if their needs are not appropriately accommodated.

[739] With respect to the nature of the interest affected, education is of fundamental importance to our society. I heard extensive and compelling evidence, which I accept, that those whose learning disabilities are not remediated risk serious, long-term consequences. They face significantly lessened opportunities, diminished self-esteem, increased unemployment, increased juvenile delinquency, increased rates of incarceration, and an increased risk of suicide. This evidence, which came primarily from the experts called on behalf of Mr. Moore, was not disputed by Dr. Siegel, on behalf of the District, or by Ms. Roch, on behalf of the Ministry.

[740] As a result, I conclude that whether the traditional analysis or the Law analysis is applied, Mr. Moore has established an injury to Jeffrey’s dignity, and other SLD students, within the context of his onus to prove a prima facie case.

Allegations of discrimination

[741] I turn now to consider the evidence to determine whether the Ministry and the District discriminated against Jeffrey, and other students like him, in their provision of educational services.

[742] It is well established that disability cannot be approached like the other enumerated grounds under s. 15 of the Charter or in the Code. Disabilities vary, and what may address the equality-related needs of one individual may not address the needs of another. As stated by the Court in Eaton v. Brant (County) Board of Education:

It follows that disability, as a prohibited ground, differs from other enumerated grounds such as race or sex because there is no individual variation with respect to these grounds. However, with respect to disability, this ground means vastly different things depending upon the individual and the context. This produces, among other things, the "difference dilemma" referred to by the interveners whereby segregation can be both protective of equality and violative of equality depending upon the person and the state of disability. In some cases, special education is a necessary adaptation of the mainstream world which enables some
disabled pupils access to the learning environment they need in order to have an equal opportunity in education.\textsuperscript{361}

[743] There are two types of discrimination alleged in this case. First, there the individual case of discrimination against the District and the Ministry. Mr. Moore alleges that the elements of the case against the District are that Jeffrey was not provided with sufficiently intensive supports early enough, and was not provided with a range of services, to allow him to access the education services being offered at Braemar. The elements of the case against the Ministry are that it under-funded the District, resulting in significant cuts to the services available to Jeffrey. In particular, the cuts led to the closure of the DC1.

[744] Second, there is the systemic case of discrimination against the District and the Ministry. The elements of the case against the District are that its SLD students are not provided with sufficient supports, or with a range of services, such that they are able to access the District’s education services. The elements of the systemic case against the Ministry are: the HILC cap is discriminatory; the Ministry is failing to appropriately monitor the delivery of special education services to SLD students; early identification and a range of services are not mandatory; and the definition the Ministry uses for categorization of SLD students to entitle them to supplemental education funding is discriminatory.

[745] While these allegations were made separately, the evidence and arguments with respect to them inevitably overlap and I propose to consider them together. Before dealing with the specific allegations of discrimination, I consider the question of the appropriate comparator group, an issue which runs throughout the allegations of discrimination in this case.

\textsuperscript{361} [1997] 1 S.C.R. 241, at pp. 273-74
The Appropriate Comparator Group

[746] The parties spent a considerable amount of time arguing about the appropriate comparator group with respect to the discrimination analysis. In the circumstances of this case, for the reasons that follow, I have concluded that focussing on a comparator group analysis is neither necessary nor helpful.

[747] Many cases of discrimination arise because there has been a distinction made, intentional or not, based on grounds relating to the personal characteristics of an individual or a group. The complainant seeks equal treatment. For example: disability insurance plans which do not extend to pregnant women;\(^{362}\) or provide differential benefits to those who are mentally and physically disabled;\(^ {363}\) government imposed rules on the entitlement to drive;\(^ {364}\) or who is covered by a benefit program.\(^ {365}\)

[748] In the context of those types of cases, a comparator group analysis is appropriate. A finding of discrimination based on the imposition of a burden or the withholding of a benefit to one person or group as opposed to another, is of necessity a comparative analysis. As Mr. Justice McIntrye wrote in *Andrews*:

> The concept of equality has long been a feature of Western thought… It is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises.\(^ {366}\)

[749] Our courts have, however, also recognized that discrimination may arise from a failure to recognize and accommodate pre-existing differences. This kind of

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\(^{362}\) *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219

\(^{363}\) *Battlefords and District Co-operative Ltd.v.Gibbs*, [1996] 3 S.C.R. 556


\(^{365}\) *Law, supra* note 337

\(^{366}\) [1989] 1 S.C.R. 143, at p. 164
discrimination, also referred to as adverse effect discrimination, is particularly relevant to disabled members of our society, who may require different treatment in order to gain full access to the benefits of our society. As outlined by the Supreme Court of Canada in *Eaton v. Brant (County) Board of Education*:

> The principal object of certain of the prohibited grounds [referring to s. 15 of the *Charter*] is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. In the case of disability, this is one of the objectives. The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society’s benefits and to accommodate them. Exclusion from the mainstream of society results from the construction of a society based solely on “mainstream” attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. The discrimination inquiry which uses “the attribution of stereotypical characteristics” reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping, which by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics, which is the central purpose of s. 15(1) in relation to disability.367

[750] Although these comments arose in the context of a *Charter* challenge, I find that they are equally applicable to a case arising under the *Code*. As a result, the *Code* prohibition against discrimination also requires different or special treatment that recognizes the special needs of disabled individuals who have historically been excluded from full participation in society. Inherent in considering a case of discrimination on the

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367 *Eaton, supra* note 361, at pp. 272-273, emphasis added
basis of a distinction, or disparate treatment, where what is being sought is equal treatment, is a comparator group analysis. However, in considering a case where the issue is not whether the claimant has been treated equally but whether the actual characteristics of the person have been accommodated so that they may access a benefit otherwise available in society, the application of a comparator group analysis is unsuitable.

[751] Hence, in *Eldridge*, the Supreme Court did not engage in a detailed examination of the appropriate comparator group and, to the extent one can be discerned from the Court’s reasoning, the comparison that was made was with those accessing health care benefits who did not require the assistance of an interpreter – hearing persons.\(^{368}\)

[752] In such a case, the focus of the inquiry must be whether enough has been done to ensure that the disadvantaged member of society has appropriate and meaningful access. In this case, that involves asking whether enough has been done to ensure that Jeffrey and other SLD students are able to access the benefits of the education service that is being offered. As discussed in *Real Canadian Superstore v. U.F.C.W. Local 1400*,\(^{369}\) in relation to issues of access and participation for the disabled, the comparison must always be between those who are disabled and those who are not.

[753] The focus of this case is the supports that SLD children need in order to access a universally available public education system. As I have already found, without supports and accommodation, SLD children will not be able to enjoy the benefits of that education. It is important, in my view, not to confuse the nature of the service that is being sought with the accommodation that is required to be able to access the service. Here the issue is the accommodation and whether the Ministry and the District have done what they can, to the point of undue hardship, to ensure access to the service. A

\(^{368}\) *Eldridge*, *supra* note 318, at para. 60

comparator group analysis will not focus the necessary attention on the accommodation aspect of this disability complaint. For these reasons, I have concluded that a comparator group analysis is unnecessary.

[754] In the alternative, in the event that a comparator group analysis is required, I now turn to consideration of the appropriate comparator group. Where applicable, the identification of the appropriate comparator group is crucial to the outcome of the discrimination analysis. In Granovsky v. Canada, Mr. Justice Binnie wrote:

The identification of the group in relation to which the appellant can properly claim “unequal treatment” is crucial. The Court established at the outset of its equality jurisprudence in Andrews, supra, that claims of distinction and discrimination could only be evaluated “by comparison with the conditions of others in the social and political setting in which the question arises.”…

[755] The following principles for determining the appropriate comparator group were set out by the Supreme Court of Canada in Hodge v. Canada (Minister of Human Resources Development). First, the choice of the correct comparator is crucial, since the comparison between the complainant and the comparator group permeates the analysis. Second, while the starting point is the comparator chosen by the complainant, the adjudicator must ensure that the comparator is appropriate and should substitute an appropriate comparator if the one chosen by the complainant is not appropriate. Third, the comparator group should mirror the characteristics of the complainant relevant to the benefit or advantage sought, except for the personal characteristic related to the enumerated or analogous ground raised as the basis for the discrimination. The comparator must align with both the benefit and the universe of people potentially entitled to it and the alleged ground of discrimination. Fourth, a complainant relying on a personal characteristic related to the enumerated ground of disability may invite

370 [2001] 1 S.C.R. 703, at para. 45
371 [2004] 3 S.C.R. 357
comparison with the treatment of those suffering a different type of disability, or a disability of greater severity.\footnote{372} I note that the fourth principal is permissive in that it broadens the comparator group that may be applicable in a complaint based on disability.

[756] Mr. Moore submits that the appropriate comparator group is all children attending and accessing educational services in public schools in British Columbia who do not require additional supports and accommodation in order to do so.

[757] The District submits that the appropriate comparator group is other SLD students either in the District or elsewhere in the public education system in BC receiving special education services between June 1992 and June 1995. It submits that the interventions Jeffrey received at Braemar were superior to those provided to other SLD students in the District and elsewhere in BC, both in frequency and quality. Jeffrey was not, it submits, denied a service available to any other SLD student. In addition, the District says that the services available at the DC1 were only available to SLD students and that, as a result, the comparator group can only be other SLD students.

[758] The Ministry submits that different comparator groups apply depending on which allegation of discrimination is being considered. With respect to funding for education generally, the Ministry submits that, regardless of the comparator group selected (other SLD students, other disabled students, or other non-disabled students), Mr. Moore has not shown that the Ministry’s method of funding education draws a distinction between Jeffrey and any other student.

[759] With respect to the issue of the HILC cap, the Ministry submits that, since it is only disabled students who receive supplemental funding, the comparator group must be either other SLD students or other disabled students for whom there is no cap on available funding. With respect to the services provided to Jeffrey and other SLD students, the Ministry largely adopts the submissions of the District with respect to the

\footnote{372 Hodge, supra note 371, at paras. 18, 20, 25, 28, 31 and 32}
appropriate comparator group. Relying both on *Granovsky* and *Law*, the Ministry submits that the purpose and effect of the legislation must be considered in determining the appropriate comparator group. It says that Mr. Moore cannot deny that Jeffrey received an educational program that was designed, in the opinion of the District, to enable him to reach his full potential. What Mr. Moore takes issue with is the quality of the program Jeffrey was given, not with whether he received a service.

[760] While I accept that there may be more than one appropriate comparator group based on the particular allegations of discrimination in a case, applying the *Hodge* criteria to this case, I conclude that the comparator group selected by Mr. Moore is appropriate. That is: all students attending public schools and accessing public education services in British Columbia, who do not require additional supports and accommodations to do so. It is all such students that best aligns with the benefit sought (access) and those entitled to it (all students). I reach this conclusion for the following reasons.

[761] The *School Act* establishes that the goal of our public education system is to enable all learners to develop their individual potential; it contemplates delivery of universal education services. As a result, it requires an assessment of each student’s individual learning needs and how they can best be met within the school system. The goal of special education services is to ensure that sufficient supports are in place to allow a student with special needs to access the core curriculum. In furtherance of that Ministry goal, the District developed a special education policy and, at the relevant time, it provided:

...Within any school district there exist "exceptional children," children who have ...needs sufficient to indicate that curriculum modification and/or special services must be provided for them. The Board recognizes its commitment to provide appropriate modifications and services and will provide them in such a way that each child is guaranteed placement in the most appropriate and least restrictive educational environment available.\(^{373}\)

\(^{373}\) Ex 4, Tab 11, p. 1
The requirement for the development of IEPs, recommended by the Ministry in the 1985 Manual and required in the 1995 Manual, and the Special Needs Students Orders, Ministerial Orders No. M638/95, M319/96 and M011/98, all point to the individual tailoring of programs to allow a disabled student to access education services. The focus is on the needs of the individual student and what interventions and supports are necessary for that student to access education services like their non-disabled peers.

In my view, it is not sufficient to say to a SLD student that he or she is receiving the same or better services than other SLD students. That would allow for minimal or no services to be provided to all SLD students, without consideration of human rights principles and regardless of whether the services provided achieve the objective of allowing each individual student to reach his or her potential. That notion of formal equality has been recognized as not achieving true equality. Rather, what is required in this context is that each student is assessed and provided with those supports that are necessary to enable them, to the extent possible, to access educational services like their non-disabled peers.374

As set out above, in my view, the more appropriate analysis is that applied by the Supreme Court of Canada in Eldridge where Mr. Justice La Forest said:

The only question in this case, then, is whether the appellants have been afforded "equal benefit of the law without discrimination" within the meaning of s. 15(1) of the Charter. On its face, the medicare system in British Columbia applies equally to the deaf and hearing populations. It does not make an explicit "distinction" based on disability by singling out deaf persons for different treatment. Both deaf and hearing persons are entitled to receive certain medical services free of charge. The appellants nevertheless contend that the lack of funding for sign language interpreters renders them unable to benefit from this legislation to the same extent as hearing persons. Their claim, in other words, is one of "adverse affects" discrimination.

374 Eaton, supra note 361, at para. 67
This Court has consistently held that s. 15(1) of the Charter protects against this type of discrimination. In Andrews, supra, McIntyre J. found that facially neutral laws may be discriminatory. "It must be recognized at once", he commented, at p. 164, "... that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality"; see also Big M Drug Mart Ltd., supra, at p. 347. Section 15(1), the Court held, was intended to ensure a measure of substantive, and not merely formal equality...

Adverse effects discrimination is especially relevant in the case of disability. The government will rarely single out disabled persons for discriminatory treatment. More common are laws of general application that have a disparate impact on the disabled…

[765] As I have already said, Eldridge demonstrates that a comparator group analysis is unnecessary in a case where the discrimination alleged is a denial of the accommodation necessary to achieve equal access. That said, if such an analysis must be employed, then the Court’s decision in Eldridge implies that the appropriate comparator group was all individuals entitled to the benefits of the medicare system, who did not require interpretive services to communicate in order to access a universally available system. Similarly, in this case, the appropriate comparator group is other students in the public school system, who do not require additional supports or accommodations to access educational services. Without appropriate supports and accommodations, Jeffrey, and other SLD students cannot access the education services which are universally available. They therefore suffer comparative disadvantage in relation to these students. Like the Deaf in Eldridge, SLD students who are not provided with sufficient services to address their disability related needs are denied access to the benefit of a universal program. The failure to provide appropriate supports and accommodations amounts to substantive discrimination.

375 Eldridge, supra note 318, at paras. 60, 61 and 64
The Individual Case of Discrimination

[766] I now turn to whether the District and the Ministry provided appropriate supports and accommodations to Jeffrey. In this part of my analysis, I deal with the individual aspects of the complaint against both the District and the Ministry together. The analysis focuses on whether Jeffrey had meaningful, equitable access to the educational services being provided by the District and the Ministry. I will then deal separately with the systemic complaints against each.

[767] Mr. Moore argued that the District and the Ministry had jointly and severally discriminated against Jeffrey on the basis that they failed: (1) to deliver early intensive intervention; (2) to maintain a range of settings to meet the needs of SLD students, and (3) to provide Orton-Gillingham, a disability-related service, free of charge.

