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Implications of *Charter* Litigation for Special Education Policy in Canada

by

Joyce Desmond Clayton

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Abstract

Twenty-five years have elapsed since the equality provisions of the *Charter of Rights and Freedoms* came into force for Canadian institutions. During this time courts and human rights tribunals been called upon to describe what equality rights mean for Canadians with disabilities. Parents of children with disabilities have used these processes as a way of clarifying their child's right to an education and resolving disputes about the provision of special education programming and services. This study builds upon and extends the body of research conducted between 1985 and 1998 that identified the influence of court and tribunal decisions on special education policies across Canada. The goal of this study is to identify how *Charter* equality provision litigation between 1999 and 2008 has influenced the continued refinement of special education policy frameworks across the country.

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CHAPTER 1: INTRODUCTION

In 1982, Canada was one of the first westernized countries to enshrine the rights of individuals with disabilities in its *Charter of Rights and Freedoms*. This was achieved through the inclusion of section 15(1)(2), which is referred to as the equality provisions of the *Charter*. Through these sections of the *Charter*, Canadians with disabilities had their right to equality before the law entrenched. To assist federal and provincial governments with the review and harmonization of legislation and policies with the constitution's equality guarantees, a three-year waiting period was provided (Sussel, 1995).

Enshrinement of these rights presented challenges for Canadian institutions providing programs and services to individuals with disabilities including ministries of education and school systems across the country. With enactment of the *Charter of Rights and Freedoms*, henceforth referred to as the *Charter*, the intent was to make equality rights meaningful through the provisions articulated in relevant provincial legislation, regulations, and policies such as those applying to health, education, and social services.

One of the most significant challenges was in the area of special education where legislation and policies needed to be aligned to the *Charter's* equality provisions. Prior to the *Charte*r, most provincial special education legislation focused on the need to accommodate a student with a disability but did not specify that the accommodations would be appropriate to the student's individual needs and abilities (Lepofsky, 1997; Sussel, 1995). Although there was

contemplation of the need to educate students with disabilities, special education policies and education acts implied or explicitly stated that educational opportunities would be extended in situations where it was determined that the student could benefit from an education. The stated preference in the education legislation was that this education would occur in separate or segregated settings away from the mainstream classroom. Although Canada did not subscribe to the American doctrine of *separate but equal*, the general treatment of Canadian students with disabilities reflected the underlying tenets of the prevailing American social and political views.

Since the enactment of section 15 in 1985, 25 years have passed during which there have been numerous attempts to clarify the meaning of equality rights in relation to public services made available to Canadians with disabilities. Education is considered to be a public service and the responsibility of each province. Provincial ministries of education describe the entitlements to a free public education and stipulate how they will ensure the education of children with disabilities in their School Acts or related regulations and policies. Additionally, education regulations and special education policies describe the specifics of how students with disabilities are to be educated.

Advocates for students with disabilities have sought to work within the scope of the *Charter* to clarify the meaning of section 15 within the public education system, specifically in relation to special education. The purpose of this study was to ascertain the degree to which the over 20 years of litigation has

influenced the direction of special education policy and practices in Canada. To achieve this goal, cases from 1985 to 1998 previously reported in the research literature were summarized and analyzed to provide context for this study. This study extended this body of research by analyzing cases from 1998 to 2008. This study also examined how the selected court and tribunal decisions have influenced special education policies and practices that reflect the goal of equality envisioned in the *Charter*.

Legal databases were searched and cases analyzed to ascertain the impact of *Charter* litigation, based on section 15, on the advancement of equality of educational opportunities made available to students with disabilities. Data collected and analyzed from these sources were used to identify implications for strengthening provincial special education policies and practices to ensure equality of educational opportunity is extended to students with disabilities. Implications for future changes to public policy in special education are identified and recommendations for further research are presented.

Purpose of the Research

A review of the literature reveals that information about the decisions of special education litigation and special education and human rights tribunal decisions from various jurisdictions in Canada are available for use by educators to inform policy development that could help transform equality rights from principles to practice. What has not consistently been made explicit in Canadian educational literature is the influence or potential influence of these decisions on

special education public policy. This study extends the work of Williams (1999) by focusing on the ramifications of court and tribunal decisions on the administration of special education in Canadian schools through the examination of legal proceedings from 1998 to 2008. The results of this analysis provided recommendations for changes to special education public policy.

Definition of Terms

Charter of Rights and Freedoms Part 1 of the Constitution Act 1982: A bill of rights that is entrenched as part of the Constitution, and can therefore be altered only by constitutional amendment. The *Charter* reiterates the fundamental freedoms and legal rights set out in the Canadian Bill of Rights including additional rights, such as equality rights (Yogis, 1998).

Equality rights: The rights provided by section 15 of the *Charter*. Equality refers to the condition of same treatment for all persons, which should not be interpreted to mean only identical treatment. Different treatment may be required to promote equality in some cases. Equality also refers to the right to be free from discrimination based on membership in a group historically disadvantaged by prejudicial assumptions (Dukelow, 2004).

Public policy: This term refers to the actions taken by government to secure particular outcomes based on the perceived needs of the community (Dukelow, 2004; Ozga, 2000). Public policy is usually not dependent upon evidence, but on judicial impression of what is or is not in the public interest (Dukelow, 2004).

Special education: This term refers to programs and/or services designed to accommodate students whose educational needs cannot be adequately met through the use of regular curriculum and services only (Hutchinson, 2001). The specialized programming and services that are available to the student are specified in their Individualized Program Plan (IPP) or an Individualized Education Plan (IEP) designed by educators and parents.

Students with disabilities: This term refers to students who require special education programming and support to achieve individual educational and social outcomes in their program plans. For the purposes of this study, the students of interest are those who are diagnosed with learning disabilities, physical disabilities, developmental disabilities, behaviour and/or emotional disorders, sensory impairments, health impairments, cognitive disabilities and speech and language impairments. These broad categories are consistent with the terminology used across Canadian provinces and territories.

Tribunal: The term tribunal refers to a body or person who exercises a judicial or quasi-judicial function outside of the regular court system, on whom a statutory power to make decisions is conferred (Dukelow, 2004) and includes but is not limited to human rights and special education tribunals or review processes provided by human rights or education statutes or legislation. In this study, the term tribunal is used with specific reference to decision making entities that review the actions of educators' relation to special education programs and services for students with disabilities.

CHAPTER 2: REVIEW OF THE LITERATURE

Chapter Overview

This chapter traces the evolution of Canadian equality rights for students with disabilities. A brief overview of the historical context for the education of students with disabilities in Canada is presented. Next, a summary of the effects of the *Charter of Rights and Freedoms* on policy and practice, with particular emphasis on the equality provisions in relation to special education. Finally, the roles courts and tribunals have played in clarifying what equality can mean in a publicly funded school system will be discussed.

Pre-Charter Special Education in Canada

Access to Special Education Prior to the Charter of Rights and Freedoms

Before the enactment of the *Charter of Rights and Freedoms,* provincial education acts across Canada tended to allow for the accommodation of students with disabilities, whereby students with disabilities could attend school. However, the various acts did not stipulate that the accommodations provided would be appropriate to the individual student's needs and abilities (Sussel, 1995). Sussel notes that even though reference was made to the education of students with disabilities prior to 1982, most provincial education acts also contained exclusion clauses that implied that not all children, particularly those with severe disabilities, would be provided access to regular education classes. Access to an education for students with disabilities before 1982 could at best be described as a privilege rather than a right to an education that was planned based on their

individual needs and allowed for parental involvement in the program planning and placement processes.

An example of this condition is the decision in *Bouchard v. School Commissioners of Saint-Mathieu-de-Dixville,* heard by the Supreme Court of Canada in 1950. In their description, Foster and Smith (2003) state:

> In this case, two students, described as insubordinate and backward, were expelled from school because of their conduct and their inability to follow the course of study. The Supreme Court held that the fact that the students were insubordinate and not educable justified their expulsion from school, citing, with apparent approval, testimony from a physician called by the school board, who stated that the students were a bad influence on the other children and it would be better if they were placed in an institution. (p.1)

Foster and Smith (2003) contend that this case has stood for more than 55 years as an affirmation of school board discretion in the exercise of its legislative authority, and continues to be cited in cases argued in Quebec. This case also speaks to the history of the deference the courts give to educators in the decisions they make.

Smith (1994) noted in his study of educational opportunities for students with disabilities that while there was access to educational facilities even this right was limited in some jurisdictions,

> …while the right to education is "universal", it is not always provided without exception because of disability. The Nova Scotia *Education Regulations* limit this right to students "who are capable of benefiting" from schooling, permitting a general exclusion on the basis of disability. The Alberta and Newfoundland *Acts* include provisions which restrict this right for students with severe disabilities who are not considered to be "educable". (p. 75)

Due to these provisions in the various provincial education acts, many children with disabilities were not afforded the opportunity to attend school and when they were, it was usually in a segregated school. In 1980, Ontario enacted amendments to its *Education Act* that maintained segregated schools for students who were blind, deaf, and "trainable retarded" but provided provisions for "exceptional pupils" or those with behavioural, communicational, intellectual, physical, or multiple exceptionalities to be placed in a special education program (Sussel, 1995). Although this legislation was considered progressive, it still provided for the exclusion of students with disabilities from mainstream educational settings.

Legislation of this nature tended to reinforce the general view in society that people with disabilities are genetically and categorically less capable than persons without disabilities, leading to people with disabilities being subjected to pity, patronization, and paternalistic or condescending treatment (Lepofsky,1997). Due to such perceptions, it is critical to recognize that in many ways education is more important for mentally and physically challenged citizens because it opens the door to individuals' full participation in employment, community, and increased opportunities to be independent (MacKay & Kazmierski, 1997). Although much has changed since the 1980s, Lepofsky (1997) notes that people with disabilities continue to be disproportionately dependent upon government bureaucracies, private sector charitable agencies, and health care providers for many basic needs. One reason for the perpetuation of perceptions that people with

disabilities are *unable* is that many politicians, civil servants, and individuals in the private sector often erroneously believe that the costs of enabling persons with disabilities to fully participate in services such as education and accommodated employment is necessarily high and consequently unaffordable (Lepofsky, 1997). These pervasive beliefs about people with disabilities are partially responsible for the expansion of the equality rights section of the *Charter of Rights and Freedoms* to include those with disabilities.

