

TOP FIVE 2013

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

MOORE v BRITISH COLUMBIA (EDUCATION), 2012 SCC 61, [2012] 3 S.C.R. 360.

Date Released: November 9, 2012

<http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12680/index.do>

Facts

Jeffery Moore received special education as a public school student because he has significant dyslexia, a learning disability with problems in reading, writing and spelling. Unfortunately, this special education program did not do enough to address his learning needs, so the psychologist from his school district recommended that Moore attend the local Diagnostic Centre to receive the necessary help. A more successful program was implemented, but because of Provincial budget cuts, the Diagnostic Centre was closed. His parents were forced to pay for him to go to a private school to get him the remedial help he needed. There he thrived and earned an award for "Most Improved Student".

In 1996, Moore's father filed a complaint with the British Columbia Human Rights Tribunal against the school district and the Province on the grounds that he had been denied a service customarily available to the public. He argued that because the Diagnostic Centre had been closed, Moore had not been provided the same educational service that other students in the province received.

British Columbia's Human Rights Code, RSBC 1996, c 210

- 8.** (1) A person must not, without a bona fide and reasonable justification,
- (a) deny to 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 the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or class of persons.

Procedural History

The Tribunal ruled that the District and the Province had discriminated against Moore when it closed the local Diagnostic Centre and failed to provide alternative accommodation. As a remedy, the Tribunal ruled that Jeffrey's parents be reimbursed for the cost of his private school tuition and,



additionally, receive \$10,000 for pain and suffering. The Tribunal also found that the closure of the Diagnostic Centre amounted to systemic discrimination against students with severe learning disabilities, and ordered a wide range of remedies against both the District and the Province.

In 2008, a judicial review in the B.C. Supreme Court overturned the Tribunal's ruling. The reviewing judge found that because the closure affected students with special needs equally as a group, Jeffrey had not been discriminated against individually. The Tribunal's decision was set aside. Moore appealed, and in 2010 a majority of the Court of Appeal dismissed the appeal. The appellate court ruled that since Jeffrey did not receive worse treatment than other students with dyslexia, he could not claim discrimination.

Moore appealed this judgment to the Supreme Court of Canada (SCC) and his appeal was heard in March 2012.

Issues

Should "service... customarily available to the public" mean education generally, or special education?

Decision

In November 2012, the SCC unanimously allowed the appeal, in part.

Ratio

Special education is an inherent part of basic education as guaranteed by British Columbia's *Human Rights Code*. It is not an extra service, but rather one part of the basic service that ensures children with special learning needs can access the same level of basic education that the Government of British Columbia is legally required to provide to all public school students in the province.

REASONS

The SCC considered whether Jeffrey had been discriminated against by being denied a "service... customarily available to the public". While basic education was clearly a service that is available to the public, the supports offered at the Diagnostic Centre were not. The judges had to decide between opposing views on Jeffrey's special education: was it an extra service that went over and above what was given to most students? Or was it the support that Jeffrey needed to in order to make use of the general educational services that other students received?

The SCC found that special education is not a luxury, but rather "...the ramp that provides access" to the basic education to which all children in British Columbia are legally entitled. The Court ruled that the lower courts had erred in comparing Jeffrey's case only to that of other students with special needs. Making individuals with disabilities



prove that the discrimination they suffer is worse than that suffered by other people with disabilities could mean that service providers could drastically cut programs, as long as the reductions affected all people with disabilities equally. This could mean perpetuating the discrimination that the *Human Rights Code* aimed to abolish.

Writing for the Court, Justice Abella noted that learning supports programs were essential to the provision of general education. Without the ongoing support of the Diagnostic Centre, Jeffrey could not receive the full benefit of his general education in the same way as other students. The Court held that Jeffrey had suffered discrimination on the basis of his disability.

Once discrimination was found, the District had the chance to justify the discrimination. The SCC found that the District was not able to do so. The District attempted to justify closing the Diagnostic Centre by arguing that it had been in the middle of a budget crisis and that it had no other choice. But, because the District had not performed any assessment, financial or otherwise, of what alternatives were available to special needs students, it could not reasonably say that it had no other choice. The Court noted further that the District had failed to adequately consider the full impact the closure of the Centre would have on students with special needs.

After finding that the discrimination against Jeffrey could not be justified, the SCC considered the appropriate remedy. The Tribunal had ordered the District to reimburse Jeffrey's parents for the cost of the private school tuition. The Court upheld this remedy because it was logically connected to the discrimination. Further, the Court upheld the Tribunal's order for the \$10,000 compensation for "injury to Jeffrey's dignity, feelings, and self-respect." However, the SCC did not restore the more systemic remedies that the Tribunal had imposed.

After completing his education, Jeffrey Moore became a successful journeyman plumber.



DISCUSSION

1. What are some ways in which teachers and schools can work to accommodate differences in the ways different students learn?

2. Did the Moore family have the option of keeping Jeffrey in public school after the Diagnostic Centre was closed? What kind of education would he have received if they had done so? Explain.

3. The District was not able to justify the discrimination because it failed to consider any alternatives to closing the Diagnostic Centre. Do you think the discrimination would have been justifiable if the District had considered alternatives? Explain.

4. The SCC noted that some programs with a similar cost, such as an environmental and outdoor education facility, were retained after the budget cuts. Try to think of one or two arguments both for and against closing that facility in place of the Diagnostic Centre.

5. Do you agree with the Court's ruling, or do you think that special needs services go above and beyond the basic educational services most students receive? Explain.