[768] While Mr. Moore acknowledges that Jeffrey received some disability-related supports, he submits that they were inadequate; Jeffrey received “too little, too late”, and has suffered setbacks from which he may never fully recover. Though identified as having obvious problems in Kindergarten, he struggled throughout his first four years of schooling with minimal supports and inadequate interventions. I accepted the evidence of Drs. Fiedorowicz and Bateman over that of Dr. Siegel in this regard.

The Importance of Early, Intensive, Intervention

[769] One of the supports discussed at length in this hearing was the provision of early, intensive remediation or intervention, and whether Jeffrey received it. The District, supported by the Ministry, submits that he did. Mr. Moore disagrees.

[770] As set out above, I heard extensive expert evidence, and was provided with many journal articles, all of which supported the importance of early intensive intervention for remediation of learning difficulties. I accepted that evidence. The first stage is to identify the child as having a learning difficulty. That must be followed by early intervention, the extent of which will depend on the severity of the student’s disability.
I also accepted that individuals who are identified early as having a learning disability, and receive appropriate interventions, usually have better outcomes. They are better adjusted, better able to advocate for themselves, and better able to cope with the symptoms and manifestations of their learning difficulties. The negative effects of failing to intervene early were set out in my conclusions with respect to the experts’ evidence. The evidence supported that interventions received after Grade 3 have to increase exponentially in comparison to earlier interventions because of the growing knowledge gap. Remediation attempted at that point will be more costly and less effective. Some losses may never be recovered.

Drs. Fiedorowicz, Bateman and Ms. Tennant all agreed that interventions must be timely and appropriate. This means interventions of the right kind, quantity, and intensity. Ms. Roch testified that early identification was the first step in the progressive planning process for an at-risk learner. It is followed by early intervention or remediation, because it is important to address a problem at the earliest opportunity when much can be done to reduce the effects of the disability. At the first sign of trouble, planning should start for intervening to deal with it. Ms. Roch agreed that it is cost effective to provide services to a child early in their education because the cost of providing services later increases. There is a cost to both the student and the service provider for failing to intervene early.

Drs. Perry, Fiedorowicz and Bateman testified that the critical importance of early intervention has been widely accepted in research circles from the 1970s on. Programs were instituted in the United States as early as 1965, where early intervention has been statutorily mandated since 1986.

Drs. Fiedorowicz and Bateman testified that NICHD studies have confirmed the effectiveness of early intervention in research spanning decades, using an unusually

376 Ex. 85, Tab 20, p. 8
rigorous standard for social science research. The importance of early intervention as an essential tool has been well established for over 30 years, and I accept, is now essentially irrefutable.

[775] Even though the critical importance of early intervention is widely recognized, it is still not widely used in B.C. schools. Dr. Siegel testified that the prevailing philosophy is still predominantly a “wait and see” approach, whereby the child is mainly observed to see if he will outgrow his difficulty. She estimated that, at the date of her evidence, only 20% of school districts are “starting” to institute early intervention programs. Prior to 1997, she was not aware of any district that had such a program.

[776] The Ministry urged me not to accept Dr. Siegel’s evidence on this point on the basis that it was given without notice; she made no reference to it in her report; there was no evidence of what she meant by early intervention or what districts were doing instead; and there was no other evidence about what various districts were doing. For the reasons that follow, I was not persuaded by the Ministry’s objections and I have accepted Dr. Siegel’s evidence.

[777] First, the Ministry’s objections were not made when Dr. Siegel gave her evidence. Second, they did not cross-examine her about the basis for her conclusions. Third, Dr. Siegel was the expert the Ministry retained to conduct the 1999 Review and, as a result, was eminently qualified to give the evidence. Fourth, the Ministry did not call an expert to refute her evidence, or lead any other evidence of district practices with respect to early intervention. Finally, the issue of the importance of early intervention as contrasted with a “wait and see” approach can have come as no surprise to the Ministry; it is central to the issues in this case.

[778] Early intervention was not specifically mentioned in the 1985 Manual. Ms. Roch and Dr. Perry testified that while early intervention is set out as a desirable practice in the Ministry’s 1995 Manual, it is not mandatory. The Ministry leaves such decisions to the districts. Both Drs. Perry and Siegel testified that Ministry manuals are not commonly read by front-line teachers. Mr. Roberts, Braemar’s principal, had not read the 1995
Manual and Ms. Waigh had read only portions of it. The Ministry first released a paper stressing the importance of early intervention in 1996.

**Was Jeffrey Provided with Early Intensive Intervention?**

[779] Jeffrey was first identified in Kindergarten as being potentially at risk for difficulty in acquiring literacy skills. He scored low on the Index which was then being used by the District for screening those children who might be at risk. His teacher observed in her March 1992 report card that he “appear[ed] to be a little lost” and, at or about the same time, referred him to the ELRT for help in assessing whether he had retrieval problems, learning difficulties, or was “just young”.

[780] I accept that when the District administered the Index in Kindergarten, it was doing something that few, if any, other school districts in British Columbia were doing. However, once Jeffrey was identified as at risk, both as a result of his score on the Index, and later as a result of his Kindergarten teachers’ concerns, no further testing was done in Kindergarten. The supports provided consisted of one-on-one time with the educational Aide assigned to his classroom for 15 minutes, thrice-weekly. In addition, Jeffrey’s teacher was asked to spend more individual time with him.

[781] Mr. Roberts, Braemar’s principal, confirmed that the school was aware that Jeffrey was “unusually disabled” in Kindergarten, as he received some additional services which was unusual.

[782] Despite these concerns, Jeffrey commenced Grade 1 in September 1992 with no additional supports in place. It was not until January of 1993, four months into Grade 1, that he was next referred to the ELRT for assessment.

[783] Following that referral, Jeffrey was provided with one-on-one assistance in the LAC commencing in early February 1993. According to Ms. Waigh, this was a service no other Grade 1 student received and used 10% of the school’s available LAC resources. In addition, Jeffrey was provided with 40 minutes, twice-weekly, with Ms. Marchand, a volunteer tutor. Ms. Waigh said this used 25% of Ms. Marchand’s availability. I
conclude that Braemar would not have provided this level of service had it not realized that Jeffrey was “unusually” disabled. He was not, however, designated SLD for more than a year.

[784] Throughout Kindergarten and Grades 1 and 2, Jeffrey’s self-esteem was affected, he developed stress-related migraine headaches, and he struggled academically. His parents and his teachers observed signs of distress and diminished self-esteem. He told his parents he was not clever. His Kindergarten teacher observed that he was “very aware and sensitive to his abilities (or lack of) in more academic situations.” His anxiety was demonstrated, most graphically, when he was asked to identify the letter “c” in Grade 1 and wet his pants.

[785] Jeffrey’s teachers, in successive years, were extremely concerned about him. On four separate occasions between Kindergarten and Grade 2, five different teachers asked for assistance and assessments to address the extent and nature of his difficulties. In particular:

- In March 1992, his Kindergarten teacher asked for an assessment to determine whether or not he had “retrieval problems or learning difficulties” or was “just young”. He was observed but not given an assessment at that time.
- Due to his “very slow progress”, his Grade 1 teachers made a second request on January 11, 1993 for an assessment to determine his difficulties.
- Two months later, on March 25, 1993, and after he had been attending LAC for two months, and had been receiving assistance from a volunteer tutor, his Grade 1 teachers again asked for “Diagnostic tests to help us determine if Jeffrey’s development is a lag perhaps due to his youngness or if there is a more specific problem.”
- On February 8, 1994, Jeffrey’s Grade 2 teachers made a fourth referral to the SBRT listing the following concerns: immature behaviours, extremely low academic skills in all subjects, unable to work on grade level material, lack of focus and comprehension skills, needs one on one instruction.
In Grade 1, in May 1993, following his second referral to the SBRT, Jeffrey underwent a number of tests, administered by Ms. Tennant. She did not complete a full psycho-educational assessment because she believed that Jeffrey was too young for the IQ test that it required. Ms. Tennant concluded that “retrieval of symbols is very difficult for Jeffrey.” Jeffrey appeared to have a “specific learning difficulty”, which affected his ability to read, write, spell, and compute arithmetic operations. She testified that a symbol-retrieval difficulty is basically a form of dyslexia. In addition, she confirmed that Jeffrey had “no phonemic awareness” at this time. She recommended that Jeffrey continue with the Edmark program (a sight reading program), and the LAC, which he had started in January. The only new suggestion was that he try a multi-sensory phonics approach like the Orton-Gillingham method. Orton-Gillingham was not then offered by the District. Jeffrey’s parents did what was suggested and arranged for an Orton-Gillingham tutor, at their own expense.

In spite of Jeffrey’s obvious difficulties, a full psycho-educational assessment was not performed. In essence, Ms. Tennant recommended a wait and see approach: “he will be monitored closely to see if his lack of progress is developmental or a symbol-retrieval difficulty.”

At the bottom of Ms. Tennant’s report, Mr. Roberts wrote: “factors show but [Jeffrey] is too young to do a full assessment.” However, Dr. Fiedorowicz testified that a full psycho-educational assessment could have been done. Drs. Siegel, Bateman and Perry all testified that an IQ test could have been administered to Jeffrey and he could have been designated as SLD.

The District submits that a full psycho-educational assessment would not have been appropriate for Jeffrey earlier than the end of Grade 2. However, as was apparent from the documentary record, in 1994 the District had designated four students in Kindergarten and five in Grade 1 as SLD. Because a psycho-educational assessment was a necessary precondition to designation, these students must have had one. In addition, in 1994/95, Ms. Tennant herself had referred two Grade 1 students, and three Grade 2
students to the DC1. If Jeffrey was “one of the worst cases” Ms. Tennant had ever seen, it is difficult to understand why he was not designated earlier.

[790] The District’s failure to complete a psycho-educational assessment in Grade 1 meant that Jeffrey was not designated as SLD. As a result, the District did not receive supplemental funding from the Ministry for his education program and Jeffrey was not assigned an Aide. In addition, he could not be placed on the waiting list to attend the DC1.

[791] The District submits that, at the time of Ms. Tennant’s testing, Jeffrey had been exposed to eight months of actual formal reading instruction. Ms. Waigh and Ms. Tennant testified that it is not uncommon for Grade 1 boys, especially those who are young, to have difficulty with reading. However, in Jeffrey’s case, in addition to the reading instruction Jeffrey was receiving in his Grade 1 class, he was also receiving one-on-one individual instruction for a total of about three hours a week with Ms. Waigh, a well-qualified and trained learning assistance teacher, and Ms. Marchand, a trained volunteer tutor. With that in mind, his actual exposure to formal reading instruction far exceeded the eight months of his fellow students and his lack of progress should have been much more alarming.

[792] The supports provided to Jeffrey in Grade 2 did not change. By the end of Grade 2, the evidence disclosed that Jeffrey had actually lost ground. In March 1994, in her LAC insert to his report card, Ms. Waigh reported that Jeffrey could recognize 100 sight words. By the end of the school year, and after her psycho-educational assessment of Jeffrey, Ms. Tennant was extremely concerned. She indicated that Jeffrey could only recognize about 30 sight words, and then only when they were presented in the same context.

[793] Despite the repeated requests of his teachers to determine the nature of his problem, Jeffrey was not given a full psycho-educational assessment until he was about to enter Grade 3. Even then, as I concluded above, it was performed only after Dr. Roland, his neurologist, suggested it. The District’s documents do not suggest, and Ms.
Tennant, Ms. Waigh and Mr. Roberts did not say, that the psycho-educational assessment would have happened then in any event.

[794] Following the psycho-educational assessment, Ms. Tennant recognized that Jeffrey needed intensive remediation in an alternate setting. The primary recommendation, and the only significant change from Ms. Tennant’s earlier recommendations, was that Jeffrey attend the DC1. However, as I explained earlier, Jeffrey was unable to do so because, on April 26, 1994, the District decided to close the DC1 due to what, I concluded, were financial considerations and what Dr. Brayne described as a financial crisis caused by years of under-funding by the Ministry.

[795] As a result of his designation, and commencing in Grade 3, Jeffrey was entitled to additional funding which resulted in an Aide being provided to him in the regular class for four 40-minute sessions a week. He continued to receive the supports earlier provided to him. I was persuaded by the expert evidence, and the journal articles which were filed with me, that Grade 3 is past the optimal time for intervention.

[796] Early in his Grade 3 year, Ms. Tennant prepared an intervention plan for Jeffrey recommending that: he continue in the LAC thrice-weekly for 30 minutes with Ms. Waigh; he continue working in a modified program in the classroom; and he continue to have use of an Aide. In addition, she noted that he had other supports including an Orton-Gillingham tutor and access to Ms. Marchand, Braemar’s volunteer tutor. In her evidence, Ms. Tennant acknowledged that the Aide was really to accommodate Jeffrey’s learning disability so that he could stay in the regular classroom and that it was not intensive remediation. She further acknowledged that the continued use of Orton-Gillingham and volunteer tutoring, which she had also recommended, was not intensive remediation.

[797] The District argued that, following the closure of the DC1, it continued to reasonably accommodate Jeffrey’s disabilities through the provision of an Aide. In so doing, it submitted that there was no empirical evidence that DC1 was effective. I found this submission quite surprising. It was clear from the evidence of all of the District’s witnesses that they thought the DC1 provided a useful service. Dr. Brayne described it as
well-respected. Ms. Waigh, Ms. Tennant and, in particular, Ms. Watts lobbied against its closure. Further, the program had run for almost twenty years. It is just not credible that the District would have continued to support it if it had not been beneficial and demonstrated a success rate. The reasons for its closure were financial not that it was not beneficial.

[798] Finally, Ms. Tennant clearly thought that Jeffrey could benefit from DC1; she recommended it. Her recommendation in this regard was in addition to the Aide time to which Jeffrey was entitled under the provisions of the Collective Agreement. Ms. Waigh agreed that DC1 would have been beneficial to Jeffrey. I accept their professional judgement in this regard as they were the District specialists who worked most closely with him.

[799] In any event, in light of the closure of the DC1, the District could not offer this service to Jeffrey. However, the decision to close the DC1 would not, alone, have been problematic if the District had provided an alternative service that was similarly intense and effective.

[800] The District argued that Jeffrey received more services in the neighbourhood school than the DC1 offered. It relied on the fact that the services he received in the LAC with Ms. Waigh and Ms. Marchand were one-on-one, unlike the small groups in the DC1. This submission was not supported by the evidence of Ms. Tennant, which I quote below.

[801] The District also argued that, after the closure of the DC1, it offered alternative services which were sufficient to accommodate the needs of Jeffrey and other SLD students. Those accommodations included access to the LAC and individual Aide time. They submitted that the service provided by Aides was better than that provided at the DC1, which was limited in duration and not individual.

[802] The evidence did not support these arguments. I can do no better than to quote the following exchange in the cross-examination of Ms. Tennant:

Q And the help that Jeffrey received in the Learning Assistance Centre did not constitute intensive remediation?
A  Not at that time, no.

Q  In fact, the LAC was never intended to deal solely with severe –

A  No.

Q  -- learning-disabled children?

A  That’s right.

Q  I believe you testified that Jeffrey had received intervention at that time, but needed something else?