Including Disability Equality Rights in the Charter of Rights and Freedoms

The inclusion of equality rights for individuals with disabilities was part of the often acrimonious debate surrounding the repatriation of the *British North America Act* in 1980. Before 1982, provincial education legislation toward children with disabilities was seen by some parents, advocates for people with disabilities, and many educators and lawyers as an impediment to the students' full participation in Canadian schools and society. When challenged through the courts, litigation outcomes reinforced the restrictive nature of prevailing education legislation. Hurlbert and Hurlbert (1992) note that the courts tended to base decisions on statutory interpretation of the legislation, which limited the scope of the litigation to whether or not school boards had fulfilled their responsibility of providing an education to a student. They suggest that if section 15 of the *Charter* had been in effect, there could have been stronger arguments made concerning the right of the student to an education equal to that of other students, instead of

whether or not the school board had simply fulfilled its responsibility to provide an education (Hurlbert & Hurlbert, 1992).

Although the 1960 *Canadian Bill of Rights* did contain clauses with respect to equality before the law in relation to federal laws, courts rarely enforced these enactments. Thus, there was no meaningful protection for disability equality at either the federal or provincial levels of government or by their agents. For children with disabilities, this translated into a lack of recognition that they should have access to an appropriate education through the provision of special education programming and services to meet their individual needs. Sussel (1995) points out that before the *Charter* coming into force, "members of the legislature, legal community, and the judiciary did not view either the legislative arena or Canada's courts as the prime levers for the expansion of rights, or for satisfying the rights claims of special group constituencies." (p. 51)

The challenge for those advocating for disability equality rights was to persuade parliament that discrimination based on disability be included as a prohibited ground in section 15 of the *Charter of Rights and Freedoms*. In the original drafts of section 15, the right to equality before the law and protection from discrimination included the grounds of race, national or ethnic origin, colour, religion, age, and sex. The justification for the inclusion of these areas and not disability was that the Charter was a generalized document that did not lend

itself to detailed qualifications and limitations (Lepofsky, 1997; Peters, 2004). The federal government contended that

> it was ultimately decided to limit the grounds of non discrimination to those few which have long been recognized and which do not require substantial qualifications. Unfortunately such is not the case with respect to those who suffer from physical handicaps and consequently provision has not been made in the Charter for this ground. (Peters, 2004, p.5)

According to Lepofsky (1997), the federal government supported its position with the following arguments:

> First, there was no need to include disability as an enumerated ground because statutory Human Rights Codes provided a better method for protecting disability equality. Second, terms like physical and mental disability were too vague and would pose problems for judicial definition. Third, the cost of providing equality to persons with disabilities was too high and finally, disability rights might not have matured sufficiently in the mind of the public to justify their inclusion. (p. 274)

Advocates for the persons with disabilities were not satisfied with this response because they understood that the *Charter* would become the supreme law of Canada and would take precedence over other laws. If they were not able to have disability entrenched in section 15, there would be no constitutional backing for complaints of discrimination based on disability, and this would create a two-tiered system of rights. Thus it was suggested that people with disabilities seeking recourse through human rights codes would have little if any recourse to raise constitutional challenges through the courts, unlike those groups who had clearly articulated protection. In essence in its draft form, the *Charter* created a hierarchy of rights where some rights were worthy of specific

identification and protection while others were not (Lepofsky, 1997; Peters, 2004).

Those opposed to these views, as described by Lepofsky (1997), advanced the position that people with disabilities formed a significantly disadvantaged minority in Canada and were subject to widespread discrimination in the public and private domains and therefore required constitutional protection. Advocates such as the Coalition of Provincial Organizations of the Handicapped (COPOH) argued that the proposed amendment to include people with disabilities in the *Charter* would benefit people with disabilities in three ways. First, it would give symbolic profile to the rights of people with disabilities. Second, because the constitution would be recognized as the supreme law of Canada, all laws in the country would be required to comply with the *Charter.* Third, it was believed that *Charter* recognition would reinforce the protection available to people with disabilities under human rights legislation (Peters, 2004; Porter, 2005).

It is not known what persuaded then Justice Minister Jean Chrétien to include disability as an enumerated ground in the *Charter of Rights and Freedoms*, section 15. Peters (2004) suggested that since the debate on the repatriation of the Constitution was taking place during the International Year of the Disabled, possible political embarrassment might have motivated politicians to act in the manner in which they did. Regardless of the sources of influence that led to changes in the draft *Charter*, advocates for individuals with disabilities felt that a new era for Canadians with disabilities was emerging.

Enactment of the Charter of Rights and Freedoms

Impact of section 15 on Public Education

With the inclusion of disability as an equality ground, the provision of educational programming and placements for students with disabilities changed. To ensure a smooth transition to the conditions outlined in section 15, the federal and provincial governments were given an additional three years to review and update legislation so that it would be aligned to the *Charter* (Porter, 2005). In terms of public policy, education systems and provincial ministries of education were no longer isolated from the involvement of federal influence and authority as they exercised their provincial and local responsibilities. Education systems and provinces found that although public school education was stated to be within the domain of the provinces, Sections 1, 7, and 15 of the *Charter* affected their ability to distance themselves from the direct influence of the federal government and the Supreme Court of Canada.

The *Charter* firmly entrenched the rights, and limits of those rights, for individuals with mental or physical disabilities. Individuals could access provincial human rights codes, provincial courts and the Supreme Court of Canada to clarify, articulate, and protect their specific rights. For public school authorities, it would no longer be possible to offer vastly different opportunities, services, and access to publicly funded institutions such as schools. However, section 1 of the *Charter* did allow limits to be set on the benefits an individual can receive through state institutions. These limits are:

> The Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. (section 1, Government of Canada, 1982)

Thus the state could provide clearly articulated rights and freedoms for its citizens, but within the bounds of duly constituted laws as passed by the representatives of the people.

In section 7, the *Charter* outlined the expectations citizens of Canada could have to protect them from undue interference from the state, within a common law framework.

> Everyone has the right to life, liberty, and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. (Government of Canada, 1982)

Finally, in section 15, the *Charter* provided the parameters for equality as it would be defined and upheld in Canada.

> (1) Every individual is equal before and under the law and has the right to equal protection and benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. (Government of Canada, 1982)

In his address to the Canadian Association for the Practical Study of Law in Education, May 2000, the Honourable Mr. Justice Michel Bastarache of the Supreme Court of Canada expressed the role of the Court in the area of schools and the *Charter*. He stated that:

> …the protection of the Charter must not result in irrational or unreasonable rules in the context of the institutions involving children, where the State has responsibility for their protection…Our Court's approach is meant to be consistent with the school's duty to foster respect of students for the constitutional rights of all members of society. Learning to respect those rights is essential to our democratic society and should be a part of the education of all students. Those values are best taught by example and maybe undermined if Charter rights are ignored by those in authority. At all times, the courts must give a contextual interpretation to Charter rights. They must therefore balance the protection of Charter rights and the public or societal interests at stake in the school context. (Bastarache, 2000)

Mr. Justice Bastarache presents the view that those in a position of authority, in this instance those with authority for public education, have the responsibility to uphold the rights and freedoms entrenched in the *Charter*. By their example, those charged with oversight of schools must demonstrate a clear commitment to apply the *Charter* fairly and transparently in the educational institutions for which they have guardianship on behalf of the Canadian public and society.

In 2006, Mr. Justice LeBel noted that the Supreme Court took a deferential stance toward the educational community in that it values the expertise of educators because the Court does not have absolute answers for the various problems that arise in the course of operating the education system. Rather, the Court favours, as much as possible, respect for the discretionary decisions made by school authorities (LeBel, 2006). However, the judge also pointed out that with this deference comes the expectation that decisions made at all levels of the school system should take into account the values entrenched in the Charter as well as the various provincial human rights acts. He concluded by stating that the

importance of school in our society and the essential role played by teachers inevitably give rise to additional responsibilities for teachers as well as school administrators (LeBel, 2006). Therefore, provincial governments and the school boards under their jurisdiction operate under the observation of the Supreme Court of Canada special education statutes and policies are developed and implemented.

Legal Framework for Equality Rights in Canada

Four components have been identified as forming the legal framework that relates to equality and disability in Canada, specifically the Constitution, Provincial Education Statutes, Provincial Human Rights Acts, and the judicial interpretation of the above (MacKay & Burt-Gerrans, 2004; MacKay, 2007). This legal framework serves as the basis for adjudication of differences related to special education disputes that in turn influence government actions through their development of public education policy, specifically special education policy. As noted previously, the *Charter* is considered the leading document in the area of equality rights. Provincial and territorial education statutes and the policies that flow from them must conform to the *Charter* requirements.

A significant challenge for Canadian educational policy makers is that each provincial government has sole responsibility for public school education. Hutchinson (2001) reviewed provincial and territorial special education policies and found that there was a high level of consistency across the country in terms of how special education was defined and the policies that were in place. MacKay

(2006) also reviewed the Canadian legislative frameworks for special education and found that most provinces and territories made specific reference to the education of students with disabilities in their Education or School Act. Those provinces and territories that did not make specific reference in their *Acts* identified special education entitlements through supporting regulations. The uniformity among the provinces and territories in this area is interesting in light of the fact that Canada does not have a national education policy related to school age students with disabilities. However, the similarities between the provinces and territories, as found in Appendix 1, could be attributed to the need to have provincial legislation conform to the *Charter* provisions.

On a practical level, others have noted that the loosely coupled national arrangement of special education has given rise to fragmenting programming for students with disabilities (Lupart, 1998). Others have pointed out that this situation has contributed to a lack of consistent special education standards and accountability measures across the country (Smith & Foster, 1996). Each province and territory develops their own definitions and categories of disability to identify students with disabilities. Currently there are no nationally agreed upon definitions or categories for use in public schools across the country although there are similarities between the provinces. For instance, each province and territory has a category of learning disability but the criteria for identification as a student with a learning disability varies. Of note, in 2005 the Federal Department of Social Development funded a project to respond to the need for developing

clear terminology around inclusive education, including special education. However, it is not yet clear how the results of this work will influence the Canadian education lexicon.

In contrast to the Canadian setting, the United States has a long history of both federal and state legislation and regulations to guide special education standards through the *Individuals with Disabilities Education Act (IDEA)*, 1997. The intent of *IDEA* is to ensure that there is consistent access throughout each state, to special education programming and services for students identified with a disability. Through *IDEA* students are guaranteed that they will have their special education needs identified; parents are to be involved in the development of their child's Individualized Education Plan (IEP); and that noncompliance with the legislation can be appealed at the local, state, and federal levels.

In spite of these intended outcomes, the reality of working within a national framework for special education has proven to be problematic. For example, some American educators view *IDEA* as having too many rules, too many lawyers, and not enough money to achieve the expected outcomes (Duff, 2001). Duff observed that due to this perception of *IDEA*, it has been suggested that while school districts would welcome a lessening of the oversight and a reduction in the multitude of regulations, many believe that doing away with the regulations could eliminate what little protection school districts have from lawsuits (p. 136). This poses a significant concern for American educators at the state and local levels because of their need to follow strictly the *IDEA* mandates to

receive federal government funds for special education. Therefore, to receive maximum federal funds, states and districts must adhere to the regulatory scheme of *IDEA* that provides limited opportunities for flexibility in local special education policy development.

While, as noted previously, Canada does not have specific federal legislation regarding special education to guide the provinces in the delivery of public school programming, the experience of American lawmakers and educators has influenced Canada's response to the education of students with disabilities (MacKay & Kazmierski, 1995; Williams & Macmillan, 2001). In the Canadian context, this influence is seen in the creation of administrative processes and procedures for developing and implementing special education programming through the individual student's education or program plan.

The provinces and territories have legislation that outline the responsibility of parents to be involved in their children's education. In particular, all have provisions for parents to consult with teachers and administrators about their child's education program and for parents to request a review of decisions made by educators that affect their child's education. Many provinces outline specific processes related to special education, which take the form of ensuring that parents are consulted about their child's individual program/education plan commonly referred to as an IPP or Individualized Education Plan (IEP).

Most provinces and territories also stipulate additional provisions for special education tribunals or similar processes, where at the discretion of the

Minister of Education, decisions related to special education made by a school board and/or its employees can be reviewed once the school board appeal process has been exhausted. As a result of these procedural guarantees for parents of students who receive special education, school administrators and teachers can become involved in the often long and arduous road to litigation. MacKay and Sutherland (2006) advised teachers and administrators that because of these procedural guarantees, they should always provide parents with appropriate information about a student's special education program and placement. They also suggested that schools and school boards maintain fair and open processes for addressing parent concerns and disagreements with the decisions staff make about a student's special education program or placement.

The second area influenced by the American experience is the increased willingness of Canadian parents to use provincial human rights provisions and litigation to pursue their child's equality rights as guaranteed by the *Charter*. It is often through such court and tribunal proceedings that governments, school boards, and educators find their policies and procedures challenged. As a result, they are called upon to defend their decisions about, and actions toward, students with disabilities. Depending upon the outcome, it is sometimes necessary for governments and school boards to review the special education legislation and policies that gave rise to the disagreement and institute changes in statues and/or practices.

The Judiciary and Public Policy

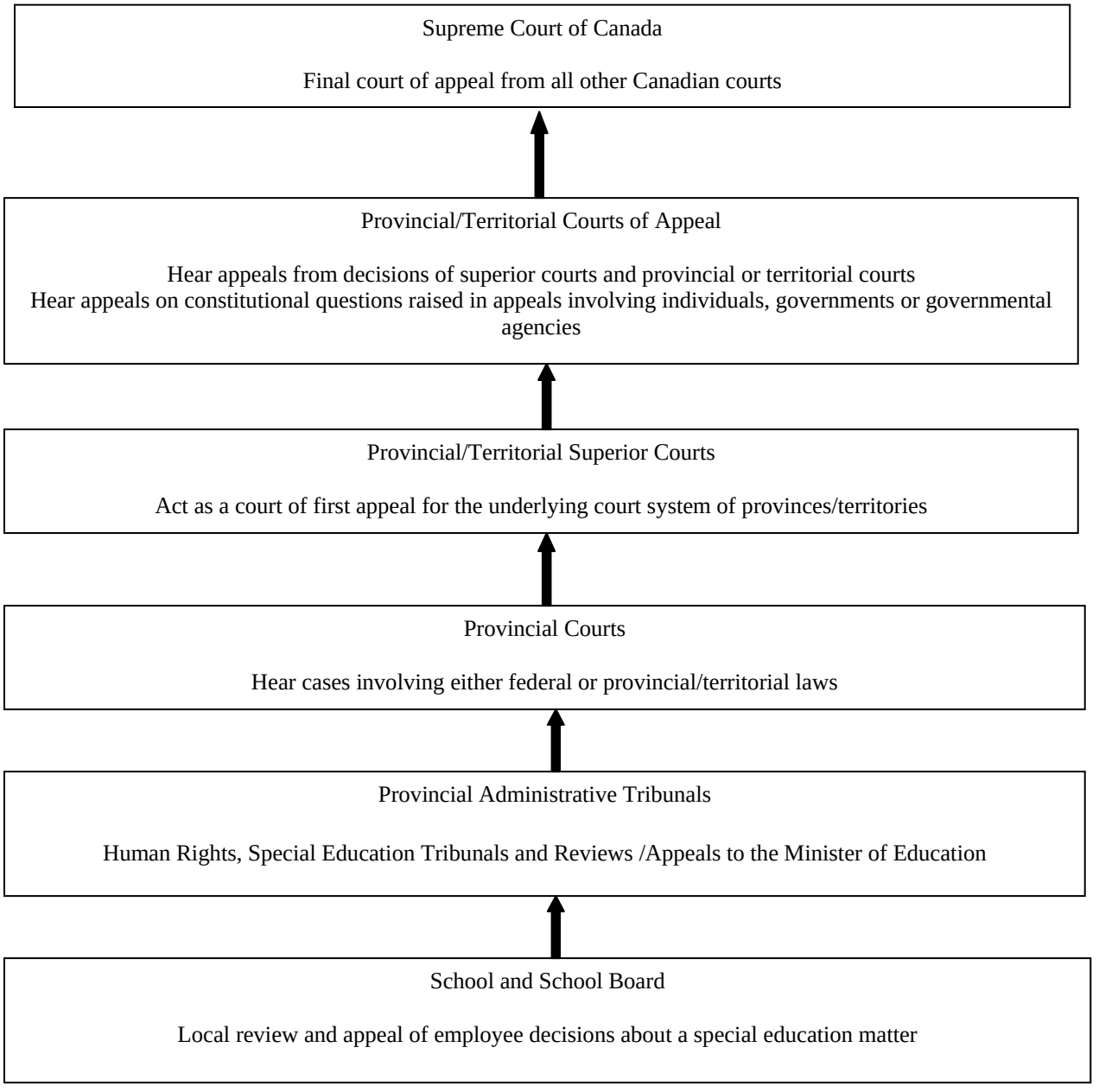
In Canada, the judiciary can play a role in the evaluation of public policy through a review of the legal issues relating to the manner of implementation of government programs. Howlett & Ramesh (1995) note that the judiciary has the ability to review government actions when asked to do so by an individual or organization filing a case against a government agency in a court of law. This process, referred to as judicial review, has been used by parents, school boards, and Ministries of Education as representatives of their government, to resolve disagreements related to special education. The primary focus of judicial reviews is whether the policy was implemented in a non-capricious and non-arbitrary manner according to the principles of due process and accepted administrative law (Howlett & Ramesh, 1995). During a judicial review, Canadian courts concentrate on whether an inferior court such as a provincial court of appeal, or a tribunal such as those convened to resolve special education disputes, or government agency, for example a human rights commission, has acted within its powers or jurisdiction.

The scope of a judicial review in Canada, as assigned to courts through provisions in the Canadian constitution, tends to focus on issues or errors in law rather than upon the facts of the case. In contrast, courts in the United States take a more activist role, as permitted through its constitution, in that they tend to consider errors of fact as well as errors of law in the deliberations. Given these

differences, a special education case with similar facts could have vastly different outcomes in these two countries.

In Canada, courts have tended to defer to Parliament or provincial legislatures and do not view their role as one of writing laws. However, the courts can rule on whether or not the various laws and public policies of government are implemented in a fair and equitable manner. Therefore, through Canadian court processes, as outlined in figure 1, it can be determined if a law ensures that the necessary conditions exist for equal opportunity and are provided as a matter of right and not on sufferance (Foster & Smith, 2003).

Figure 2-1 Responsibilities of Canadian Courts in addressing Special Education Disputes



Adapted from *Canada's Court System* (2005)

In litigation involving special education issues, Canadian courts have tended to defer to the expertise of educators. This raises the concern that by demonstrating deference to educators, the equality rights of the individual with a disability can appear to be of secondary importance. This was especially evident during pre-*Charte*r cases. In their analysis of special education litigation, Williams and MacMillan (2003) reviewed cases between 1978 and 1998. They noted that between 1978 and 1984 the courts ruled only on the administrative aspects of the complaint and included in their decisions statements to the effect that the courts did not have the authority to rule on the specifics of schooling (Williams & MacMillan, 2003). In contrast, their analysis found that between 1986 and 1998, the courts continued to deal with the administrative aspects of education legislation but also began to address the equality rights of students with disabilities. While the decisions primarily addressed requests for specific special education or integrated school placements, the individual characteristics of the student with a disability factored more prominently in the courts' decisions. This shift was thought to be a direct result of section 15 of the *Charter* coming into force. A summary of the cases identified by Williams and MacMillan as demonstrating these shifts in litigation outcomes is reproduced as Table 1.