A  Yes.

Q  Do you recall saying that?

A  Yes.

Q  At the meeting held with – well, either Mrs. Moore or the Moores to discuss the psycho-education assessment, would it be fair to say that the Moores were looking to you for advice?

A  Yes.

Q  And you testified that you thought you had raised the option of Kenneth Gordon School during that meeting?

A  Yes.

Q  And they weren’t familiar with the Kenneth Gordon Program, were they?

A  No, not that I remember.

Q  And like DC1, Kenneth Gordon provided a specialized setting for students with severe learning disabilities?

A  Yes.

Q  And like DC1, Kenneth Gordon provided small student/teacher ratios?

A  Yes.

Q  And like DC1, Kenneth Gordon provided intense remediation?

A  Yes.
Q You testified that you didn’t recall saying that Kenneth Gordon was the only option. Do you recall saying that?

A Yes.

Q But you would agree, Ms. Tennant, that in light of the closure of DC1, it was the only option for intensive remediation at that time, wasn’t it?

A Yes, unless – unless they had kept Jeffrey in the school system and increased the Orton-Gillingham tutoring at home to four times a week, which some children do. That, to me, would have been considered intensive as well.

Q But that wasn’t an option that was being offered by the –

A School.

Q -- public school system?

A No, no.

Q that was something the parents would have had to have paid for --

A That’s right.

Q --themselves?

A Mm-hmm.

…

Q Apart from continuing with LAC, tutoring and aide time in a modified program, the North Vancouver School District couldn’t really offer Jeffrey anything else in terms of intensive remediation?

A Without DC1, no.

[803] Ms. Tennant described Jeffrey’s case as one of the worst she had ever seen in her many years of experience. According to her, Jeffrey needed a high degree of intensive one-on-one instruction in a setting designed to minimize distractions. Her opinion was that Jeffrey needed intensive remediation which, in the District, was only offered by the DC1.

[804] In February 1995, more than half way through Grade 3, Jeffrey’s teacher completed a pre-referral form for KGS. She painted a very bleak picture of Jeffrey’s
abilities, reporting that he was at the bottom of his class, and unable to function at even a basic level. I accepted that it accurately described his capabilities at that time. Mr. Moore testified that he could not read his birthday card. Yet the District did not take any steps to increase the services available to Jeffrey in Grade 3. It provides the following justification for that failure.

[805] The District Screening Committee initially allocated Jeffrey two hours of Aide time a week, the minimum contemplated under the Collective Agreement. This level of allocation is surprising given Ms. Tennant’s concern about his lack of progress which she expressed to Mr. Kelly in advance of Jeffrey being considered by the District Screening Committee. It is also surprising in light of her conclusion that Jeffrey was one of the worst SLD cases she had seen. In any event, Jeffrey actually received an additional 40 minutes of Aide time per week because it became available. It was clear from Ms. Waigh’s evidence that in order to access more Aide time for Jeffrey, Braemar would have to demonstrate to the District Screening Committee that the initial Aide time allocated to him had been tried and found insufficient. Ms. Waigh testified that Jeffrey would have benefited from more Aide time in Grade 3.

[806] The District submits that its reason for not applying to the District Screening Committee to increase the Aide time for Jeffrey in Grade 3 was the direction of Ms. Moore that they were not to put any additional pressure on him.

[807] Ms. Waigh testified that no request was made due to Ms. Moore’s direction. Further, Ms. Waigh said that the Moores knew that more Aide time could be made available but they never asked for it. Ms. Ray said that even if she had concluded that Jeffrey needed more Aide time, it would not have been available before the start of Grade 4, but that she did not request it because of Ms. Moore’s direction. Ms. Moore’s recollection was that she did not want Jeffrey pushed with too much homework.

[808] The evidence, taken as a whole, shows that the Moores never asked the school not to provide services to Jeffrey. Nothing suggests that this was the attitude of the Moores at any time in Jeffrey’s education. A request not to put more pressure on Jeffrey is a far cry from a request not to provide all available supports. Further, even if the Moores had
made such a request, District staff had a duty to Jeffrey to provide him with the supports he needed and to advise the Moores of their view that he needed more Aide time, that it could be provided, and the risks they were taking in not accessing those services. None of this was done. Overall, this paints a very negative picture of the District’s commitment to Jeffrey in Grade 3, a year in which the District knew he needed intensive remediation which it had recommended.

[809] Ms. Tennant said that she was not consulted about Jeffrey after she completed his intervention plan in the fall of Grade 3. She said that she would not usually go to a school unless a teacher made a referral to her. She agreed that it was probable that she was not called in with respect to Jeffrey because Braemar had then done everything that it could for him. However, Ms. Tennant did not need to be called in during Jeffrey’s Grade 3 year; she had been redeployed as a result of the cuts to the ELRT and was located in Braemar. She was therefore readily available to Ms. Ray and Ms. Waigh for advice with respect to Jeffrey. Apparently, she was not sought out in this regard.

[810] When asked about her lack of involvement in Jeffrey’s Grade 3 year, Ms. Tennant said:

Q  It’s fair to say in this case that you weren’t called because Braemar had done everything that it could for Jeffrey at that time?

A  Probably.

[811] The evidence disclosed that at the start of Grade 3, Jeffrey was still working at a Grade 1 level, and was unable to integrate the isolated skills that he had learned.

[812] I accept the evidence of Drs. Bateman and Feidorowicz that the interventions Jeffrey received were not provided early enough, nor were they intensive enough to appropriately accommodate his disability. Dr. Feidorowicz summarized the problem as follows:

...the school was aware of the significance and severity of Jeffrey’s difficulties. They did provide some supports, and some of the supports that they provided appear to have been consistent with the type of difficulty that Jeffrey was experiencing. However, importantly, he did not receive the supports soon enough, and the supports that he received were not
sufficient. This is significant since, although it is known that learning
disabilities, including dyslexia, are lifelong disabilities, the literature has
indicated for some time that the earlier the intervention and the more
intensive the intervention, the greater the likelihood of a successful
outcome.\textsuperscript{377}

[813] According to Dr. Bateman, Jeffrey’s lack of early intensive supports has harmed
him and caused him to “struggle unduly” ever since. Dr. Bateman concluded, and Dr.
Siegel agreed, that Jeffrey received no phonemic awareness training while at Braemar.
Dr. Bateman said that it was essential that Jeffrey have phonemic understanding before
moving to phonics. I accept that, within academic circles, the role of phonemic
awareness in reading difficulties was well-understood and documented. I also accept that
the teaching profession was not then as aware as it should have been of its importance.
However, I would have expected experts in the field of special education, like Ms.
Tennant, to have known of its importance. When Jeffrey was failing to progress, I would
also have expected District staff to have explored the literature for other options. There
was no evidence that this was done.

[814] The primary intervention Jeffrey received at Braemar was provided through the
LAC. Starting in February 1993, when he was in Grade 1, and until he left Braemar after
Grade 3, Jeffrey received three, 30-minute sessions per week with Ms. Waigh. While it
is clear that the one-on-one attention he received was unusual, and that Ms. Waigh was a
well-qualified specialist, the services were not intensive enough to meet his disability-
related needs.

[815] Ms. Waigh, who worked with Jeffrey for over two years in the LAC, testified that
Braemar considered increasing the length of his sessions but decided against doing so
because “it was pretty intense working one-on-one”. She did not ask his volunteer tutor,
or his Orton-Gillingham tutor, how Jeffrey coped in his longer sessions with them.

\textsuperscript{377} Ex. 8, Part IV, p. 1
Because of the demands of other students requiring the services, Braemar did not increase the number of days that Jeffrey attended the LAC with Ms. Waigh and the volunteer tutor. Ms. Waigh said that she was limited by available resources.

Drs. Bateman and Fiedorowicz testified that Jeffrey did not derive any meaningful benefit from the LAC. Ms. Tennant testified that the LAC was not intensive enough to meet Jeffrey’s needs. This is not surprising, because the LAC was never intended to provide services to SLD students. The 1985 and 1995 Manuals describe the LAC as a school-based service designed to assist students with mild to moderate learning problems within the regular classroom. Both Manuals clearly distinguish between those students intended to be served by the LAC and SLD students.

In cross-examination, Dr. Siegel appeared not to know that the LAC was never intended for SLD students. She opined, nonetheless, that Jeffrey had received adequate interventions at Braemar through the LAC.

I accept that the supports that Jeffrey received in the LAC were not sufficiently intense or effective to accommodate his learning needs.

There was, and perhaps continues to be, an educational debate whether it is appropriate or helpful to “label” a child as SLD. The debate, according to the evidence of Drs. Perry, Siegel and Bateman, was ongoing when Jeffrey attended Braemar. Dr. Siegel opined that the debate resulted in many school boards adopting a “wait and see” approach to dealing with children with learning disabilities. The wait and see approach assumes that many children grow or mature out of their learning difficulties and, as a result no interventions are necessary.

The wait and see approach, Drs. Siegel and Perry testified, remained a philosophy in education faculties. It is contradicted by growing knowledge about the importance of early intervention.

Jeffrey’s school records from Braemar contain some indication of a wait and see approach. Documentation in Kindergarten makes reference to District staff being unable to determine whether Jeffrey’s difficulties were a result of a learning difficulty or his age.
When Ms. Tennant tested Jeffrey at the end of Grade 1, she was still unable to “tease out” whether he had a learning difficulty or was just late to mature. Mr. Roberts noted, “factors show but he is too young to do full assessment”. Waiting and seeing is inconsistent with early intervention.

[823] Early intervention, as an educational concept, was not included in the 1985 Manual. Ms. Roch testified that the first Ministry document which referred to it was published in August 1996. It is apparent, however, from the expert evidence and research published between 1992 and 1994, that reading disabilities are a specific learning deficit and not a developmental lag and the importance of early intervention was understood in both academic and education settings. Vancouver had introduced the Reading Recovery program as a pilot project for Grade 1 students before 1991.

[824] The practical difficulty with a wait and see approach is that supplemental funding for a SLD student’s education program is only available from the Ministry after a student has been designated. While it is open to a district to provide interventions and supports prior to designation and without additional funding, and this was done for Jeffrey, intensive supports are available only after designation. After designation the District was able to provide the assistance of an Aide and, had it remained open, Jeffrey could have attended DC1.

[825] There was other evidence about the fact that students are not designated early enough. Ms. Stubson testified that KGS used to admit students in Grade 1 but has delayed admission to Grade 2 because few students are diagnosed as being learning disabled in Grade 1 and the students were too immature to respond to intensive remediation. Ms. Stubson testified that most students are not identified as having learning difficulties until Grade 3 or 4 and most start at KGS in Grades 4 or 5 because there is often a one-year wait for psycho-educational testing.

[826] Dr. Siegel and Ms. Tennant testified about the waits for a psycho-educational assessment that can often be as long as a year.
[827] In conclusion, for all of these reasons, I find that the District and the Ministry failed to ensure that Jeffrey’s needs were appropriately accommodated in the District. Without earlier and more intensive remediation, and without access to the DC1, or another appropriately intense and effective alternative, Jeffrey’s disability was not accommodated within the District.

The Systemic Case Against the Ministry

[828] The essence of Mr. Moore’s case against the Ministry is that it furthered the discrimination of the District by failing to live up to its unique responsibilities. He submits that the Ministry has an overriding moral and legal duty to ensure that special needs students have access to a free and appropriate public education. Nonetheless, he says, throughout this case, the Ministry has consistently tried to deny or minimize its responsibilities.

[829] Mr. Moore makes the following systemic allegations against the Ministry:

   a) it established the HILC cap which limited the available funding for SLD students;

   b) it underestimated the actual incidence of SLD students at 1-2% of the student population;

   c) it under-funded the District;

   d) it failed to monitor the effectiveness of programs for SLD students; and

   e) it did not make early intervention and a range of services for SLD students mandatory.

[830] Although the allegations were presented separately, to a certain extent they overlap. For example the issue of the 4% HILC cap subsumes the issue of the estimate of the prevalence of SLD students at 1-2%, because SLD students are one of the categories of learning disabilities subject to the HILC cap. In addition, the failure to monitor for results is part of an allegation of a general failure of the Ministry to mandate and monitor program delivery for SLD students.
Before turning to the specific allegations against the Ministry, I address their arguments about what is necessary to establish a case of systemic discrimination.

What is necessary to establish a case of systemic discrimination?

The mere fact that a complaint of discrimination includes allegations of a systemic nature does not change the fact that a complainant must establish, on a balance of probabilities, the elements of a *prima facie* case.

The Ministry submits that, in this case, which was brought as an individual complaint as opposed to a class or group complaint, to establish a case of systemic discrimination as against it, Mr. Moore must show that Jeffrey was discriminated against by the Ministry’s policies or actions. It acknowledges that he can do so by way of evidence of a direct or adverse impact on him but says he has been unable to establish either. Alternatively, the Ministry says Mr. Moore must show that some named individual within the group of SLD students was directly or adversely affected by the Ministry’s policies or actions. The Ministry makes this argument, in particular, with respect to the HILC cap because, it submits, the incidence of SLD students in the District never exceeded the 4% HILC cap and, hence, Jeffrey could not have been affected by it. It also submits that there was no evidence to establish that any other SLD student was affected by the HILC cap because there is no evidence of a student being denied services in any district as a result of its existence.

There have been very few cases which have analyzed the elements of a *prima facie* case of systemic discrimination in Canada. Most such cases arise in the employment context. Although many individual cases result in systemic change, and some have resulted in systemic remedies, the leading case remains the Supreme Court of Canada’s decision in *C.N.R. v. Canada (Human Rights Commission)*, (“*Action Travail des Femmes*”). In it, the Court adopted the following description from the 1984 *Report of the Commission on Equality in Employment* by Judge Rosalie Abella (as she then was):

> Discrimination … means practices or attitudes that have, whether by design or impact, the effect of limiting an individual’s or a group’s right to the opportunities generally available because of attributed rather than
actual characteristics …. It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone’s potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.

That is why it is important to look at the results of a system…. 378

[835] The Court went on to say:

In other words, systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of “natural” forces, for example that women “just can’t do the job” (see the Abella Report, pp. 9-10). To combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged…. 379

[836] The focus, therefore, was on barriers to participation and the practices and systems in place which led to an adverse impact.

[837] Recently, in Radek v. Henderson Development (Canada) and Securiguard Services (No. 3), a complaint arising in the services context, the Tribunal said:

In my view, the nature of the evidence necessary to establish systemic discrimination will vary with the nature and context of the particular complaint in issue. If the remedial purposes of the Code are to be fulfilled, evidentiary requirements must be sensitive to the nature of the evidence likely to be available. In particular, evidentiary requirements must not be made so onerous that proving systemic discrimination is rendered effectively impossible for complainants…. 380

378 [1987] 1 S.C.R. 1114, at para. 34

379 Action Travail des Femmes, supra note 378, at para. 34

380 2005 BCHRT 302, at para. 509
I agree with that finding. Given the problems with proof of the effect of systemic discrimination on a particular individual, the Ministry’s submission would have the effect of unduly limiting the very concept of systemic discrimination. It is group, rather than individual, focussed. Even if I accept that by application of Law, to prove an individual case of discrimination, a complainant must show an injury to dignity, the Supreme Court has not said that proof of individual injury to dignity must apply in a case of systemic discrimination, where the focus is not on the individual but on the group. The following comments of the Supreme Court in Law, with respect to the evidentiary burden on a s. 15 claimant, are even more applicable in the context of the burden in a systemic case:

First, I should underline that none of the foregoing discussion implies that the claimant must adduce data, or other social science evidence not generally available, in order to show a violation of the claimant’s dignity or freedom. Such materials may be adduced by the parties, and may be of great assistance to a court in determining whether a claimant has demonstrated that the legislation in question is discriminatory. However, they are not required. A court may often, where appropriate, determine on the basis of judicial notice and logical reasoning alone whether the impugned legislation infringes s. 15(1)...

Second, it is equally important to emphasize that the requirement that a claimant establish a s. 15(1) infringement in this purposive sense does not entail a requirement that the claimant prove any matters which cannot reasonably be expected to be within his or her knowledge....

In this case, because the obligation is to ensure that each student is able to meaningfully access education, Mr. Moore cannot be reasonably expected to prove the effect of the Ministry’s policies and actions on any one individual student. As I have said, each student will have different needs. The focus must be on the system in place to ensure than an individual needs-based assessment is possible and that sufficient supports and accommodations are provided.

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381 Law, supra note 337, at paras. 77-80
In my view, the goal of a systemic analysis in this case is to review all of the evidence about the education system to examine the way in which it operates, as a system, to ensure that it is accessible to SLD students in a meaningful way. If that evidence discloses that there are systemic barriers, through Ministry policies or actions, that do not facilitate access, then a finding of systemic discrimination should follow. As a result, it is not necessary that Jeffrey be directly affected by the systemic issues he complains of, or that I hear from other students that they have been individually affected. As the Court said in Law, such evidence may be of assistance, but it is not required. Systemic cases can be made out when the facts reviewed as a whole establish the discriminatory nature of a government policy. The evidence as a whole must be considered to determine if the actions or inactions of the Ministry have the effect of limiting access to educational services for SLD students.

I note that in Eldridge, Mr. Justice La Forest noted that it was not strictly necessary for him to decide whether the particular plaintiff’s rights were breached:

This Court has held that if claimants prove that the equality rights of members of the group to which they belong have been infringed, they need not establish a violation of their own particular rights.\textsuperscript{382}

This finding in Eldridge was adopted by Madame Justice Allan in Auton, when accepting the government’s arguments and declining to certify a class action.\textsuperscript{383}

To require Mr. Moore to call evidence of any student who has been affected by the policies is to view systemic discrimination through the same lens that has been created to review cases of individual discrimination and is, in my view, a much too narrow focus. Consider the 4% HILC cap as an example. To say that Jeffrey cannot claim systemic discrimination with respect to it because he was lucky enough to live in a district without

\textsuperscript{382} Eldridge, supra, note 318, at para. 46

\textsuperscript{383} Auton (Guardian ad Litem of) v. British Columbia (Minister of Health), [1999] BCJ. No. 718, at paras. 46-48
more than 4% HILC students puts the focus on his individual circumstances, not on the systemic structures. The focus should not be on the individual circumstances but on the group and on the structures which the Ministry has put in place to accommodate the group and the individuals in it.

[844] I now turn to the specific allegations against the Ministry.

[845] The Supreme Court of Canada has recognized that in the sphere of education, the focus of the accommodation efforts must be on the needs of each child. In Eaton, the Court took judicial notice of the fact that learning disabled students may require an alternate setting to meet their disability-related needs:

…While integration should be recognized as the norm of general application because of the benefits it generally provides, a presumption in favour of integrated schooling would work to the disadvantage of pupils who require special education in order to achieve equality. Schools focussed on the needs of the blind or deaf and special education for students with learning disabilities indicate the positive aspects of segregated education placement. Integration can be either a benefit or a burden depending on whether the individual can profit from the advantages that integration provides. 384

[846] For the reasons that follow, I find that Mr. Moore has established a prima facie case of systemic discrimination by providing sufficient evidence to show the broader impact of Ministry policies and actions on SLD students.

Block Funding

[847] As discussed above, under block funding, the Ministry was essentially the sole source of funds for education. Block funding, and the fiscal framework, divided government funds allocated for education between the districts. Based on formulae, a

384 Eaton, supra note 361, at p.274
district’s share of the block was determined, but due to variable factors, the per student amount in each district differed.

[848] Mr. Gage acknowledged that block funding stressed as important goals predictability and simplicity (economic and administrative efficiency). In the interest of achieving these goals, the Ministry did not always consider circumstances particular to each district. So, for example, the provisions of the District’s Collective Agreement, which were a real cost to them, were not reflected in its share of the block.

[849] Mr. Gage conceded that the goals of equitable access for special needs students, and the desire for simplicity, were at odds with each other and that the Ministry had to make choices between the two. One example of this is the HILC cap.

[850] The LDABC argued that the Ministry knew, when it introduced block funding, that it would have a detrimental effect on SLD students. The evidence did not support that conclusion. However, as I set out below, the HILC cap and the particular application of block funding to the District are problematic.

The HILC Cap

[851] As discussed in detail above, the Ministry first established the HILC cap in 1987 and, at the time of the hearing, it was at 4%. Over time, the categories of mild intellectual disabilities and severe behaviour problems were removed from the HILC cap and separately funded. A new category, moderate behaviour problems, was added to those disabilities subject to the cap. SLD students have always been subject to it.

[852] Under the HILC cap, a district is entitled to funding for up to 4% of their full-time enrolled students. Identifying more students does not result in additional funding. Mr. Gage conceded that the HILC cap was brought in not to fund need, but to control the numbers of students being identified.

[853] The Ministry submits that the HILC cap was used simply as a method to determine how to allocate finite funds between the school districts. The supplemental funding for SLD students was not prescriptive of the amount of money that could, or should, be spent
by districts on SLD students. Districts were expected to use the block funds given to them by the Ministry to provide all students, including those with SLDs, with educational programs. Because the block was fixed, the Ministry says that increasing the HILC cap, or removing it, would require a corresponding decrease in funding in another program. Mr. Gage testified that, typically, that would be in the overall per-pupil amount. As a result, the Ministry submits that the districts which complain about the HILC cap have misunderstood it.

[854] The existence of an HILC cap, which limits funding regardless of actual incidence, is *prima facie* discriminatory. The result of the HILC cap is that the actual needs of students, to the extent numbers exceed the cap, will not be funded through specific supplemental funds. Districts will be required to find the funding elsewhere within their budgets or not to provide necessary services. Such a discriminatory effect can only be justified if the Ministry can establish that it would cause undue hardship to fund actual incidence levels, an argument I return to later.

[855] The Ministry was unable to explain fully how it arrived at the level of the cap, and it knew, or at least had reason to believe, that the HILC cap was less than the actual incidence. Mr. Gage could not recall how the initial level was chosen. He believed that it was based on actual incidence reported in 1987. He prepared a chart, which he used in his evidence, to explain the level of the cap. The chart was not a document that had otherwise been prepared by the Ministry. It was prepared solely for the purposes of this hearing.

[856] I concluded, after cross-examination, that I could not rely on the chart. Mr. Gage acknowledged, when shown the evidentiary record indicating that school districts may have been under-reporting numbers of HILC students, that the numbers in it were likely too low.

[857] Further, Mr. Gage acknowledged that his chart was incomplete because it did not show the numbers of students, the percentage they represented, or the unfunded amount. Mr. Gage was presented with a revised chart, submitted on behalf of Mr. Moore, reflecting the missing information. For each year in question, it showed that the Ministry
funded less than the actual incidence. As a result, Mr. Gage’s chart, and the hypothesis he used it to support, did not hold up to a probing analysis. Even without taking into account that the reported numbers were likely low, the revised chart consistently showed that funding available under the HILC cap was less than the incidence level.

[858] Ms. Roch also conceded, and Ministry documents indicated, that the HILC cap created an incentive for districts to under-report HILC students.

[859] Mr. Kelly’s evidence, on behalf of the District, provided an example of how the existence of an HILC cap could be used by a district which was under financial pressure. Following the 1994/95 budget cuts to services for SLD students, the District continued to be faced with spiralling financial problems. In particular, the open-ended Aide hours that could be allocated under the Collective Agreement was of concern. Believing that it had already identified up to the HILC cap, the District advised staff not to identify any more students. When the District realized that it was below the cap, but still faced financial pressure, it implemented a cost saving strategy of delisting students and encouraging principals not to identify further students.

[860] Further, documents put to Mr. Gage show that the Ministry knew in 1989 that the HILC cap was too low and that it penalized districts and the students they were trying to serve. Concerns about the adequacy of the funding were brought to the Ministry’s attention through the committee reviewing the Financial Management System for 1988/89. The Special Education Branch recommended, for the committee’s consideration, that the “artificial” cap be increased to a more realistic, though admittedly conservative, estimate of prevalence of 4.35%. Nonetheless, the Ministry chose a cap of 3.5%, lower than the most conservative estimate.

[861] The majority of districts consistently reported a higher number of students in the HILC program than they received funding for. Mr. Gage acknowledged that providing funding at a level less than actual incidence penalized districts. Ms. Roch acknowledged that the Ministry received criticism about the adequacy of the HILC cap from a number of different sources including teachers, administrators, and independent reviewers. They advised the government that the HILC cap was unfair, and asked the Ministry to fund the
HILC category of students on an actual incidence level. The 1997 LAC Review, commissioned by the Ministry reached the same conclusion. Submissions to the 1999 Review repeated the concerns. Further, the Ministry set the HILC cap without considering how it would impact on districts with special populations where the incidence of HILC students was extremely high.

[862] As set out above, within the HILC cap, the Ministry estimated that SLD students represented 1-2% of the student population. However, the Ministry set that prevalence level without consulting with experts or undertaking any studies. In fact, the information that was available to the Ministry indicated that, in most districts, the incidence was higher than 1-2%, and in some, significantly so.

[863] The Stikine school district consistently reported SLD incidence of between 12% and 15%, the Quesnel district reported a 7.7% incidence, and the Cranbrook district had similarly high numbers. As a result, these districts were disproportionately disadvantaged by the HILC cap, as were the students they attempted to serve. With respect to the Stikine, Mr. Gage’s evidence was instructive. He said:

[...]

[864] Implicit in his evidence is the view that a district will have excess funds in other areas of its budget which it can use to provide services to SLD students. The evidence did not support that view. In addition, that funding is not targeted and is subject always to the demands in other areas of the budget, resulting in the needs of SLD students being weighed against the needs of other district programs. It is exactly this that s. 129.1 and s. 125.1 of the School Act was intended to prevent by guaranteeing that funds for special needs programs would be spent on them and for the groups which they were intended to benefit.
The HILC program was one of the programs subject to s. 125.1. Districts were required to spend funds in that program for SLD students. If districts moved funds from other areas of their budget to support the SLD students that they had designated in excess of the cap, then there was no guarantee that those funds would continue to be spent in that program area. They could be cut or reallocated. In this regard, it is instructive to note that in his report to the Ministry with respect to possible further cuts in the District, the Official Trustee suggested:

Funding for Special Education, based on the Ministry of Education targeted grants, amounts to $10.55 million in 1995/96. The District has budgeted to spend $12.98 million, or $2.43 million more than the grants. Most of the services provided to students with special needs are defined in legislation or contract. Services provided through policy, not through contract, can be reduced. It is noted that further cuts will reduce services to those students who are in greatest need for extra support. Section G in Chapter IV above indicates that special education programs have been reduced by 13 FTE teachers and 4 FTE aides between 1992 and 1994.

Cuts in these areas were only possible because the funds allocated to them were not targeted.

The Ministry consistently refused to address the issue of the HILC cap. According to Mr. Gage, it had no “appetite” to do so, in spite of the concerns that were raised.

In conclusion, with respect to the existence of the HILC cap, Mr. Moore has established a prima facie case of systemic discrimination. The evidence was clear that the Ministry set the HILC cap to control the number of students designated in the categories of disability subject to it and that it is aware that actual Provincial incidence exceeds the HILC cap. The Ministry also knew that the effect of the HILC cap was to create a disincentive for districts to designate more students than they would receive funding for because districts would have an obligation to provide services without receiving additional funding to do so.

The Ministry consistently ignored district requests for assistance even though it knew that the funding under the HILC cap “penalized” them. I have concluded that the cap is discriminatory. Further, having a cap that is rigidly applied in a uniform manner
across all districts, regardless of need, compounds that discrimination and is inconsistent with fundamental human rights principles.

Under-funding the District

[870] The Ministry also knowingly under-funded the District by approximately $1.5 million per year, and refused to address this shortfall, even when it knew of the District’s increasingly dire financial circumstances and that it was cutting specialized programs. The TDG Report recommendations highlighted the under-funding but, despite repeated pleas from the District, the recommendations of the TDG were not implemented until after the Official Trustee was appointed and, then, only in part.

[871] As a result, the District made significant cuts to its services for SLD students.

Early Intervention and a Range of Services not Mandatory

[872] Neither the 1985 nor the 1995 Manual makes early intervention or a range of services mandatory. Dr. Perry testified that many teachers are unfamiliar with the contents of the 1995 Manual. Her evidence was confirmed by the 1999 Review. Dr. Brayne, in cross-examination, did not appear to know the distinction between integration and inclusion. He assumed that Ministry resources would only be available to support the goal of integration. The Ministry auditors seemed to think it was entirely appropriate to fully integrate all SLD students into the regular classroom. There was a great emphasis on integration. Ms. Roch conceded in cross-examination that the push to integration was achieved to the detriment of students who required a different level of service.

[873] The Ministry is aware of the importance to SLD students, and to the education system, of early intervention programs. However, it has no mandatory early intervention policy. Surprisingly, Dr. Siegel testified that only 20% of districts were starting to offer such programs. The Ministry did not contradict that evidence. In fact, in August 1996, when it released its paper *Early Intervention of Learning Difficulties*, it was intended to
provide background information to school districts who were interested in establishing early intervention programs. Clearly, the Ministry knew that some had not yet done so.

[874] The Ministry has also failed to ensure that a range of services and settings, appropriate to meet the needs of SLD students, is offered and maintained by districts, despite the Special Needs Student Order which is discussed above. Both the 1985 and 1995 Manuals indicate the need for such a range.

[875] Advocacy groups for learning disabled students, including the LDABC, raised concerns throughout the 1990s that services, including intensive remediation settings, were disappearing. The Ministry was put on notice of this by the LDABC on at least two separate occasions an that it was to the detriment of SLD students. The Ministry did not respond.

[876] Further, in April 1994, the Ministry was advised by parents that the only specialized setting for SLD students in the District was being closed. Without exception, they were referred back to the District.

[877] The concerns expressed about the District were not particular to it. Other districts were also closing intensive remediation settings for financial reasons, again to the detriment of SLD students. Dr. Overgaard testified that, until 1997, Vancouver had centres much like the DC1. They were pull-out programs where students received intensive instruction from specialist teachers for 12 weeks before being integrated back into their regular classrooms with a plan for their ongoing support by the classroom teacher. In 1997, those programs were restructured with fewer staff, and were cut at the end of 1999. Dr. Overgaard testified that Vancouver would be happy to reinstate those programs because the district, parents, and its Special Education Advisory Committee all believed the model was successful. It could not afford to in light of the HILC cap, and the failure of the Ministry to fund the actual incidence of HILC students.