Table 2-1 *Summary of Cases: 1978-1998*

Case	Issue(s)	Forum(s)	Outcome
Carriere: 1978	Access to school	Supreme Court of Alberta	• Court recognized student's right to attend school, but lacked the authority to rule on specifics of schooling
Bales: 1984	Placement: mainstreaming	British Columbia Supreme Court	• Segregation in special school does not constitute negligence or discrimination; • The Court stated that the question of whether a student should be mainstreamed is not for the courts to decide.
Elwood: 1986	Placement in a regular class	Nova Scotia court injunction followed by an out of court settlement	• Settlement brokered under Sections 2,7 & 15 (equality) of the Charter of Rights and freedoms and ensured continued placement in regular classroom
Razaqpur: 1988	Placement in gifted class	Ontario Special Education Tribunal	• Placement in a gifted class required and to be sponsored by school board.
Trofimenkoff et al,. 1991	Access to education restricted due to closure of Provincial School for the Deaf; equality rights	a) Saskatchewan Court of Queen's Bench b) Saskatchewan Court of Appeal	• Closure was lawful; • While issues cited were said to be laudatory, the Court of Appeal stated that they were not ones with which the courts could concern themselves.
*Rouette:*1993	Placement: equality rights	a) Human Rights Tribunal b) Quebec Court of Appeal	• Integrated placement needs, material and moral damages granted and an affirmative action program required. • Decision overturned.
Marcil: 1994	Placement: equality rights	a) Human Rights Tribunal of Quebec b) Quebec Court of Appeal	• Integration should be considered but it is not a right; partial integration was ordered • The school board must provide services to accommodate students with special needs.
Eaton: 1996	Inclusion: equality rights	a) Ontario Court of Justice-General Division b) Ontario Court of Appeal c) Supreme Court of Canada	• Court of Appeal overturned previous rulings. They found that special education placement was discriminatory and that discrimination stemmed from section 8 of the Ontario Education Act. Amendments to the Act were ordered. • Decision overturned by the Supreme Court. The judges ruled that no Charter-based presumption for inclusion existed and that a child-centered approach to student placement is required.
Eldridge: 1997	Service delivery; applicability to	Supreme Court of Canada	• In some circumstances, private institutions do not fall under the

	private institutions		Charter; • Within the stipulations of s. 1 of the Charter, resources must be provided to allow people with disabilities to benefit from programs.
Pononzie: 1997	Identification of special needs; inclusion in secondary settings	Ontario Special Education Tribunal Ontario Divisional Court	• The ruling of Ontario Special Education Tribunal was upheld and segregated placement was supported.
Grimm: 1997	Inclusion	Special Chambers Hearing	• The appeal in favour of full inclusion was denied and the case was ordered to trial.
Concerned Parents for Children with Learning Difficulties Inc: 1998	Segregated programs; equality rights	Saskatchewan Court of Queen's Bench	• School boards must provide appropriate education, which may include segregated classes and/or specific programs.
Halifax Regional School Board: 1998	Funding tuition for a special private school; the authority of Ministerial Appeal Board	Supreme Court of Nova Scotia	• Ministerial Appeal Board ruling was upheld and the Halifax Regional School Board was ordered to pay fees.

(Williams and MacMillan, 2003. Reproduced with permission)

Special Education Public Policy

Legislation such as school and education acts, regulations, ministerial orders, and policies about special education are considered public policy instruments that articulate the expectations for the education of students with disabilities in various Canadian provinces and territories. Therefore, special education public policy supports the societal goal of ensuring that a high quality public education is available and accessible for all students in keeping with their needs and abilities (MacKay & Burt-Gerrans, 2003; MacKay & Sutherland, 2006). However, legislation concerning special education across Canada continues to grant a high degree of discretion to administrators regarding the interpretation and implementation of provincial special education legislation rather than

to students with disabilities and their parents (MacKay & Kazmierski, 1997). To counteract this trend, many parents have turned to human rights legislation for assistance (Watkinson, 1999) while others have used the courts to address issues regarding the application of special education public policies.

Section 15 of the *Charter* guarantees that "everyone in Canada is equal before and under the law and possesses the right to equal protection and benefit of the law without discrimination" (Department of Canadian Heritage, 2003). Additionally, provisions under provincial human rights acts provide for non-discrimination in services delivery (MacKay & Burt-Gerrans, 2004). MacKay and Burt-Gerrans note that it is well established and rarely contested that both types of guarantee do apply to education and educational service delivery. However, specific application and the meaning of these rights in practice is a matter of vigorous debate that takes the form of court cases, tribunal hearings, and judicial review (MacKay & Burt-Gerrans, 2004). The results of such proceedings can affect special education public policy and may provide guidance to educators in addressing the education of students with disabilities. A significant challenge for educators is determining an appropriate course of action from such findings, because many of the decisions have been conflicting and confusing (Watkinson, 1999).

In terms of special education public policy, two areas emerge as central to the debate concerning exercising the equality rights of students with disabilities. The first area deals with the results of judicial deference to educators in determining the specifics of schooling for students with disabilities. A likely effect of this deference is that education experts tend to consider only the framework of educational services that are

currently available, and do not explore new or innovative approaches in meeting students' educational needs (MacKay & Burt-Gerrans, 2003; Williams & MacMillan, 2003). Thus, the courts have been increasingly called upon to strike a balance between the competing rights and educational philosophies of school officials and parents in determining the most reasonable and appropriate educational program and placement for students with disabilities (Sussel, 1995). Therefore, governments charged with developing and monitoring the implementation of special education policies face significant challenges in determining an appropriate course of action that considers the seemingly competing interests of educators, parents, students with disabilities, when presented with a range of tribunal and court decisions.

A second area that attracts attention relates to the various and conflicting views on student placement. Williams and MacMillan (2001) suggested that although parents ask for courts and tribunals to support their position on student placement, parents have not consistently advocated for a particular type of educational placement. In their review of special education litigation, Williams and MacMillan (2000) noted that parents have sought both inclusive and segregated placements for their children within the context of ensuring their child's equality rights are upheld. Commenting on this state of affairs, MacKay and Burt-Gerrans (2003) pointed out that there are benefits to both types of placements. They contend that the critical factor in making a determination of appropriate placement is that the unique characteristics of the individual student in question are primary to ensuring that equality rights are addressed.

A presentation made by ARCH, A Legal Resource Centre for Persons with Disabilities, echoes these points during in their 2002 submission to the Ontario Education Equality Task Force. This organization stated that the Ontario government and Ministry of Education should ensure through amendments to the *Education Act*:

- that every child receives a free appropriate public education,
- that students should be provided with appropriate individualized disability-related supports and services regardless of the identification or placement of the child and
- that a sufficient number of qualified special education personnel be available to ensure equal access to public education.

They also requested that there be public reporting of outcomes for children identified as exceptional, and of children who may have special needs but have not been formally identified (ARCH, 2002). Against this backdrop, other Canadian provincial governments and ministries of education policy designers face similar calls for provisions to ensure that students with disabilities can realize their equality rights.

The Courts, Equality and Special Education

The leading education case in relation to articulating the role courts have played in clarifying what equality means for a student with disabilities is *Eaton v. Brant County Board of Education*, 1997 1 S.C.R. 214. This case was heard before the Supreme Court of Canada in October 1996, with the written decision delivered in February 1997. The subject of this case was Emily Eaton, a child from Ontario diagnosed with cerebral palsy.

The facts of the case are reproduced below in their entirety to convey an accurate portrayal of the issues the Court was asked to address.

> The respondents are the parents of a 12-year-old girl with cerebral palsy who is unable to communicate through speech, sign language or other alternative communication system, who has some visual impairment and who is mobility impaired and mainly uses a wheelchair. Although identified as an "exceptional pupil" by the Identification, Placement and Review Committee (IPRC), the child, at her parents' request, was placed on a trial basis in her neighbourhood school. A full-time assistant, whose principal function was to attend to the child's needs, was assigned to the classroom. After three years, the teachers and assistants concluded that the placement was not in the child's best interests and indeed that it might well harm her. When the IPRC determined that the child should be placed in a special education class, the decision was appealed to a Special Education Appeal Board which unanimously confirmed the IPRC decision. The parents appealed again to the Ontario Special Education Tribunal (the "tribunal"), which also unanimously confirmed the decision. The parents then applied for judicial review to the Divisional Court, Ontario Court of Justice (General Division), which dismissed the application. The Court of Appeal allowed the subsequent appeal and set aside the Tribunal's order. (*Eaton v. Brant County Board of Education*, 1997 1 S.C.R. 214, p.1)

The Court was specifically asked to rule on several questions based on the facts presented above. The first question centered on whether the placement and the process used in making decisions about the education of Emily could be made without her parents' consent and if the results of these decisions by the school board infringed upon the her section15 *Charter* rights. A related question asked: If there was an infringement, was it justifiable under section 1? In other words, the Court was asked to determine that if Emily had been discriminated against, could the government justify this discrimination as a reasonable limit to the choice of educational placement available to her. Finally, the Court was asked to rule on whether the Court of Appeal erred in considering constitutional issues without receiving the necessary notice as required by the *Court of Justice Act*.

For many educators, the first two questions are of greatest interest because they reflected challenges to the provincial special education policies and procedures that guided their work. For ministries of education, the questions challenged the legislated schemes they had in place to address the education of students with disabilities. For advocates of people with disabilities, the responses to the questions could establish that there was a right for students with disabilities, especially those with severe disabilities, to be integrated and educated in regular schools and classrooms. In this case, some educators and lawyers believed that the Court's decision could establish that the full-time integration of students with disabilities into regular classrooms with their peers was the only logical conclusion, and thus bring about an end to segregated special education classes (Hutchinson, 2001; Lupart, 1998; MacKay & Kazmierski, 1997).