[878] Dr. Chapman concluded that the District’s lack of alternate settings adversely affected the needs of SLD students who were “underserved”. Though aware of the
Chapman Report, the Ministry did not ensure that services were restored or alternative services provided.

[879] Under its authority, whether by Ministerial Order, legislative amendment, or by specific targeted funding, the Ministry has the legal capacity to make both early intensive remediation and a range of services mandatory. On a policy basis, it has chosen to leave those decisions to the districts. It did not, however, hesitate to step in and replace the District’s Board when it had financial concerns. The Ministry must intervene when it knows that supports and accommodations which allow SLD students to access educational services are not being provided or are insufficient.

Failure to Monitor

[880] The Ministry has broad duties to oversee the work of school boards but, other than the collection of data with respect to special education, and the power to audit whether funding criteria are being met, the Ministry imposes little systemic accountability. As Ms. Roch and Mr. Gage testified, the Ministry does not audit to ensure that districts’ special programs meet the needs of individual students or groups of students. Ms. Roch admitted the Ministry’s deficiency in this regard. It monitors for financial compliance only.

[881] Dr. Siegel testified that the Ministry did not have a standard for monitoring the success of interventions. There were standards for the designation of a student as SLD but, thereafter, the responsibility for monitoring was that of the districts.

[882] In its submissions to the 1999 Review, Vancouver recommended that the Ministry move to “educationally” rather than “fiscally” focussed accountability mechanisms to measure how effectively government money was spent in meeting the goals of each student’s IEP.

[883] In particular, the Ministry fails to monitor to ensure that districts are providing early intervention and a range of services for SLD students, both of which I have
determined to be necessary to ensure that SLD students are able to access the benefits of an education program and, hence, are critical to the equality interests of SLD students.

[884] The combination of under-funding, the Ministry’s failure to ensure that necessary services are mandatory, and the failure to monitor the activities of the districts, led to the disastrous circumstances that faced Jeffrey and other SLD students in the District. When a number of concerned individuals wrote about the District’s cuts to special education and the closure of the DC1, the Minister’s response was to refer them back to the school Board who, in turn, said decisions were being made in response to a financial crisis created by the lack of Ministry funding. When an audit was done by the Ministry of the District’s special needs program, it was a financial audit, not a service delivery one.

The 1997 LAC Review

[885] The District reorganization in 1994, which placed a burden for meeting the needs of SLD students on the LAC, was not an anomaly. The Ministry was aware that the services replacing disappearing specialized settings were mainly being provided by the LACs, a program not designed or resourced to provide the specialized services that were required. The Desharnais Report concluded that LAC services were being swamped by SLD students that it was ill-equipped to serve and many SLD students received their only special education service in the LAC. These concerns were the subject of a special briefing note to the Minister which conceded that SLD students did not have access to appropriately intense services, and led to a significant delay in the release of the report.

[886] The Ministry did not take any concrete steps to address the concerns in the Desharnais Report. Two years later, when commissioning the 1999 Review, the Ministry did not ask the reviewers to consider the enhanced role of the LAC in the delivery of special education services. The 1997 LAC Review is only briefly mentioned in the 1999 Review; it recommended that the Desharnais Report be recirculated.
Summary of Findings Against the Ministry

[887] In summary, I find that Mr. Moore has established a *prima facie* case of systemic discrimination against the Ministry. Based on all of the evidence, I have concluded that the Ministry discriminated by: establishing and maintaining the HILC cap and, as a result, underfunding the actual incidence of the students subject to it, including the SLD category; underfunding the District through not implementing the recommendations in the TDG report until after the District experienced a financial crisis that resulted in significant cuts to the services provided to SLD students; and by focussing its monitoring only on spending and fiscal concerns and failing to ensure that early intervention and a range of services for SLD students was mandatory.

The Systemic Case Against The District

[888] In addition to failing to provide Jeffrey with the services he needed, Mr. Moore submits that the School District systemically discriminated against all SLD students in three ways:

a. by disproportionately cutting special needs services;

b. by planning how to limit services to existing and future special needs students purely to address fiscal concerns; and

c. by closing the DC1, the only service which provided unique and necessary services for SLD students, without analysis of the impact it would have on those students, and without having sufficient alternative supports in place to replace it.

[889] Jeffrey attended Braemar in the early 1990s when the District faced an ever-worsening financial situation which eventually led to the appointment of an Official Trustee. During this time, the District made deep and substantial cuts to education services for SLD students.

[890] In 1992, it eliminated the diagnostic centres for special needs students with severe behaviour problems. In 1994, it eliminated the ELRT and reassigned its members. Each psychologist was assigned to three schools to provide psychological services for all special needs students on a 0.75 FTE basis. The balance of their time was to provide
District-wide psycho-educational assessments. Ms. Tennant testified that when Jeffrey attended Braemar, she had a long list of students waiting for a psycho-educational assessment. Also in 1994, the District closed the DC1.

[891] The District and the Ministry acknowledge that disabilities vary in severity. Students with disabilities require a range of services, from full integration into the regular classroom with supports, to full or partial instruction in a specialized class. This is particularly true of SLD students, whose disabilities vary significantly in severity.

[892] Both the 1985 and 1995 Manuals, as well as Ministerial Order 150/89, make clear that a range of settings must be available to meet the needs of disabled students. The Ministry’s policies focus on the needs of the individual child as governing. All of the expert evidence, with the exception of Dr. Siegel, was consistent that SLD students require a range of services and settings. Journal articles filed by other experts in the field also supported that view.

[893] Ms. Tennant also agreed that SLD students required services in an intensive setting. The DC1 was the only setting in the District that offered intensive remediation. After its closure, the District did not have such a setting. Dr. Chapman noted this in 1998 in his comprehensive review of the District’s special education services.

[894] The financially-driven restructuring undertaken by the District did not address the void created by the closure of the DC1. As set out above, the documentary record indicates that the need to reorganize "sprang quickly" from the District’s financial crisis. While Mr. Kelly testified that the closure of DC1 had been considered on a philosophical basis prior to its implementation in 1994, there were no documents which confirmed his evidence in that regard. I was not persuaded by his evidence because the documentary record contradicted it and shows that the decision was driven by financial considerations.

[895] Prior to making the decision, the District did not undertake a needs-based analysis, consider what might replace DC1, or assess the effect of the closure on SLD students. Ms. Waigh and Ms. Tennant, despite their role in providing services to SLD students, were not consulted with respect to it.
The District had no specific plan in place to replace the services provided by the DC1. The details were left to be worked out. The philosophy for the restructuring was not prepared until two months after the decision had been made. The philosophy contemplated that all students would be integrated into the regular classroom, regardless of their individual needs and whether the classroom teacher was then qualified to teach students who would previously have received services in DC1. This philosophy is contrary to Ministerial Order 150/89, the policy of inclusion set out in the 1985 and 1995 Manuals, and does not take into account the individual needs of a SLD student as is required by Eaton.

The plan, once it was finalized, was that the LAC, the classroom teacher, and Aides would provide the support to SLD students and replace the services previously provided by the DC1. The LAC became the central “plank” for the delivery of services for SLD students. It was ill-suited for the task. By definition, and purpose, it was never intended to deal with SLD students.

I accept Dr. Perry’s opinion, as supported by the Ministry’s 1985 and 1995 Manuals, that “learning assistance services should serve as a screen or ‘first line of defence’ for students with more serious learning and behavioural problems, not as the primary provider of direct service from special education.”

The District recognized that the teachers expected to take over from the DC1 experts were under-qualified for this task and referred to the major “role refinement”, “skill acquisition” and “perspective shift” that would be required. Perhaps even more concerning was that it all had to occur very quickly, within weeks, as the next school year was about to start. The schedule of in-service courses for the LAC and classroom teachers indicated that the first of such courses was not offered until October 1994, and was optional. By that time, SLD students were already enrolled in classes and both the LAC and classroom teachers were already providing service.

Parents, including Ms. Moore, expressed concern over the closure of the DC1 and the apparent lack of anything tangible to replace it. Expert staff in the District expressed concern about the “massive cutbacks” and the impact on their ability to meet the needs of
SLD students. The Ministry was aware of the cuts and the concerns raised with respect to them.

[901] To be clear, it is not the closure of the DC1 in and of itself that failed to meet the needs of SLD students; it was the failure to provide alternate services of sufficient intensity and effectiveness to replace it. Dr. Bateman said the location of the intervention was less important that what went on in it and Dr. Perry would prefer that intensive services be school-based rather than referring students out to diagnostic or remedial centres for intensive support for a short period of time. Had the District put in place sufficient intensive remedial supports at a school level, they would have met their obligations to SLD students.

[902] As a result of all of the foregoing, I conclude that the District systemically discriminated against all of its SLD students when it disproportionately cut services to them. In addition, I find that when making those cuts, including closing the DC1, it did not analyze the impact on SLD students and did not ensure that it had sufficient alternative services in place to replace the intense services previously provided by the DC1. The closure of the DC1 affected all those students who were eligible to attend it and those former students who were entitled to the ongoing assistance its staff provided after they returned to the regular classroom.

**Summary of Findings Against the District**

[903] In summary, with respect to the District, I find that it discriminated against Jeffrey by: failing to ensure that he received early intensive intervention; not providing him with an individual needs-based assessment; not providing Orton-Gillingham or another alternative program within the District; not following their own recommendation that he attend the DC1; and not ensuring that, following the DC1 closure, other sufficiently intense and effective interventions were in place to replace it.

[904] I also find that the District discriminated against all of its SLD students by: closing the DC1 without ensuring that other sufficiently intensive interventions were
available thereafter; not ensuring that there was a range of services for SLD students adequate to their needs; and disproportionately cutting core services for SLD students.

[905] I now consider whether the discrimination which I have found can be justified.

Justification

[906] Once a complainant has established the elements of a prima facie case, in a complaint of discrimination in the provision of services, the onus shifts to a respondent to prove, on a balance of probabilities, that there was a bona fide justification for the applicable standard or policy under the test set out by the Supreme Court of Canada in Grismer. To meet that burden the respondents must show that:

1. it adopted the standard for a purpose or goal that is rationally connected to the function being performed;

2. it adopted the standard in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal; and

3. the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.\(^\text{385}\)

[907] The application of the Grismer analysis in a case in which the whole focus is whether Respondents have provided appropriate accommodations, and where the allegations are of a systemic nature, is difficult. What is in issue here is not a single standard, but a series of interrelated decisions and the application of policies, all of which affected the services available to SLD students within the provision of funding by the Ministry. Such cases do not fit neatly into the Grismer analytical framework. Despite that difficulty, I will apply the Grismer factors as modified to fit the circumstances of this case.

\(^{385}\) Grismer, supra note 364, at para. 20, see also British Columbia (P.S.E.R.C.) v. B.C.G.S.E.U., [1999] 3 S.C.R. 3, at para. 54
There were widely divergent submissions from the parties both with respect to the function(s) in which the District and the Ministry were involved and with respect to the applicable standard(s).

Mr. Moore says that the function is to ensure that students have equitable access to core educational services, regardless of their disability. He says that the standard applied was the exclusion of certain students from those core educational services.

The District says that its function was to provide its students, including Jeffrey and other SLD students, with an appropriate education. They say the standard adopted was the program of interventions and remediations which the District put in place for Jeffrey. They say, further, that the program is a matter of education policy best left in the hands of professional educators.

As I understand the Ministry’s submission, it adopts the function described by the District, and says that the standard applicable to it is: providing a framework for the provision of educational services to children in the Province by enacting the School Act, which empowers districts to decide how educational programs will be delivered; setting broad policy; and distributing finite resources, allocated to the Ministry, between the districts. In particular, with respect to the HILC cap, the Ministry says the standard is the use of a formula to distribute finite resources between the districts.

In this case, I have determined that the service the Ministry and the District are engaged in providing is educational services. That is the function in issue. The general function of both the Ministry and the District, as set out in the School Act, the Education Policy, Ministry Manuals and Ministerial Orders, is to ensure equitable access to educational services for all students, regardless of disability. In this case, they must

386 The Ministry refers to this as the standard, but in the context, must be taken to mean the function.
provide the necessary supports and accommodations so that the access for SLD students is meaningful.

[913] In the context of that service or function, what is the standard that was applied?

[914] I do not agree with the characterization of the standard suggested by any of the parties. Mr. Moore’s characterization assumes an exclusionary rule that has not been shown on the evidence. The District’s submission, as it did in the comparator group analysis above, focuses on the services provided to Jeffrey and other SLD students, that is its accommodation efforts, and if accepted would have the effect of protecting its decisions from a human rights review even if the decision was to provide a minimal level, or no services, to SLD students. In my view, the District has confused its function with the standard it established in performing that function.

[915] The Ministry’s submission, as it did with respect to the definition of services, would limit its responsibility to the establishment of a framework for education in which responsibility is delegated to the districts. As I have said, the ultimate responsibility for providing education services rests with the Province. In delegating that responsibility to school boards, the Ministry has a responsibility to monitor their delivery of service. While the School Act does not contain a specific provision requiring the Ministry to monitor the delivery of services, that obligation flows from its constitutional responsibilities and, despite the legal submissions made, was accepted by Ms. Roch in her evidence and is the subject of continuing discussion in the documentary record set out above. As was said by the Supreme Court in Eldridge, the Ministry cannot escape its responsibilities by devolving them on the districts.

[916] In my view, the appropriate standard is: the Ministry and the District will provide support and accommodation services to Jeffrey, and other SLD students, to allow appropriate and meaningful access to the benefits of the educational system, based on then known best practices and available resources.
Was the standard adopted for a purpose rationally connected to the function being performed by the Ministry and the District?

[917] I accept that the standard, as I have outlined it, is rationally connected to the provision of educational services. Neither the District nor the Ministry can be expected to provide services on other than what were the then known best practices. Further, it must be acknowledged that government funds are not infinite and some limits on funding have to be established to ensure that the District and the Ministry are able to carry out the function of providing educational services as balanced against the Province’s other constitutional responsibilities.

Was the standard adopted in good faith?

[918] Mr. Moore does not challenge the bona fides of either the Ministry or the District in relation to step two of the Grismer test. I accept that the standard was adopted in good faith.

Can the Ministry and the District accommodate Jeffrey and SLD students without undue hardship?

[919] Under the third step of the Grismer test, the evidentiary burden is on the Ministry and the District to establish that they cannot accommodate the needs of Jeffrey, and SLD students like him, without incurring undue hardship.

The Ministry

[920] With respect to the Ministry, to establish undue hardship, it must lead evidence to establish that it considered and rejected all viable forms of accommodation. The evidence did not support that such an analysis was undertaken here. The Ministry has failed to set policies and standards which protect the equality rights of SLD students. Throughout the 1980s and 1990s the Ministry stopped providing direct services to them, by closing Provincial Resource Programs. Instead, the Ministry devolved all responsibility for program delivery onto the districts, with, as I have previously found,
inadequate resources to do so. In establishing the HILC cap and maintaining it at 4%, a level the Ministry knew was below actual incidence levels, and would penalize districts with incidence levels exceeding the HILC cap, thereby adversely affecting those students in the capped HILC program. It further knew that the HILC cap created a disincentive to identify SLD students.