The decision of the Court determined that the school board should be reimbursed for its costs; the appeal court decision was set aside and the decision of the Divisional Court was deemed appropriate. Therefore, the placement of the child, as determined by the Tribunal was also deemed appropriate and did not constitute the withholding of a benefit, in this case to be educated in a regular classroom. The Court reasoned that this child was not disadvantaged by being placed in a segregated special education class. In consequence, she was not denied the benefit of receiving an education. As well, the Court determined the Tribunal's reasoning and decision did not result in discrimination under section15 of the *Charter,* and that it conducted itself within the parameters of the provincial special education statutes that governed its function. The Court also addressed the topic of a right to an integrated school placement for students with disabilities. In

responding to this issue, the Court determined that while integration should be recognized as the norm of general application because of the benefits it generally provides, there was no presumption in favour of integrated schooling because some students require special education to achieve equality. The Court pointed out that integration could be either a benefit or a burden depending upon whether the individual can benefit from the advantages that integration can provide. Finally, the Court noted that although children with special needs may not be able to communicate their needs except through their parents, parental views on or preferences about school placement are not the sole determiners of what is in the best interests of the child. Rather, the Court took the position that the body charged with this responsibility, in this case the Tribunal, must proceed from a child-centered perspective, a perspective which attempts to make equality meaningful from the child's perspective based on their individual and unique characteristics (Bogie, 1997; Keel, 1997; LeBel 2006; MacKay & Kazmierski, 1997; MacKay & Sutherland, 2006; Robertson, 2003; Williams & MacMillan, 2003; Williams, 1999).

The outcome in this case continues to be relevant and raises interesting questions for government policy makers and educators. For instance, the decision raises questions about how to measure the best interests of the child and who should be the final decision makers in this regard. Given that there are numerous adults involved in a child's life, including parents, educators, and the courts, what roles and responsibilities should each be assigned in arriving at the best interests of the child? MacKay (2007) notes that compared to the Ontario Court of Appeal decision in this case, the Supreme Court

showed greater deference to the expertise of the educational officials and placed a higher burden on the parents to demonstrate that the educators had it wrong.

Impact of other Equality Cases

Eldridge

Although the focus of this study is court and tribunal decisions relating to school age students with disabilities, there have been several cases involving adults that have helped clarify the meaning of equality. Since the enactment of the *Charter*, there has been speculation about whether it might be used to compel governments to fund particular programs or provide funding to individuals (Munro, 2003). A decision from the Supreme Court of Canada addressed this type of claim within the context of providing interpreter services to an individual who was deaf and required assistance when attending medical appointments. In *Eldridge v. British Columbia (Attorney General),* 1997, Robin Eldridge argued that that the provincial government should provide sign-language interpreter services so that she could access core medical services. This case is important for its explanation of the principle that equality for all does not necessarily mean identical treatment for all. In this case, the government of British Columbia argued that it was not the direct provider of health care services, having arranged for these services to be provided through the health boards. In turn, the health board argued that because of budget restraints it was not responsible to provide interpreters because this was not a core medical service.

The Court ruled that in some circumstances, section 15 requires governments to take special measures to ensure that disadvantaged groups are able to benefit equally

from government services, in this case health care, by extending the benefit to a previously excluded group (Hurley, 2007). The reasoning in this decision was that by denying access to sign-language interpreters, deaf individuals did not receive the same benefit and access to health care as hearing individuals resulting in discrimination under section 15. This decision emphasized that when a government puts programs or services in place, it retains overall responsibility and cannot divest itself of its constitutional obligations. Robertson (2003) summarizes the case by stating the although British Columbia health care legislation applied equally to both deaf and hearing populations in British Columbia, nevertheless the lack of funding for sign language interpreters rendered the deaf unable to benefit from the legislation to the same effect as hearing persons and this constituted *adverse effect* discrimination. Within an education context, this could mean that governments are not in a strong position to argue that they only provide funding to school systems and are not responsible for ensuring that school boards deliver educational services in a non-discriminatory manner.

Meiorin and Grismer

The Meiorin and Grismer cases provide another example of how decisions of the courts can provide clarity and direction in interpreting the meaning of equality. Although neither case dealt with public school education, they do provide direction to education policy makers. These cases are useful in determining if provincial education legislation could have an unintended outcome of being discriminatory even though that was not the intention of the particular legislation or policy.

The Supreme Court of Canada landmark decisions in the *Meiorin* and *Grismer* cases provided direction about identifying when discrimination under section15 occurs and the information that the parties involved in such cases must present to be successful in making and responding to discrimination claims. In *British Columbia (Public Services Employees Relations Commission) v. British Columbia Government and Service Employees' Union*, 1999 3. S.C.R, usually referred to as the *Meiorin* case, a provincial government employee was involved. After three years of employment, Ms. Meiorin was dismissed from her job as a forestry firefighter because she failed one part of a newly implemented physical fitness test required of all employees. She argued that the new fitness requirement discriminated against women and that she had demonstrated that she could do the work involved as a forestry firefighter based on her three years of successful employment. The Government of British Columbia argued that meeting the new fitness requirement was a condition of continued employment.

The circumstances in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, 1999 3 S.C.R 868, referred to as the *Grismer* case, were that Mr. Grismer had an eye condition that limited his left-side peripheral vision in both eyes. The Superintendant of Motor Vehicles cancelled Mr. Grismer's driver license because he could no longer meet the field of vision standard. In addition, although there were certain exceptions to the field of vision requirements, the Superintendent of Motor Vehicles never granted a license to those with the same diagnosis as Mr. Grismer. Although Mr. Grismer re-applied for his license several times and passed all necessary requirements except for the field of vision test, he was not given

the opportunity to demonstrate that he was able to compensate for his limited field of vision.

The Court decisions in these cases shifted the onus from the individual to prove they had been discriminated against, to the employer or service provider to prove that their standard, policy, or practice was necessary and could not be altered to accommodate the individual. In its decisions in these cases, the Court outlined an in-depth analysis and test for determining when accommodation to the point of undue hardship has been reached in both employment and the provision of public services (Canadian Human Rights Commission, 2005; MacKay & Burt-Gerrans, 2002). The application of accommodation to the point of undue hardship is especially relevant to the provision of educational services in public school systems. MacKay (2007) discusses the application of undue hardship in educational settings as follows:

> Specific services and aids for students with disabilities are, generally speaking, individual accommodations to enable the individuals to benefit from education. This area, as educators and government providers are well aware, can be characterized by a seemly limitless demand for services and the money that goes with them. Rights, though are not absolute. Rights guaranteed under section 15(1) are subject only to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Rights under human right acts are similarly bounded by the limits set out in the Act and by the judicial interpretation of "accommodation to the point of undue hardship test set out in the landmark cases of Meiorin and Grismer. This test poses the questions whether "the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship, whether that hardship takes the form of impossibility, serious risk or excessive costs." In setting out this test, the Supreme Court supported the assertion that "undue hardship means that more than negligible effort is required to accommodate". (p. 7)

For governments and school systems application of the test for accommodation to the point of undue hardship opens them to the possibility that it may be difficult to deny

services or supports to a student with a disability by stating that the requests fall outside of their existing policies, practices, or standards. As MacKay (2007) points out, there can be limits imposed by law; however, governments and school systems must be able to demonstrate that they have done everything possible to accommodate the individual. To a greater or lesser degree, this a recurring theme in special education as evidenced by requests for governments and school boards to provide more funding for students with disabilities to meet their needs. The challenge for governments and school boards is in being able to demonstrate with concrete evidence that they have done everything within their budgetary power to meet the identified needs to the point of impossibility or undue hardship within the bounds of their total operation.

Chapter Summary

In this review of the literature, the Canadian perspective on equality rights for students with disabilities has been presented. Many of the issues related to achieving equality for students with disabilities have been addressed, however, to make equality meaningful further work is required if the goals of Canadian society in the area of equality are to be realized. For this reason, it is important to examine the legacy and lessons that can be learned from over 20 years of special education litigation and tribunal decisions. Examination of these decisions can assist in determining how public policy can be designed to bring equality rights of students with disabilities, as envisioned by the *Charter of Rights and Freedoms*, section 15, to the forefront of the education agenda. It is the position of this researcher that only through continuous in-depth analysis of court and tribunal decisions can governments and educators design public education systems and

allocate resources to achieve equality that is in the best interests of students with disabilities in Canadian schools and society.

CHAPTER 3: METHOD

Chapter Overview

In this chapter, the qualitative research approach used in this study is outlined and described. As well, I discuss the strategies used to collect, organize, and analyze the data, and outline details of the processes used to establish and maintain the credibility and trustworthiness of the research project. Delimitations and limitations of the study are outlined along with information describing the perspective and experiences of the researcher in informing the research process.

Research Design

This study used a qualitative research approach. Qualitative research methods have a long history in the social sciences and are suited to research that locates the observer in the world (Denzin & Lincoln, 2000). This study used written texts that were interpreted and analyzed. Qualitative research of this type is referred to as the interpretation of mute evidence. Mute evidence refers to written texts and artifacts and involves the studied use and collection of historical texts (Hodder, 2000), which, in this study was comprised of court and tribunal decisions. Court and tribunal decisions can be classified under the category of written documents and records. Hodder (2000) notes that researchers distinguish between the terms documents and records in qualitative research. He cites the distinction made by in 1985 by Lincoln and Guba between documents and records based on whether the text was prepared to attest to some formal transaction. Hodder that these researchers make the distinction that records are prepared for official reasons while documents are prepared for personal reasons. Referring to both forms,

Hodder (2000) states, “Such texts are of importance for qualitative research because, in general, access can be easy and low cost, because the information provided may differ from and not be available in spoken form, and because texts endure and thus give historical insight” (p. 704). When defined in this manner, the use of the records and documents pertaining to Canadian court and tribunal decisions in the area of special education as the primary data source is appropriate for this study.

The study of educational legal cases belongs to the style of qualitative inquiry known as analytical research. Analytical research examines legal topics using documentation found in primary and secondary sources. Analytical research also describes and interprets the past or recent past from selected sources using logical induction to analyze traces of the past. The credibility of an analytical study lies in the procedures inherent in the methodology, which includes the search for and criticism of sources, and the interpretation of facts for causal explanations (McMillan & Schumacher, 1997).