[921] This is contrary to the requirements of Meiorin and Grismer, which require a respondent to consider the impact of its standards, and choose the least discriminatory alternative. Here there was no attempt to do so. The Ministry not only failed to institute less discriminatory solutions, it did not consider reasonable alternatives to meet the individual needs of this group.

[922] The Ministry failed to implement the recommendation in its 1997 LAC Review to abolish the HILC cap and fund the capped HILC categories of disabilities on an actual incidence basis. It also failed to follow the recommendations of the TDG to fund the District adequately, even when it knew that, as a result, the District was reducing the services it had earlier provided to SLD students in response to its funding crisis.

[923] The Ministry did not explore the option of operating programs like the DC1 itself, assisting the District to run it, operating such programs in conjunction with one or more districts, or requiring the districts to cooperate in offering such programs. The Ministry did not respond to a request by the Vancouver School District to reinstate a Provincial Resource Program for SLD students or explore other options for delivery of services to students whose needs were not being met in the public system.

[924] The Ministry ignored the warnings of groups like the LDABC, and others, that the settings necessary for SLD students were disappearing, and, in particular, failed to consider the requests of parents of children in the District to protect the DC1. It did not make any serious inquiry into the District’s plans for service delivery after its closure. When told that plans were uncertain for what would replace the DC1, there was no evidence of any follow up.
The only undue hardship argument raised by the Ministry has been cost. While cost can be a consideration in concluding that there is undue hardship, in the context of special education services for vulnerable students it plays a limited role. In *Grismer*, the Supreme Court of Canada commented that respondents providing public services should be wary of citing cost as a justifying factor in discrimination against the disabled:

> The Superintendent alluded to the cost associated with assessing people with H.H., although he offered no precise figures. While in some circumstances excessive cost may justify a refusal to accommodate those with disabilities, one must be wary of putting too low a value on accommodating the disabled. It is all too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment. This Court rejected cost-based arguments in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at paras. 87-94, a case where the cost of accommodation was shown to be modest. I do not assert that cost is always irrelevant to accommodation. I do assert, however, that impressionistic evidence of increased expense will not generally suffice. Government agencies perform many expensive services for the public that they serve. Moreover, there may be ways to reduce costs. For example, in this case the Motor Vehicle Branch might have used simulators or tests available elsewhere. The Superintendent’s evidence did not establish that the cost of accommodation would be excessive and did not negate the possibility of cost-reduced alternatives. It was therefore open to the Member to reject the Superintendent’s argument based on cost.  

In the circumstances of this case, I am persuaded that cost as a justification for a failure to accommodate should be approached even more warily because of the nature of the interests at stake. What is at stake is access to education services for vulnerable students and a statutorily mandated responsibility to provide that service. It would be only in the rarest of circumstances, which I am satisfied do not exist here, that the failure to provide appropriate supports and accommodations to a vulnerable group could be justified on the basis of cost. In any event, the Ministry led no evidence on what it would cost to remove the HILC cap and fund programs for SLD students on an actual incidence basis. Nor did they lead evidence that there would be any additional cost associated with

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387 *Grismer, supra* note 364, at para. 41
monitoring the delivery of support services by the districts or making early intervention and a range of services mandatory.

[927] The Ministry argued that, because the block is established by the Ministry of Finance and Treasury Board, increasing the available funding to SLD students would result in less funding in another program, most probably, funding for instruction of all students. I find this argument untenable, for that is exactly what is happening now. Districts who identify and provide service to SLD students in excess of the HILC cap are taking that money from other functions for which they receive funds. As a result, the true cost of providing a necessary level of service is hidden and, as I set out above, is not protected by the targeting provisions in the School Act. Further, the Ministry did not lead any evidence that requests for additional funds in the budget process, in light of concerns about meeting human rights obligations, would be rejected.

[928] In any event, and more importantly, there was compelling evidence that not providing appropriate supports and accommodation to SLD students would cost the Ministry and the Province both in the short and the long term. The expert evidence was unanimous that, even in the relatively short term, it costs the Ministry more in resources (with less beneficial effect) to remediate a child who has been denied sufficient supports in the early primary grades. In addition, the experts agreed that failure to provide adequate supports and accommodations to SLD students costs the Province more overall in the criminal justice and mental health systems. The personal and social costs occasioned by a failure to provide adequate services to SLD students are incalculable.

[929] Finally, the Ministry is in a much better position to accommodate the cost of basic education for SLD students than families like the Moores, who, on a modest income, had to place their child in an expensive setting to get his basic needs met. On balance, it is a greater hardship for families to bear the burden of education than for the public bodies statutorily mandated to provide the service. Further, while Jeffrey was lucky that his parents were able to support him and to purchase the services that he needed, it is beyond the means of many families to pay for such services. The evidence is clear that these children, in turn, will only cost society, and the government, more in the long run.
I, therefore, conclude that the Ministry has not established that it has accommodated SLD students to the point of undue hardship.

The District

The District’s financial circumstances are more compelling and I was sympathetic to their plight. The District submits that there were no other alternatives available to it and, as a result, it has established undue hardship.

Following its release, the District sought to make submissions on the application of Newfoundland (Treasury Board) v. N.A.P.E. and all parties were invited to do so. I have chosen to consider those submissions here.

The District submits that Newfoundland stands for the proposition that where there is a financial emergency or crisis, Charter, and by analogy Code, rights may be infringed where necessary to promote other values of a free and democratic society.

The District submits that it faced undue financial hardship in the 1990s and that the cuts it made to services for SLD students were based solely on the need to balance its budget in the face of increased expenditures and decreased funding from the Ministry. It submits that the hardship was as a result of: the implementation of block funding and the elimination of the District’s local taxing power; elimination of the special purpose grants; the Ministry’s failure to implement the recommendations of the TDG; budget cuts which, by the end of 1994/95 exceeded $17.5 million; the Compensation Fairness Act; the cap on administration resulting in a low of $314,000; increased costs passed on to the District by the Ministry; the shrinking unallocated block due to Ministry prescription with respect to the expenditure of funds and the increase in targeted funds; and a three-year Collective

388 2004 SCC 66
Agreement (1992-1995) which called for salary increases in the third year which were not funded by the Ministry.

[935] It submits that the critical state of its finances was known to the Ministry and is evidenced by the Ministry’s decision to appoint an Official Trustee. At that point, the District had an accumulated deficit of $5.462 million and had made budget cuts of over $17.5 million.

[936] In my view, the analysis in *Newfoundland*, under s. 1 of the *Charter*, is analogous to the undue hardship analysis that is undertaken in the third step of the *Meiorin* and *Grismer* analysis. I accept that a financial crisis can amount to undue hardship in particular circumstances. I have already cited the Supreme Court’s warning about putting too low a value on accommodating the disabled. It is also important to note what the Supreme Court said in *Newfoundland* about the role of financial pressures in the context of infringing *Charter* rights:

…At some point, a financial crisis can attain a dimension that elected governments must be accorded significant scope to take remedial measures, even if the measures taken have an adverse effect on a *Charter* right, subject, of course, to the measures being proportional both the fiscal crisis and to their impact on the affected *Charter* interests.

…

The result of all this, it seems to me, is that courts will continue to look with strong scepticism at attempts to justify infringements of *Charter* rights on the basis of budgetary constraints. To do otherwise would devalue the *Charter* because there are *always* budgetary constraints and there are *always* other pressing government priorities. Nevertheless, the courts cannot close their eyes to the periodic occurrence of financial emergencies when measures must be taken to juggle priorities to see a government through the crisis. It cannot be said that in weighing a delay in the timetable for implementing pay equity against the closing of hundreds of hospital beds, as here, a government is engaged in an exercise “whose sole purpose is financial”…

389 *Newfoundland*, *supra* note 388, at paras. 64 and 72
[937] The effect of these decisions is to require a court or tribunal to weigh the financial hardship to a government service provider against the Charter or Code rights at stake. In this case, in weighing the Code right at stake, and the life-long impact of failing to provide appropriate supports and accommodations to SLD students to enable them to access educational services, I am persuaded that an infringement of the right should not be justified based on the District’s budgetary situation or on the basis that the District was unable to meet its obligations because of undue hardship.

[938] First, there was no evidence that the District reasonably considered a range of alternatives to meet the needs of SLD students before cutting available services. The District had some discretion. The Official Trustee identified a pattern of District expenditures that he said was inappropriate in a period of public sector fiscal restraint. He outlined a number of options which could be, and in fact were, implemented. These included reductions in the following: building management hours; administration; school-based discretionary spending; and the cost of portables. He also recommended adjusting school boundaries and increasing revenues from the Outdoor School and Continuing Education Programs. The Outdoor School, which was a benefit provided to all District students, but was not part of the core educational services, was still being supported by District Funds.

[939] Second, with respect to my findings on individual discrimination against the District, there was no evidence that providing Jeffrey with more intensive services earlier would have cost the District more money. His kindergarten class had an assigned teacher’s aide. The District did not lead evidence that she was unable to assist Jeffrey further. The District did not lead evidence that providing support services to Jeffrey in the first four months of Grade 1 would have cause them undue hardship. It did not establish that more time in the LAC, with a volunteer tutor or tutors, or working with a multi-sensory phonics based program, was not possible without undue hardship. If Jeffrey had been designated earlier, the supplementary funding the District would have received for his educational program could have been used to defray any additional costs.
Third, with respect to their decision to close the DC1, the District did not consider other options for its continued operation.

As a result, I conclude that neither the District nor the Ministry has established that they could not accommodate Jeffrey’s needs, and those of other SLD students, without undue hardship.

THE REMEDIES

Having found both individual and systemic discrimination, I now consider the appropriate remedies.

Section 37 of the Code provides the Tribunal with broad authority to remedy discrimination. At the time, it provided, in part:

1. If the member or panel designated to hear a complaint determines that the complaint is not justified, the member or panel must dismiss the complaint.

2. If the member or panel determines that the complaint is justified, the member or panel
   (a) must order the person that contravened this Code to cease the contravention and to refrain from committing the same or a similar contravention,
   (b) may make a declaratory order that the conduct complained of, or similar conduct, is discrimination contrary to this Code,
   (c) may order the person that contravened this Code to do one or both of the following:
      (i) take steps, specified in the order, to ameliorate the effects of the discriminatory practice;
      (ii) adopt and implement an employment equity program or other special program to ameliorate the conditions of disadvantaged individuals or groups if the evidence at the hearing indicates the person has engaged in a pattern or practice that contravenes this Code, and
   (d) if the person discriminated against is a party to the complaint, or is an identifiable member of a group or class on
behalf of which a complaint is filed, may order the person that contravened this *Code* to do one or more of the following:

(i) make available to the person discriminated against the right, opportunity or privilege that, in the opinion of the member or panel, the person was denied contrary to this *Code*;

(ii) compensate the person discriminated against for all, or a part the member or panel determines, of any wages or salary lost, or expenses incurred, by the contravention;

(iii) pay to the person discriminated against an amount that the member or panel considers appropriate to compensate that person for injury to dignity, feelings and self respect or to any of them.

(3) An order made under subsection (2) may require the person against whom the order is made to provide the deputy chief commissioner or any other person designated in the order with information respecting the implementation of the order.

(4) The member or panel may award costs against a party to a complaint that, in the opinion of the panel or member, has engaged in improper conduct during the course of the investigation or the hearing of the complaint.  

[944] In this case, Mr. Moore seeks both individual and systemic remedies.

**Does the Tribunal have Jurisdiction to Award Damages Against the Ministry and the District?**

[945] Before turning to the remedial claims, I first deal with whether it is appropriate to award damages against the Ministry and the District. The Ministry argues that, in effect, they are immune from liability for damages arising from the exercise of their legislative and policy functions. Following the release of the Supreme Court of Canada’s decision

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in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal* ("Communauté"), the Ministry wrote to the Tribunal and said that the effect of the decision was that the Tribunal had no jurisdiction to award damages against it.

[946] The District argues that, given the nature of the public policy issues this case raise, no damages should be awarded against it after a finding of discrimination.

[947] Both respondents rely on the same line of *Charter* cases.

[948] The government unsuccessfully made similar arguments to the Tribunal in *Bolster v. BC (Min. of Public Safety and Solicitor General)* and in *Hutchison v. B.C. (Min. of Health)*. In *Bolster*, the issue of government immunity from damages was not fully argued before the Tribunal. The Tribunal held that, absent clear language in the *Code* to support a conclusion that the Tribunal could not award monetary damages against government, and in light of earlier Tribunal awards being upheld by the courts, there was no such limitation.

[949] In *Hutchison*, the government relied only on *Communauté* to support its argument that the Tribunal had no jurisdiction to award damages against it. The Tribunal rejected the government’s submissions about *Communauté*, finding that the decision was based on, and limited to, the unique statutory scheme for the protection of human rights in Quebec.

391 2004 S.C.C. 30

392 2004 BCHRT 32

393 2004 BCHRT 58, at paras. 244-252

394 *Bolster, supra* note 392, at paras. 119-123
The government sought judicial review of both Tribunal decisions. The issue was fully argued and the government’s submissions were rejected in both cases. The British Columbia Supreme Court upheld the Tribunal’s decisions. In Bolster, Mr. Justice Parrett, after reviewing the development of the law with respect to Crown immunity, said:

In each case, these decisions involved a consideration of whether legislation (a law or a regulation) was invalid by application of constitutional principles…

…There is in the present case no law or regulation under attack and there is no underlying legislative function. At best the petitioner must strive to equate what happened in the present case with the exercise of a “quasi-judicial function” exercised in good faith. There is no decision here subsequently found to be invalid let alone one found to be invalid “because of anterior procedural defects.”

…

In my view, the Welbridge decision and the line of authorities derived from it do not support the broad application of the concept of Crown immunity urged on the court in the present case….  

Further, when specifically dealing with the government’s submissions with respect to Communauté, Mr. Justice Parret said:

With respect this submission seeks to expand the decision well beyond its bounds to create a widespread form of crown immunity that even encompasses specific terms of its own legislation.

Mr. Justice Cullen, in Hutchinson, distinguished Communauté on the basis that the impugned discriminatory act was clearly legislative, as opposed to the administrative practice in issue in Hutchinson. He said:


396 Bolster, supra note 395, at paras. 82, 85 and 89

397 Bolster, supra note 395, at para. 93
In the circumstances, the conditions in the case at bar do not invoke the fundamental rules or traditional principles of immunity required “to safeguard the free and effective discharge of the legislative function” because the adoption of the impugned policy represents an administrative practice rather than the exercise of a legislative function.  

[953] The government has since appealed the Court’s decision in Bolster but has not done so in Hutchinson.

[954] Here, the respondents’ arguments are based on a line of Supreme Court constitutional cases which begins with Welbridge Holding Ltd. v. Winnipeg (Greater) and ends with Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick and Communaute.  

[955] The development of the law is explained by the majority of the Supreme Court of Canada in Mackin as follows:

According to a general rule of public law, absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional (Welbridge Holdings Ltd. v. Greater Winnipeg, [1971 S.C.R. 957; Central Canada Potash Co. v. Government of Saskatchewan, [1979] 1 S.C.R. 42). In other words “[i]nvalidity of governmental action, without more, clearly should not be a basis for liability for harm caused by the action” (K. C. Davis, Administrative Law Treatise, vol. 3, 1958, p. 487). In the legal sense, therefore, both public officials and legislative bodies enjoy limited immunity against actions in civil liability based on the fact that a legislative instrument is invalid. With respect to the possibility that a legislative assembly will be held liable for enacting a statute that is subsequently declared unconstitutional, R. Dussault and L. Borgeat confirmed in their Administrative Law: A Treatise (2nd ed. 1990), vol. 5, at p. 177, that:

398 Hutchinson, supra note 395, at paras. 163


In our parliamentary system of government, Parliament or a legislature of a province cannot be held liable for anything it does in exercising its legislative powers. The law is the source of duty, as much for citizens as for the Administration, and while a wrong and damaging failure to respect the law may for anyone raise a liability, it is hard to imagine that either Parliament or a legislature can as the lawmaker be held accountable for harm caused to an individual following the enactment of legislation.

However, as I stated in *Guimond v. Quebec (Attorney General)*, supra, since the adoption of the *Charter*, a plaintiff is no longer restricted to an action in damages based on the general law of civil liability. In theory, a plaintiff could seek compensatory and punitive damages by way of “appropriate and just” remedy under s. 24(1) of the *Charter*. The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government. In other words, this doctrine makes it possible to determine whether a remedy is appropriate and just in the circumstances. Consequently, the reasons that inform the general principle of public law are also relevant in a *Charter* context. Thus, the government and its representatives are required to exercise their powers in good faith and to respect the “established and indisputable” laws that define the constitutional rights of individuals. However, if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable. Otherwise, the effectiveness and efficiency of government action would be excessively constrained. Laws must be given their full force and effect as long as they are not declared invalid. Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded. (*Crown Trust Co. v. The Queen in Right of Ontario* (1986), 26 D.L.R. (4th) 41 (Ont. Div. Ct.)).

Thus, it is against this backdrop that we must read the following comments made by Lamer C.J. in *Schachter*, supra, at p. 720:

> An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available. [Emphasis added.]

In short, although it cannot be asserted that damages may never be obtained following a declaration of unconstitutionality, it is true that, as a rule, an action for damages brought under s. 24(1) of the *Charter* cannot
be combined with an action for a declaration of invalidity based on s. 52 of the Constitution Act, 1982.  

[956] In each of the cases referred to in Mackin, and the other cases referred to by the Ministry and the District, the issue was whether a law, either a statute or a regulation, was constitutionally invalid. Communauté involved a complaint of discrimination against the City of Montreal for its failure to accommodate a hearing-impaired municipal police officer. The City, pursuant to regulation-making powers under its enabling Act, adopted and applied a hearing acuity standard as part of its minimum hiring requirements. The Quebec Human Rights Tribunal found that the arbitrary application of a non-individualized standard amounted to discrimination and awarded damages. The Supreme Court of Canada held that damages could not be awarded by the Quebec Tribunal.

[957] In this case, Mr. Moore does not seek to have the School Act or the School Regulation declared invalid. Rather, it is the implementation of the School Act through practices and policies of the Ministry under the School Act, and the manner in which the Ministry and the District fulfill their obligations under it, that form the basis of the claim for damages. In my view Welbridge, and the line of authorities following it, do not support a broad application of the principle of Crown immunity. For the same reasons, the finding in Communauté, tied as it was to the specific statutory regime and the legislative nature of the discrimination, does not limit the Tribunal’s jurisdiction to award damages in this case.

[958] This Tribunal has often made awards against various government ministries following a finding of discrimination.  The Tribunal’s authority to make these damage

401 Mackin, supra note 400, at paras. 78-81

awards has not been questioned and the Tribunal’s award in *Grismer* was not disturbed by the Supreme Court of Canada.

[959] In light of the broad purposes of the *Code* in s. 3, the paramountcy of the *Code* over other legislative enactments in s. 4, and the special nature and character of human rights legislation, I conclude that it would require a clear legislative pronouncement to limit the Tribunal’s broad remedial powers in s. 37. In that regard, it is important to recall what the Supreme Court of Canada said about human rights legislation in *Winnipeg School Division No. 1 v. Craton*:

…Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement….

[960] The Legislature can amend the *Code* to provide the immunity sought by the Ministry but it has not done so despite major revisions to the *Code’s* provisions in 2003 and 2004.

[961] As a result of all of the foregoing, I conclude that the Ministry and the District have not identified a principle of law that carves out an exception to the express language in section 37(2)(d)(ii) and (iii) of the *Code*. I find that the Tribunal has jurisdiction to order compensation against a person, including the Ministry and the District, who has discriminated contrary to the *Code*.

**The Individual Remedies**

[962] The individual remedies sought pursuant to s. 37(2)(d)(ii) include the costs of: Jeffrey’s Orton-Gillingham tutor while he attended Braemar; his attendance at KGS in

403 [1985] 2 S.C.R. 150, at para. 8
Grades 4-7; his attendance at Fraser Academy through to and including Grade 12; transportation costs; and the cost of the expert witnesses used to pursue his claim.

[963] In addition, Mr. Moore seeks damages in the total amount of $10,000 for the injury to the Moores’ and Jeffrey’s feelings, dignity and self-respect.

[964] There was an issue between the parties with respect to the treatment of the tax credits the Moores have received from the allowable deduction of some or all of his school fees as medical expenses. The Tribunal was advised that the parties have resolved that issue among themselves.

[965] In *O’Malley*, the Supreme Court of Canada said that human rights legislation aims at the removal of discrimination and its “main approach” is “to provide relief for the victims of discrimination”. In *Robichaud*, the Supreme Court wrote:

> The [Canadian Human Rights Act] Act, we saw, is not aimed at determining fault or punishing conduct. It is remedial. Its aim is to identify and eliminate discrimination. If this is to be done, then the remedies must be effective, consistent with the “almost constitutional” nature of the rights protected.

[966] This principle was adopted by the Supreme Court of British Columbia, which, referring to *Robichaud*, agreed with the Ontario Court of Appeal that “the purpose of compensation in the human rights context is to restore a complainant to the position he or she would have been in had the discriminatory act not occurred.” It is with these compensatory principles in mind that I consider the individual remedial requests.

404 *O’Malley*, supra note 329, at para. 12

405 *Robichaud*, supra note 331, at para. 13


286
Orton-Gillingham

[967] The District submits that the decision to engage a private tutor is one made by many parents and is an “extra” that parents choose to obtain as a benefit for their children.

[968] I have concluded, based on the evidence, that the use of an Orton-Gillingham tutor was not an “extra”. Ms. Tennant recommended an Orton-Gillingham program for Jeffrey in Grade 1 and continued to recommend it throughout his attendance at Braemar. The District did not then provide Orton-Gillingham. It was a private therapeutic method and, apparently due to licensing or collective agreement difficulties, the District was unable to provide it. However, they did not offer an alternative, similarly intense and effective program. I have found their failure to provide Orton-Gillingham, or an alternative, discriminatory.

[969] When Ms. Tennant recommended the Super Reading Program as an alternative to Orton-Gillingham, the District had an obligation to explore it, and other available programs such as the Lindamood program mentioned by Dr. Bateman and known to Dr. Siegel, and Reading Recovery, an intensive early intervention program developed in New Zealand and used by Vancouver on a pilot basis in 1991.


[971] In these circumstances, I conclude that Mr. Moore should be reimbursed for the cost of the Orton-Gillingham tutor while Jeffrey attended Braemar.

School Fees for KGS and Fraser Academy

[972] The District makes two submissions with respect to Mr. Moore’s claim for reimbursement of the private school tuition fees paid to KGS and the Fraser Academy. First, had there been no discrimination, the District would not have provided a program equivalent to what Jeffrey received in the private schools. Their resources would not have permitted the small-group settings and specialized personnel. Second, Mr. Moore had an obligation to assist with the search for accommodation for Jeffrey. It relies, by
analogy, on the obligations imposed on unions, employers and employees to do so in Central Okanagan School District No. 23 v. Renaud. It submits that the Moores have failed to participate in a reasonable search for accommodation for Jeffrey within the public school system and, as a result, should not recover these costs. Although not argued on that basis, this argument is analogous to an argument that Mr. Moore has failed to mitigate the damages in this case.

[973] In support of its first argument, the District relies on the fact that the British Columbia Court of Appeal in Auton adopted the trial judge’s reasons for rejecting one of the petitioning family’s claims for reimbursement for private treatments for their child. Madam Justice Allan, in rejecting that claim, said:

The petitioners submit that compensatory damages would restore them to the economic position they would have been in but for the Charter violation. I do not agree that fully reimbursing the petitioners for the costs of Lovaas Autism Treatment would place them in that position. The evidence unequivocally established that had the Government provided Early IBI, such treatment would not have been in the form of Lovaas Autism Treatment.

…

The family…has apparently spent in excess of $240,000 on Lovaas Autism Treatment. To their credit, they made that decision to expend those moneys in their daughter’s best interests. But it cannot be assumed that had the government offered Early IBI to autistic children…at all relevant times, it would have expended that sum of money on a single child. A just and appropriate award cannot be determined by reference to the petitioners’ outlay of funds for Lovaas Autism Treatment.

[974] I am of the view that the findings of Madam Justice Allan are distinguishable from the facts in this case because, as I concluded earlier, the District recommended to the Moores that Jeffrey be placed in KGS. They had concluded that he needed a level of


408 [2001] B.C.J. No. 215, at paras. 61 and 63
intense remediation that, with the closure of the DC1, they could not provide. The Moores did what was recommended and enrolled Jeffrey in KGS. Having done so, the District is responsible for the cost of Jeffrey’s attendance there.

[975] For the same reasons, I reject the District’s submission that the Moores were obliged to contact it to determine what educational programs might be available in the public system.

[976] Ms. Stubson testified that KGS’s goal is to remediate students so that they are able to return to the public school system. At the end of Grade 6, they concluded that Jeffrey was not ready to return. The 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.

[977] The District did not lead any evidence about the services it had available to provide support to SLD students following Jeffrey’s departure. Ms. Waigh testified about changes that had been made in the early primary years in the District. All of them were directed at early identification and remediation and would have come too late for Jeffrey. She described District resource rooms in high schools that provide accommodations to students with reading disabilities. No evidence was led about the services provided in such resource rooms. Apart from Ms. Waigh’s testimony, the only available evidence about services in the District is the report prepared by Dr. Chapman, while Jeffrey was at KGS, which indicated that students with learning disabilities were under-served in the District.

[978] Further, I am not persuaded that the obligation on the Moores to participate in a search for an accommodation can be analogized to the obligations on workplace participants in Renaud. The obligations in Renaud are mutual, arising in the context of a continuing relationship. Expectations are placed on all parties in the search for suitable accommodation. Here, the district had no further contact with Jeffrey or his parents after Grade 3. There was no evidence that in Grade 3 the District attempted to persuade the Moores to have Jeffrey stay at Braemar for Grade 4 or that it was now in a position to provide Jeffrey with the intervention services it said he needed.
Jeffrey was settled in his school situation at KGS, he was making progress and his self-esteem was intact. Parents of a vulnerable special needs student are entitled to rely on the advice of the experts providing services. As they did with the District’s advice to keep Jeffrey at Braemar and allow him to advance to Grade 1, to retain an Orton-Gillingham tutor, and to enrol him in KGS, the Moores followed the advice of the KGS staff. Throughout, the Moores have done what the professionals providing support to Jeffrey recommended. In light of the significant negative long term consequences that may accompany an unremediated learning disability, in my view, the Moores were not obliged to put Jeffrey at risk. I find that they made a reasonable and informed decision not to put Jeffrey back into the public school system.

The District did not lead any evidence that it anticipated any change in its service delivery for special needs students for Jeffrey’s Grade 12 year, which, at the time of the hearing had yet to commence. For the reasons I set out above, it is reasonable for the Moores to have Jeffrey continue at Fraser Academy for Grade 12 and for the respondents to pay the costs for that year.

As a result, pursuant to s. 37(2)(d)(ii), I order that the costs of Jeffrey’s attendance at KGS and Fraser Academy, up to and including his Grade 12 year, are to be paid by the Respondents.

Transportation Fees

The Moores seek the cost of transportation for Jeffrey to attend KGS and Fraser Academy. I accept that these were expenses incurred because Jeffrey did not receive the services he required in his neighbourhood school from the District. I have however considered that, if the District and the Ministry had considered the other options for the delivery of educational services to SLD students that I have outlined, it is possible that some of them might have resulted in Jeffrey not attending his neighbourhood school and incurring some transportation costs. Attendance at the DC1, which was at Canyon Heights Elementary, might have resulted in some transportation costs.
[983] As a result, pursuant to s. 37(2)(d)(ii), I order that half of Mr. Moore’s transportation costs be paid by the Respondents.

Injury to Dignity, Feelings and Self-respect

[984] Mr. Moore submits that an award of damages in the amount of $10,000 should be made pursuant to s. 37(2)(d)(iii) to compensate Jeffrey and the Moores for their injury to dignity, feelings and self-respect.

[985] I agree that an award in that amount is appropriate in the circumstances of this case. However, while I accept that the Moore family suffered as a result of the District’s and the Ministry’s failures to appropriately accommodate and support Jeffrey’s learning disabilities, these complaints are representative complaints brought by Mr. Moore on behalf of Jeffrey. As a result, any damage award for injury to dignity, feelings and self-respect can only take Jeffrey’s circumstances into account and reflect his injuries.

[986] I have taken the following factors into account in determining the appropriateness of this award. First, damage awards under this provision of the Code are intended to be compensatory, not punitive.

[987] Second, while I have accepted that there are very serious personal consequences that can result from a failure to appropriately remediate a SLD student, fortunately Jeffrey has not experienced them. His report cards, Dr. Fiedorowicz’s assessment of him at the end of Grade 8, and his demeanour and self-confidence in this hearing, all demonstrate that Jeffrey’s story is one of personal success. However, the documentary record is clear that when he attended Braemar he suffered as a result of the District’s failure to appropriately accommodate and support his learning disability. His teachers noted his anxiety, he suffered from migraines which Dr. Roland said were related to stress arising from his learning difficulties, and he struggled academically.

[988] Third, the District’s failure to provide sufficiently intensive supports in Grade 3, a key learning year, meant that Jeffrey suffered unnecessarily. When he started Grade 4 at KGS, he was essentially a non-reader who was quiet and withdrawn.
[989] Fourth, the failure to provide Jeffrey with intensive supports early enough has caused him to struggle ever since.

[990] For all of these reasons, in my view, an award of $10,000 is appropriate and any lesser award would not reflect the seriousness of the injury to Jeffrey’s dignity, feelings and self-respect that I have found here.