Analytical research can be a method used to study educational case law and educational policy. When used to study educational case law, the focus is on the examination of legal issues in specific situations such as equality rights of students with disabilities. Analytical research methods can also be applied to the study of educational policy through the examination of the policy-making processes. By interpreting the facts drawn from an examination of the policy processes, causal explanations can be made (McMillan & Schumacher, 1997). These areas of analytical research are important because they provide knowledge of the past that serves to clarify current legal and policy

discussions. In turn, information from these types of research studies support the creation of a common sense of purpose in articulating the goals of education in society, which in this research study related to special education policies and their impact on students with disabilities.

To conduct credible educational case law research, it is necessary to locate primary sources of data such as federal, provincial, and local legislation, statutes, and regulations. In addition to these primary sources of information, the original court decisions need to collected and analyzed. Secondary sources of information that assisted with the analysis of the data included commentaries about court and tribunal decisions. The result of this research provided a comprehensive summary and interpretation of the legal issues related to equality and students with disabilities in Canada.

Procedures

To collect data for this study it was necessary to become familiar with resources usually used by lawyers in legal research. With increased availability of electronic media to store and retrieve this information, limited use was made of print materials. A major advantage of using primarily electronic resources was that information tended to be more current and updated more frequently. This helped to ensure that the cases and commentaries used in this study accurately reflected court decisions. Using electronic databases also enabled conducting searches in a timely manner using combinations of key words and phrases to identify the greatest possible number of cases that could be relevant to this study. These searches ensured that relevant court proceedings, and reported human rights and special education tribunal decisions, if available, were included in the overall

analysis. Secondary sources included Canadian educational law journals, legal journals, case commentaries, dissertations, and educational law conference papers.

Data collection

The primary sources of the cases analyzed for this study were obtained through searches of the Canadian Legal Information Institute (CanLII) database and the LexisNexis Quicklaw database. CanLII is a non-profit organization managed by the Federation of Law Societies of Canada, and hosted through the LexUM Laboratory at the Université de Montréal. The stated goal of CanLII is to make Canadian law accessible at no cost on the Internet. Quicklaw is a commercial database accessed through paid subscription. This database is owned and operated by LexisNexis Canada and is considered to be the most widely use research tool in the legal profession. Searches of both databases were conducted for the period 1999 to 2008.

To obtain cases relevant to this study from both databases, initial broad searches were conducted using key words and accessing all levels of courts in all provinces and territories. The key words identified for broad searches were *equality rights*, *disability*, *special education*, *school board*, and *student/pupil*. These key words were used in various combinations to search for cases. The search process was repeated until the same cases appeared at least three times across all of the searches. This process assisted in establishing that the greatest number of potentially relevant cases had been located. The results of these searches were categorized according to the province/territory and the level of court where the case was heard.

The format of the search results from both databases contained the name of the case, citation, and docket number. As well, each set of results also contained key words/terms that described the primary focus of the case. For each of the identified cases, additional information was used to determine the relevance of the case to this research study. Possible relevancy for inclusion in this study was ascertained by reviewing the Reflex Record for the CanLII cases. The CanLII Reflex Record contains the following information: related decisions, legislation cited, and decisions cited. If a particular case was cited in another decision, this was indicated in the Reflex Record under the heading of Noteup. For the cases identified through Quicklaw, a check was made of the Statutes, Regulations and Rules Cited section that is found at the beginning of each case. As well, cases located through Quicklaw contained an overview summary of the reasons for the decision. Cases from both databases had key words or terms highlighted that described the legal concepts discussed in the decisions.

To determine if a particular case should be considered for inclusion in this study, two main criteria had to be met. First, a check was made of the legislation cited. If the cited legislation included references to an *Education Act* and/or the *Canadian Charter of Rights and Freedoms*, it was deemed to fit the data collection criteria. The second data collection criterion was cases reported in English from 1998 to 2008 naming publicly funded school districts as a party to the proceedings.

All provincial and territorial court and tribunal decisions meeting these criteria were subjected to further examination. A descriptive word search strategy was used to narrow the number of decisions to those making specific reference to special education,

disability, and equality rights in a school context. This descriptive word search assisted in narrowing the records to those involving school age students with a diagnosed disability attending a publicly funded school. In several cases, references were made to private schools, but not as primary parties to the litigation. All of these cases involved staff from the private schools called as witnesses for families who were pursuing an action against a publicly funded school system. Based on this information, private schools were not included in the data analysis.

A table of the cases was created to organize the results by province, level of court and/or type of tribunal, legislation cited, diagnoses, and date of the proceedings. To facilitate connecting cases, names of cases cited in the Noteup section were highlighted on the printed copies as many of the decisions had multiple references to previously adjudicated cases. This process served two purposes. First, it became a source for locating decisions that could be relevant to the study but might have been missed in the key word searches because of the names of the litigants. Second, it provided a way to cross-reference the cases during the data collection process. This was important to the study because it connected previous court or tribunal proceedings to cases occurring after the initial decision.

In this study, it was also important to distinguish between decisions that could influence special education policy versus those that are legally binding decisions resulting in a change to special education policy. The interaction between court decisions that influence versus those that are binding also needed to be considered in terms of sphere of influence. For example, in a particular province, a provincial court or human

rights tribunal decision might influence special education policy in that province but not others. In contrast, if a decision from a provincial court is appealed to the Supreme Court of Canada, that decision can have implications for special education in all provinces and territories. This was an important consideration throughout this study because courts and other bodies, such as human rights tribunals, will often review and cite information from previous decisions in other jurisdictions as they interpret the facts before them to assist in formulating and rendering their decisions.

In addition to searches of the CanLII and Quicklaw databases, searches were conducted of the human rights commissions for each province. This strategy was employed because not all provinces provide information on their tribunal decisions to the databases indicated above. For each province, the official web site was located and searched for sections entitled Decisions and Annual Reports to determine if there were relevant decisions between 1998 and 2008. Decisions from these searches meeting the research criteria were printed and filed by province. The same process was used to search provincial and territorial ministry of education web sites to locate special education reviews by the minister and special education tribunal decisions. In addition, these sites were searched to obtain copies of provincial and territorial education or school acts, ministerial orders and policies for special education. A table of this information was created to facilitate the comparison of special education legislation.

To assist with the interpretation of the decisions, additional sources of information were consulted to confirm the accuracy of the researchers' analyses of the cases. Sources of case commentaries from the Education Law eBulletin, CAPSLE Comment and the

Education Law Reporter were monitored on a monthly basis from October 2006 to March 2008. These resources were selected because they are specifically designed to present legal information using language that is more accessible to educators who do not have formal legal training but can benefit from the information for use in their work. Where available, the archives of these publications were searched to obtain commentaries on decisions from 1998 to 2008. These commentaries were printed and used to compare and augment the analyses completed for this study.

Data Analysis

A purpose of a study of educational law is to become knowledgeable about "what the law actually is" as it applies to education (McMillan & Schumacher, 1997). To achieve this end, "this usually means an analysis of relevant court cases, augmented with an analysis of statutory law where applicable, to derive legal principles", (McMillan & Schumacher, p. 490). McMillan & Schumacher highlight that "the objective of researching educational law is to understand the law at a particular point in time because a court decision today, may be overturned tomorrow, and statutes may be passed, modified or repealed; the law is never static" (p. 409).

To maintain objectivity in determining the facts and outcomes in each case as it relates to litigation seeking equality rights for students with disabilities in Canada, all court and tribunal decisions were analyzed using a systematic approach. A framework proposed by Hudgins & Vacca (1995), to systematically analyze legal decisions was used. Application of this analytical framework ensured that all cases were reviewed using the same criteria. The use of a systematic approach analysis was also important because

court and tribunal decisions can be appealed to higher courts that may uphold, vary, set aside, or refuse to review the previous decision. Through a systematic and consistent approach to the analysis of the decisions, including any related appeal decisions, all of these factors were included in the analysis and conclusions reported in the results and discussion chapters of this study. The legal case analysis framework used in this study, and based on the work of Hudgins & Vacca (1995), is found in Table 3-1. This analysis format proved to be appropriate for both human rights tribunal decisions. For these types of cases, several terms were modified, such as substituting the references to court and replacing it with tribunal, and judge to panel to best represent the flow of the proceedings.

Table 3-1

Legal Cases Analysis Framework

Component	Questions
The Facts	Who is suing whom? What situation precipitated a suit? What is the plaintiff's case based on? What is the defendant's response to the plaintiff's charge? What remedy is the plaintiff seeking?
The question	What is the court being asked to decide, in its simplest form?
The decision and rationale	What is the court's actual decision? What are the reasons for this decision? Were there concurring and/or dissenting opinions? What was the reasoning of the judges?
Implications	Does the decision have general or local applicability? Is it consistent with prior rulings on the same subject or does it set a precedent? What effect will it probably have on a school system?

Adapted from Hudgins & Vacca, 1995

In addition to analyzing the relevant law and court decisions, McMillan & Schumacher (1997), stress the importance of the researcher examining secondary sources, such as legal commentaries from education law journals. They point out that "by synthesizing both primary and secondary sources, the analyst should be able to state a definitive position on the given legal issue" (McMillan & Schumacher, 1997, p. 491).

Consideration of these points was critical to the success of this study because of its focus on developing knowledge and designing special education policy that is consistent with the *Charter*. By analyzing the data contained in the decisions and the frequency with which particular decisions are cited in newer cases, themes were identified relative to specific areas that policy makers should consider in addressing the equality rights of students with disabilities through the design of special education policies. Through this process, connections between legal decisions and current policies were made.

To connect the themes from the analysis of litigation and tribunal decisions to actions that have been or could be taken by special education public policy designers, current provincial special education policies were compared. The analysis of similarities and differences between provincial special education policies provided a current description of the Canadian special education policy context.