*Hearing-Related Expenses*

[991] Mr. Moore seeks reimbursement, pursuant to s. 37(2)(d)(ii), of the fees paid by him to the experts who testified on his behalf, on the basis that these are hearing related expenses directly arising from the discrimination. The amount claimed in this regard was not quantified.

[992] The Ministry and the District argue that the Tribunal’s ability to award, what they say are in effect costs, is limited by s. 37(4) of the Code and must be tied to a finding of improper conduct. With respect to its cost ordering power, the Tribunal has set a relatively high standard for the level of improper conduct that will attract costs. 409

[993] However, in my view a claim for hearing-related expenses is different than a claim for costs. Relying on its power “to compensate the person discriminated against for … expenses incurred, by the contravention” the Tribunal has awarded travel expenses incurred by a party to have witnesses attend at a hearing. 410 On a similar basis, the

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Tribunal has awarded both the costs of expert reports and the cost of requiring experts to attend at the hearing.\textsuperscript{411}

[994] I conclude that the cost of the experts reports, and of having the experts attend at the hearing, are “expenses occurred by the contravention” and should be reimbursed by the District and the Ministry, and I order them to do so pursuant to s. 37(2)(d)(ii).

\textit{Interest}

[995] The Tribunal has consistently awarded interest on damage awards under the \textit{Code}, on the basis that if awards are to be truly compensatory, they must include an interest component.

[996] Pre-judgment interest, in accordance with the \textit{Court Order Interest Act},\textsuperscript{412} is payable on all amounts ordered hereunder, with the exception of the award for injury to dignity, feelings and self-respect. Post-judgment interest is payable on all amounts ordered. Interest is to be calculated at the bankers’ prime rate as published by the British Columbia Supreme Court Registry.

\textit{Joint and Several Liability}

[997] The respondents are jointly and severally liable for the damage awards hereunder.

\textbf{The Systemic Remedies}

[998] Against the Ministry, Mr. Moore seeks the following systemic remedies, pursuant to s. 37(2)(c):


\textsuperscript{412} R.S.B.C. 1996, c. 79
A direction that the Ministry develop and implement a strategy, within six months of this decision, which:

- establishes safeguards to ensure accountability of all districts for delivery of free and appropriate programs to children with learning disabilities;
- ensures that a range of services and settings exists in each school to meet the needs of students with SLD;
- ensures the provision of adequate support mechanisms for children with learning disabilities within each school including the availability of learning assistants and resource teachers (or special educators);
- ensures the uniform delivery of free and appropriate programs to children with learning disabilities throughout the province;
- ensures appropriate qualifications and training of learning assistants, resource teachers and other teachers who work with children with learning disabilities;
- ensures that learning assistants and resource teachers have adequate time to meet the needs of children with learning disabilities and their teachers within each school;
- establishes a review of the identification processes for learning disabilities (i.e. the use of the discrepancy model over core processing model for identification of children at risk for learning disabilities) and adopts a standardized approach throughout BC for identification of learning disabilities in all school districts which will provide intervention at an early age;
- ensures that core educational requirements for children with learning disabilities are adequately communicated to all districts in BC; and
- establishes a policy for the reimbursement of tuition fees and related educational costs for children with learning disabilities who require basic educational services which cannot be provided within the public school system.

[999] In addition, Mr. Moore seeks an order directing the Ministry to provide him with an opportunity, through the Community Legal Assistance Society and other interest groups, to comment on the strategy prior to its implementation.
Against the District, Mr. Moore seeks the following systemic remedies, pursuant to s. 37(2)(d):

requiring the District to develop and implement a strategy within six months of this decision that ensures:

- the delivery of free and appropriate programs to children with learning disabilities within each school in the District;
- the provision of a range of services and settings exist to meet the needs of severe learning disabled students;
- the provision of adequate support mechanisms for children with learning disabilities within each school in the District including the availability of learning assistants and resource teaches (or special educators); and
- that core educational requirements for children with learning disabilities are adequately communicated to all teachers within the District.

In addition, Mr. Moore seeks an order directing the District to provide him with an opportunity, through the Community Legal Assistance Society and other interest groups, to comment on the strategy prior to its implementation, and to consider any comments made.

Against both respondents, Mr. Moore seeks a declaration that states:

the right to equal access to services guaranteed by the Code includes the right of every child with a learning disability to an education in an inclusive school system, with proper accommodation or access to an alternative educational program that adequately addresses the special educational needs of the child; and includes the right to receive that education or access in a manner which best accords with the inherent dignity of the child.

Mr. Moore also seeks an order, pursuant to s. 37(3) of the Code, requiring the Ministry and the District to provide a report to him, through the Community Legal Assistance Society, the LDABC, and/or other appropriate groups, within one year of the date of this decision, outlining the steps taken to implement these orders.
Finally, Mr. Moore asks the Tribunal to retain jurisdiction to deal with any issues that may arise with regard to implementation of any of its orders.

Analysis of Systemic Remedies

[1005] In the course of its argument, the Ministry repeatedly raised a concern about the Tribunal’s institutional capacity to deal with the issues presented in this complaint. While this was an issue which ran through its submissions, I consider it most appropriate to deal with it here.

[1006] The Tribunal administers the Code, a quasi-constitutional enactment, with broad remedial purposes set out in s. 3. As set out earlier in this decision, the Supreme Court of Canada has repeatedly described the pre-eminence of human rights statutes. That pre-eminence is reflected in s. 4, which provides for the paramountcy of the Code over other legislative enactments. The School Act does not contain a provision exempting it from the operation of the Code and, therefore, the activities of the Ministry and the District under the School Act are not immune from its provisions. In addition, the Tribunal adjudicates the fundamental equality rights of the Province’s most vulnerable citizens. As a result, I am satisfied that the Tribunal has jurisdiction to review both the actions of the Ministry and the District in the provision of educational services, and to provide appropriate remedies within the scope of the broad remedial authority in s. 37 of the Code.

[1007] However, having the power to make an order, and deciding to exercise discretion to do so in a given circumstance, engages different considerations.

[1008] The separation of powers between the judicial and legislative branches of government, and the impact that has on the appropriate remedial orders for breaches of the Charter, have been the subject of comment in a number of judicial decisions. In Mahe v. Alberta, Dickson C. J. said:

At this stage of early development of s. 23 jurisprudence, the appropriate response for the courts is to describe in general terms the requirements mandated. It is up to the public authorities to satisfy these general
requirements. Where there are alternative ways of satisfying the requirements, the public authorities may choose the means of fulfilling their duties...

For these reasons, I think it best if the Court restricts itself in this appeal to making a declaration in respect of the concrete rights which are due to the minority language parents in Edmonton under s. 23. Such a declaration will ensure that the appellants’ rights are realized while, at the same time, leaving the government with the flexibility necessary to fashion a response which is suited to the circumstances. As the Attorney General for Ontario submits, the government should have the widest possible discretion in selecting the institutional means by which its s. 23 obligations are to be met; the courts should be loath to interfere and impose what will be necessarily procrustean standards, unless that discretion is not exercised at all, or is exercised in such a way as to deny a constitutional right....

[1009] Following Mahe, the Supreme Court of Canada has repeatedly warned against the judiciary encroaching on the domain of policy making bodies. For example, in Reference re: Public Schools Act (Man.), the Court said:

[t]his Court should be loath … to detail what legislation the Government of Manitoba must enact to meet its constitutional obligations.

[1010] Further, in Eldridge the Court said that there were a “myriad [of] options available to the government” to rectify the breach of the appellants’ s. 15 rights, but it was not the Court’s role to dictate how that rectification should be accomplished.

[1011] These concepts have been applied with respect to remedial orders under the Code. In The Minister of Health Planning et al. v. The British Columbia Human Rights Tribunal et al, the B.C. Supreme Court overturned the Tribunal’s remedial order, and said:

413 [1990] 1 S.C.R. 342, at paras. 59 and 96
414 see also Schachter v. Canada, [1992] SCJ No. 68, at para. 96
415 [1993] 1 S.C.R. 839, at p. 860
416 Eldridge, supra note 318, at para. 96
The proper remedy in these circumstances was to order that the department cease the contravention and refrain from committing the same or a similar contravention. This the Tribunal did. It should be left to the Director, acting within his or her authority, to choose between the myriad remedial steps available to correct the discriminatory aspects identified.\textsuperscript{417}

[1012] The general principle which can be derived from these cases is that courts and tribunals are to identify violations of Charter or Code rights, but should generally leave the precise method of remediying the breach to the legislature or other body charged with responsibility for implementation of the order.

[1013] In this case, I heard extensive evidence about the educational debate over how reading is best taught to students, particularly those with learning disabilities. I heard evidence about the educational debate over labelling students for the purposes of supplemental funding. Further, it was apparent from the evidence of the experts, their reports and the journal articles that were filed as exhibits, that there is no consensus among experts on the best way to treat dyslexia. Some dyslexics are, regardless of the form or intensity of remediation used, resistant to the acquisition of average reading skills. Dr. Fiedorowicz agreed that it is not possible to predict beforehand which children will respond to remediation. Dr. Perry testified that early intervention cannot remedy all learning disabilities. Dr. Bateman acknowledged that dyslexia is remediable but not curable and that the most severely learning disabled students respond most slowly, regardless of the skill of the teacher or the quality of the interventions.

[1014] The Tribunal has no inherent expertise in the appropriate pedagogical approach to remediating SLDs. The Ministry and the District either do have, or have access to, that institutional expertise, and as a result, the means by which to remedy their failure to provide the appropriate strategies for SLD students like Jeffrey, are for them to determine.

\textsuperscript{417} 2003 BCSC 1112, at para. 27
As a result, pursuant to s. 37(2)(c) I make the following orders against the Ministry:

The Ministry must, within one year of this decision:

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*;

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.

I decline to direct how the Ministry is to comply with the above orders. I do not think it appropriate for Mr. Moore, in his personal capacity or though his counsel, the Community Legal Assistance Society, to comment on the Ministry’s plans. Apart from what he has learned as the parent of an SLD child and during this hearing process, neither he nor his counsel has any special expertise.

That expertise resides in the Ministry, the districts, the faculties of education in our universities in British Columbia, and in the myriad of experts who testified at this hearing and who have, from time to time, been retained by the Ministry to review service delivery in the Province. I would expect that, as it has done in the past, the Ministry will consult them with respect to implementation of my remedial order.

Pursuant to s. 37(1)(c), I make the following remedial orders against the District:

The District must, within one year of this decision:

i) establish mechanisms for determining that its delivery of services to SLD students are appropriate and meet the stated goals of the *School Act*, the *Special Needs Student Order*, and the 1995 Manual;
ii) ensure that it has in place an early intervention program so that SLD students can be identified early and appropriate intensive remediation services provided; and

iii) ensure that it has in place a range of services to meet the needs of its SLD students.

Summary of Remedial Orders

[1019] I have found Mr. Moore’s complaints to be justified and as a result, pursuant to s. 37(2)(a) of the Code (as it then was), I order the District and the Ministry to cease the contravention and refrain from committing the same or a similar contravention.

[1020] Pursuant to s. 37(2)(d)(ii), I order the District and the Ministry to compensate the Mr. Moore for the:

i) costs incurred by him to provide Jeffrey with an Orton-Gillingham tutor;

ii) tuition paid by him for Jeffrey’s attendance at both KGS and Fraser Academy, up to and including his Grade 12 year;

iii) costs incurred by him for Jeffrey’s transportation to both KGS and Fraser Academy, reduced by half;

iv) costs incurred by him in obtaining the expert evidence reports and the expert attendance at this hearing.

[1021] Pre-judgment interest is to be paid on all these amounts.

[1022] Pursuant to s. 37(2)(d)(iii), I order the District and the Ministry to pay to Jeffrey Moore $10,000 for the injury to his dignity, feelings and self-respect.

[1023] Post-judgment interest is payable on all amounts ordered.

[1024] In addition, pursuant to s. 37(2)(c), I order the Ministry, within one year of this decision, to:

i) make available funding for SLD students at actual incidence levels;
ii) establish mechanisms for determining that the support and accommodation services provided to SLD students in the Province are appropriate and meet the stated goals of the School Act and the Special Needs Student Order;

iii) 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

iv) ensure that all school districts have in place a range of services to meet the needs of SLD students.

[1025] Finally, pursuant to s. 37(2)(c), I order the District, within one year of this decision, to:

i) establish mechanisms for determining that its delivery of services to SLD students are appropriate and meet the stated goals of the School Act, the Special Needs Student Order, and the 1995 Manual;

ii) ensure that it has in place an early intervention program so that SLD students can be identified early and appropriate intensive remediation services provided; and

iii) ensure that it has in place a range of services to meet the needs of its SLD students.

[1026] The Tribunal will remain seized of this matter to ensure that its remedial orders are appropriately implemented.

_______________________
Heather M. MacNaughton
Tribunal Chair
### Glossary of Defined Terms

<table>
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<tr>
<th>TERM</th>
<th>DEFINITION</th>
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<tr>
<td>1993 Review</td>
<td>Comprehensive Review of Special Education</td>
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<td>1997 LAC Review</td>
<td>A Ministry-commissioned study regarding learning assistance services</td>
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<tr>
<td>1999 Review</td>
<td>Province-wide review of special education – March 22, 1999</td>
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<tr>
<td>Advisory Committee</td>
<td>A Special Education Advisory Committee established to oversee the 1993 Review of Special Education</td>
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<td>BAC</td>
<td>Budget Advisory Committee</td>
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<td>Communauté</td>
<td>Québec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal, 2004 S.C.C. 30</td>
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<td>DC1</td>
<td>District Diagnostic Centre</td>
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<td>DCC</td>
<td>Deputy Chief Commissioner</td>
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<td>Desharnais Report</td>
<td>&quot;Review of Learning Assistance Services&quot; released July 1997</td>
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<td>District</td>
<td>Board of Trustees of School District No. 44</td>
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Education Policy  Mandate for School System, September 1, 1989


ELRT  Elementary Learning Resource Team

FTE  Full Time Equivalent


HILC  High Incidence / Low Cost - disabilities that occur with relatively high frequency in the student population but are low cost in terms of required resources

HILC Cap  cap on available funding for certain disabilities in the HILC program

IEP  Individual Education Plan

Index  Jansky de Hirsch Screening Index


KGS  Kenneth Gordon School

LAC  Learning Assistance Centre


LDABC  Learning Disability Association of British Columbia

LDAC  Learning Disability Association of Canada

LIHC  Low Incidence / High Cost - disabilities that occur with relatively low frequency in the student population but are high cost in terms of required resources

Meeting  The meeting between the Moores and the District following Jeffrey's psycho-educational assessment

Ministry  Her Majesty the Queen in right of the Province of British Columbia, as represented by the Ministry of Education

NICHD  National Institute of Child and Human Development
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<th>Abbreviation</th>
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<tr>
<td>NVTA</td>
<td>North Vancouver Teachers' Association</td>
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<td>Reaney</td>
<td>British Columbia Government and Service Employees' Union v. British Columbia (Public Service Employee Relations Commission), 2002 BCCA 476</td>
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<td>Respondents</td>
<td>The District and the Ministry together</td>
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<td>SBRT</td>
<td>School Based Resource Team</td>
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<td>School Act</td>
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<td>School Regulation</td>
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<td>SLD</td>
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