Trustworthiness

Denzin & Lincoln (2000) define qualitative research as "a situated activity that locates the observer in the world" (p. 3). As such, qualitative research consists of a set of interpretative practices that make the world visible. This was relevant in this study

because the researcher was immersed in the world of legal documents and used them to establish links to explain the influence of court and tribunal decisions on special education policy and practices. In a qualitative research study, it is important to ensure that a variety of strategies are employed to ensure the accuracy of the findings (Creswell, 2003) otherwise referred to as validity in quantitative methods.

In this study, three strategies were employed to ensure trustworthiness. First, triangulation was used to ensure that the accounts of court and quasi-legal proceedings were accurate. Triangulation uses different data sources of information and examines evidence from the sources to build a coherent justification for themes (Creswell, 2003). Triangulation has also been described as the search for convergence of, and consistency among, evidence from multiple and varied sources (Brantlinger, Jimenez, Klingner, Pugach & Richardson, 2005). They also note that data triangulation refers to the researcher using a variety of data sources in a study, which was an important approach employed in this study. Through the use of primary and secondary sources of information about the various court and tribunal decisions that were analyzed, evidence was gathered that ensured the facts and results of decisions were reported accurately. To ensure that various points of view were represented in the results, the analysis included decisions that reflected negative or discrepant information. This included results of proceedings where the decisions did not support the complainant(s) position that there had been an infringement of equality rights as well as those that did uphold the complainant(s) position. Decisions subject to further court appeal and the resulting outcomes were

included in the analysis to capture the legal reasoning that resulted in a particular case being upheld or overturned.

A second strategy employed was to have the analysis and results of the study reviewed by external auditors. In qualitative research studies, use of external auditors is a recognized and accepted method of adding credibility to a researcher's presentation of the findings. The role of external auditors is to examine if, and confirm that, a researcher's inferences are logical and grounded in findings (Brantlinger et al., 2005). To ensure that the data had been accurately analyzed and interpreted consistent with legal principles, drafts of the study were reviewed by a lawyer whose area of practice is education law. Again, comments and suggestions for revisions were incorporated into the document.

Finally, to do qualitative work well, individuals must have experience related to the research focus, be well read, knowledgeable, analytical, reflective, and introspective (Brantlinger et al., 2005). Related to these areas is the need for qualitative researchers to identify and acknowledge their bias. By articulating and clarifying potential areas of bias, the researcher believes that she presents an open and honest narrative (Creswell, 2003) that reflects the information obtained from the data, not her opinion or musings on the topic under investigation.

Regarding relevant researcher background, I bring to this study over 30 years of experience as an educator in the field of special education. During the course of my career, I have had the opportunity to work at both the elementary and junior high school (grades 7 to 9) as a special education resource teacher and classroom teacher. As well, I have experience as a public school system senior administrator with responsibilities for

special education and student services in a large Canadian school board. Most recently, I have been employed in a provincial ministry of education in the area responsible for developing special education policies and supporting school jurisdictions with implementing ministry directives. All of these positions required that I keep myself informed of issues related to special education from the perspectives of students, parents, teachers, school administrators, advocates, colleagues, and various legal counsels. These perspectives at times clashed and resulted in disagreements requiring the use of fair and transparent processes to resolve the dispute. It is through being involved in the design of dispute resolution mechanisms that I developed an interest in and increased my knowledge of how the equality provisions in the *Charter* could be used as the basis for extending meaningful educational opportunities to students with disabilities.

To build my knowledge and expand my skills set, I attended education law conferences and worked with school board legal counsel to design professional development and board level special education appeal processes based on the principles articulated in the *Charter*. As part of my ongoing education and interest, I continue to read extensively in the area of the *Charter* and apply this information in my work and studies. Through my various work assignments, I have also had the opportunity to be party to judicial reviews of special education decisions and testify in court proceedings. These experiences have assisted me in developing a balanced perspective and response to special education issues, which was critical in grounding this research study. In their totality, I feel that these experiences and opportunities prepared me to undertake this study with the curiosity, confidence, and skill set required of qualitative researchers.

Delimitations

The data collected in this study were limited to court and tribunal decisions reported in English. The limitation excluded decisions reported in French and limited the discussion of judicial and human rights tribunal decisions from the province of Québec. All decisions included in the analysis involved a publicly funded school system and excluded private schools because of the lack of legislated agreement across the country defining this classification of schools and the lack of consensus around their responsibilities for providing special education programming and services to students with disabilities. In contrast, legislation related to publicly funded school systems is more consistent and allows for more accurate comparison of expectations around special education.

This research study focused on students with disabilities as defined previously, therefore court cases and tribunal decisions involving students who are gifted and talented were not included in the analysis or resulting conclusions. The decision not to include cases involving these students was based on the premise that superior cognitive ability and extraordinary talents are not typically considered mental or physical disabilities as referred to in *Charter* section 15. However, in special education practice, students who are gifted and talented are often included under the broader umbrella of *students with exceptionalities*, which includes students with disabilities. As such, program planning and school placement decisions involving students who are gifted and talented have been subject to litigation and human rights tribunals. Since many students who are gifted and talented benefit from special education programming, most provincial

special education policies include these students so that their educational needs are addressed.

Decisions between 1985 and 1998 were summarized; however, the focus of the proposed research study will be on the analysis of cases occurring after this time period. This is based on the results of a review of the literature showing that there is an existing body of Canadian educational law commentaries reporting extensively on these cases. Of note, Williams and McMillan (2001 & 2003) provided extensive summaries of special education litigation and implications for educational practices, with particular emphasis on the inclusion of students with disabilities in schools. The current study built on their research and extended their findings to encompass more recent decisions. Building on the trends they identified in *Charter* litigation, the review of the literature for this study revealed that courts and human rights tribunals appear to be more willing to render decisions that consider more than the administrative processes of special education. As well, Canadian courts are also increasingly prescribing remedies to address the perceived gaps in special education services and programming provided to students with disabilities, thus demonstrating less deference to the expertise of educators than in previous decades. This change may also signify that courts and human rights tribunals are increasingly prepared to make equality rights explicit through the clarification of expectations for educators who provide special education programming to students with disabilities. Therefore, both educators and policy makers can use this information to inform their work.

Chapter Summary

This chapter identified the steps involved in collecting data for this study and selecting the cases for in-depth analysis. In addition, the challenges associated with conducting a study relying on document reviews were outlined. The strategies used to ensure that the study results were trustworthy and can withstand scrutiny by educators and lawyers, were documented.

CHAPTER 4: RESULTS

Chapter Overview

In this chapter, I present the procedures and processes that were used to identify, analyze, and categorize cases. Cases for this study were drawn from two sources of proceedings that are generally available accessible to parents as forums in which they resolve special education disputes involving their child and a school system. The chapter begins with a discussion of the database search strategies and how I used the results to identify cases meeting the criteria for this study. Descriptive statistics were conducted to identify the gender, age, and disability categories represented in the cases. Finally, I present the process used to group the cases into broader categories. These findings are discussed in Chapter 5.

Forums for Dispute Resolution

In Canada, human rights tribunal and court proceedings were the two most frequently identified forums for special education dispute resolution found during the research for this project. Human rights proceedings tend to be conducted at no cost to the participants and do not typically require the services of a lawyer, although a parent may choose to have legal representation. A human rights tribunal may, in some instances, award financial damages. In contrast, court proceedings are formal legal procedures with set protocols or rules that must be followed by the litigants. For example, there are rules concerning timelines for filing motions of actions. As well, there are policies and procedures that stipulate the format and content of any evidence introduced for

consideration by the judge(s). Due to the nature of the typical court process, most parents and school systems engage the services of lawyers to guide them.

Database Searches

Identification of Court Cases

Key word searches were conducted using the Canadian Legal Information Institute (CanLII) and LexisNexis databases. For the first round of searches, all courts and tribunals were selected. During this phase of the research, the following terms were used either singularly or in various combinations to retrieve potential cases: *equality rights*, *disability*, *special education*, *school board*, *school district*, *student*, and *pupil*. The results of the key words searches are shown in Tables 4-1 and 4-2.

Table 4-1

Search Results – All Courts and Tribunals 1998 to 2008

Database	Term(s)	Result
CanLII	Equality Rights	29,795
CanLII	Disability	39,554
CanLII	Special Education	596
CanLII	School Board	3,819
CanLII	School District	1,820
CanLII	Student or Pupil	272

Table 4-2

Search Results – All Courts and Tribunals 1998 to 2008

Database	Term(s)	Result
LexisNexis	Equality Rights	>3,000
LexisNexis	Disability	>3,000
LexisNexis	Equality Rights and Disability	13
LexisNexis	Special Education	520
LexisNexis	School Board	>3,000
LexisNexis	Student or Pupil	>3,000
LexisNexis	Special Education and Student	262
LexisNexis	Special Education and Pupil	148

In reviewing the search results, the most relevant search term yielding cases directly related to the focus of this study was *special education*. Both databases produced similar total results, in that the case citations were the same, indicating a high degree of consistency in contents of both databases. The results of the special education searches were reviewed, and a manual check was conducted. When the same case citation was found in the results from each of these databases, it was noted.

To narrow the results further, and to identify probable cases for further analysis, a search was conducted of the legislation cited in the cases. The key terms used in these searches were: *Education Act, School Act, Canadian Charter of Rights and Freedoms*. Terms were combined to facilitate the retrieval of the broadest possible number of cases that could be relevant to this study. The results are presented in Tables 4-3 and 4-4.

Table 4-3

Search Results – Legislation Cited 1998 to 2008

Database	Legislation Key Words	Results
CanLII	Education or School Act	12,529
CanLII	Education Act	24,185
CanLII	School Act	27,891
CanLII	Canadian Charter of Rights and Freedoms	8,141

Table 4-4

Search Results – Legislation Cited 1998 to 2008

Database	Legislation Key Words	Results
LexisNexis	Education or School Act	>3,000
LexisNexis	Education Act	527
LexisNexis	School Act	459
LexisNexis	Canadian Charter of Rights and Freedoms	>3,000

Both databases returned large numbers of cases based on the key words. To narrow the results to cases of interest to this study, additional limits were placed on the scope or responsibilities of the courts that were searched. The next series of searches excluded courts responsible for adjudicating provincial offenses, such as traffic and criminal cases, family and youth courts, small claims courts, and probate courts. Cases adjudicated by a federal court were removed from the data if they were heard by the Federal Court of Appeal, Federal Court of Canada, or Tax Court of Canada because these courts do not deal with provincial matters related to provincial or territorial legislation, such as public school education. The results of this search of both databases identified 53

cases meeting the criteria of this study. All of these cases were in English, cited either school or education acts or the *Canadian Charter of Rights and Freedoms*, and included a specific or general reference to a disability or more than one disability. These cases were listed in a table with the following categories: province, level of court where the actions were adjudicated, name of the case, legislation cited, issue before the court, type of disability, and age and gender of the parties if stated in the case.

Cases heard before the Supreme Court of Canada between 1998 and 2008 were included under the appropriate province. This added one case to the province of British Columbia. In addition, one case from Ontario made an application to be heard before the Supreme Court of Canada; however the Court did not give leave to appeal. Therefore, this case was included in Ontarios's total and calculations. To ensure further that all of these cases were relevant to this study, the names of cases were manually cross-referenced against a list of case names generated during the review of the literature. No additional cases were identified for inclusion in this study. This process also confirmed that there were no relevant cases from the following provinces and territories: Newfoundland, Prince Edward Island, Manitoba, Northwest Territories, or the Yukon. The 53 court cases in Appendix 2 are believed to represent all cases of interest meeting the criteria set forth for this study.

Analysis of Court Cases

Descriptive statistics were applied to the results in Table 4-5 to generate the number of cases adjudicated by province. Over half of the cases, 67%, were from either British Columbia or Ontario. Nova Scotia ranked third with 13% of the cases with the

remaining provinces and territories accounting for 20% of the cases analyzed. It is important to note that of the total number of parent litigants, eight families accounted for 43% of the cases.

Table 4-5

Number of Court Cases by Province

Province	Number	Percent
Alberta	4	8%
British Columbia	14	26%
New Brunswick	2	4%
Nova Scotia	7	13%
Nunavut	1	2%
Saskatchewan	3	6%
Ontario	22	41%
Total	53	100%

A number of separate court proceedings involved the same families over the course of the 10-year time frame. The majority of these cases centered on families pursuing litigation involving more than one level of court. Parents in these cases argued that their children had been discriminated against because the province had terminated services directed at mitigating the impact of a diagnosis of autism. Most of these cases were heard before courts in British Columbia and Ontario. This trend is also reflected in the number of complaints of discrimination filed with the Ontario Human Rights Commission. In both Ontario and British Columbia the impetus for the litigation appeared to be the type of legislation that was in place to make funding and services available to children with autism. Due to the enforcement of the legislation which existed

at the time, parents felt that after they had exhausted the administrative appeals processes, their only alternative was to pursue action through courts and human rights tribunals in order to have services continue for their children.

Analysis of Court Cases by Disability/ Diagnosis

A coding sheet was developed to determine the categories of disability subject to court proceedings. Each case was reviewed and the diagnosis or disability was noted. In cases where there was no information, data were recorded using the description from the court decision. For example, in several instances the students were referred to as meeting the provincial criteria for having a disability although a diagnosis was not specified. The majority of cases (n=35) involved children from British Columbia, Ontario and Nova Scotia with an autism spectrum disorder. The results of the disability/diagnosis analysis are presented in Table 4-6.

Table 4-6

Number of Separate Court Cases by Disability

Disability/Diagnosis	Number	Percent
Attention Deficit Hyperactivity Disorder	1	1.9%
Autism Spectrum Disorders	35	66.0%
Communication/Language Disorder	1	1.9%
Down Syndrome	3	5.7%
Learning Challenges	1	1.9%
Learning Disability	3	5.7%
Mild Developmental Disability	1	1.9%
More than one disability	8	15.0%
Total	53	100.0%

Analysis of Court Cases by Age and Gender

To confirm that the cases selected for this study involved children of school age, each case was analyzed to determine the age of the child or children named in the proceedings. Although 27 cases did not specify age, information in the court decision such as the name of the school and grade the child attended confirmed that they were between the ages of 6 and 20 years. For the remaining cases, a tally sheet was used to count and group these students by age and level of schooling as presented in Table 4-7. School and grade level were assigned based on the traditional grade level groupings used in Canadian public school systems. This analysis determined that from the information available, the majority of the court cases involved students of elementary school age. In conjunction with the age analysis, a further examination of the data determined the gender of the students named in the cases. This analysis was limited by the available information. However from the cases where gender was specified, 100 males and 16 females were identified, while seven cases did not specify the gender of the students.

Table 4-7

Age and School Groupings

Age Group	Number of students	Grades	School Level
6 to 11 years	19	1 to 6	elementary
12 to 14 years	4	7 to 9	junior high
15 to 20 years	3	10 to 12	senior high
not specified	27	not specified	not specified

Human Rights and Special Education Tribunal Cases

Identification of Human Rights and Special Education Tribunal Decisions

Every province and territory has legislation in place whereby citizens can bring complaints of discrimination against agencies, institutions, or businesses that they feel have treated them unfairly. The basis for any complaint made under these pieces of legislation must be articulated in the relevant provincial or territorial Human Rights Act provisions. In the case of students who are either under the age of majority or who are unable to advocate for themselves, parents or guardians may file a complaint on their behalf. Parents acting on behalf of their child with a disability do not need make use of school board or Ministry appeal processes before filing a complaint. Education legislation for each province and territory also contain sections permitting parents to request an appeal of special education decisions to their local school board. In the majority of provinces and territories, clauses also make it possible for parents to request that the Minister of Education review or hear an appeal of a school board decision. All of these types of decisions can be subject to further review by a court. This process of judicial review makes it possible for dissatisfied parties to seek resolution of unresolved issues in matters related to discrimination based on disability and special education decisions made by school boards and ministries of education. Parents, school boards, or a ministry of education may make an application for judicial review that brings special education legislation, regulations, policies, and procedures under court scrutiny.

Collecting cases and decisions of provincial and territorial human rights and special education tribunals proved to be more challenging than anticipated. The CanLII

and LexisNexis databases were searched for relevant decisions using the same search terms as those identified for court cases. Through the course of these searches, it was determined that there were additional factors not accounted for during the research planning stages of this study. First, not all provincial and territorial human rights commissions archive their decisions in legal databases. Second, where there are legal databases, there are often limitations on accessing the decision if it pertains to a minor. Third, because of the various time limitations for filing a human rights complaint, several cases were not brought to a tribunal for decision or were dismissed by a human rights commission. These factors were also present during the searches for provincial or territorial special education tribunals. Four human rights tribunal decisions involving school age children were located using the CanLII and LexisNexis databases, two from British Columbia and two from Ontario for the period 1998 to 2008.

A second search strategy involved a search of each provincial and territorial human rights commission web site to determine if human rights commission decisions and cases from other provinces and territories could be located. If the site had a link to decisions from that province or territory, the cases were read on screen and if they met the search criteria for this study, they were printed for later analysis. This search identified two additional tribunal decisions, one from Alberta and one from Saskatchewan. In total, six human rights tribunal decisions were included as data for this study and are identified in Appendix A.

Analysis of Human Rights Tribunal Cases

The six human rights tribunal cases were analyzed using an adapted version of the court case template. This template was adjusted to take into consideration the different terminology used in these types of proceedings as outlined in Table 4-8.

Table 4-8

Human Rights Tribunal Analysis Framework

Component	Questions
The facts	Who filed the complaint? What situation precipitated the complaint? What is the respondent's response to the complaint? What remedy is the complaint seeking?
Complaint grounds	What is the tribunal being asked to decide, in its simplest form?
The decision and rationale	What is the tribunal's actual decision? What are the reasons for this decision? Were there concurring and/or dissenting opinions? What was the reasoning of the tribunal?
Implications	Does the decision have general or local applicability? Is it consistent with prior decisions on the same subject or does it set a precedent? What effect will it probably have on a school system?

Adapted from Hudgins & Vacca (1995)

Due to the small number of total cases, descriptive statistics were not computed but the cases were summarized. Five of the cases involved males while the sixth case did not indicate gender of the student. The age of the student at the time of the complaint being filed was stated in only two of the cases, 12 and 14 years old respectively.

The grounds cited in the complaints alleged discrimination in the provision of goods and services, specifically education, age discrimination, discrimination based on family status, and failure to accommodate based on disability. Each of the complaints was filed by a parent on behalf of a child and named a school district and/or the provincial ministry of education. Five of the complaints specified the disability of the child. These disabilities included attention deficit/hyperactivity disorder, brain injury, dyslexia, severe mental and physical disabilities, autism, and William's syndrome. One case from Ontario was noteworthy because it began in 2003 as a complaint filed by one family on behalf of their son but by 2005 had expanded to include 245 families of children with autism. The Ontario Human Rights Commission grouped those complaints spanning the years 2003 to 2005, to facilitate the process of adjudication. All of these cases dealt with alleged age discrimination against students with autism.

Special Education Tribunal Decisions

The LexisNexis and CanLII databases were searched for decisions of special education tribunals, special education appeals, or reviews of a special education matter by a provincial Minister of Education. Special education tribunal decisions for Ontario were located using the LexisNexis database and also on the ministry web site. The remaining

provinces and territories did not have decisions archived in the legal databases or web site archives of special education tribunal or ministerial appeal decisions.

For Ontario, 38 special education tribunals were convened during the period of 1998 to 2008. Ontario has provisions for establishing special education tribunals for both English and French public and separate school systems. Of interest for this study were the English Special Education Tribunal decisions. Cases heard by the Tribunal are governed by the entitlements outlined in Ontario Regulation 181/98, *Identification and Placement of Exceptional Pupils*. Regulation 181/98 sets out the expectations of the ministry for the processes to be used to identify and place students with disabilities in the provincial school system. Special Education Tribunals are the final non-judicial body that can adjudicate disputes between parents and school systems about the identification and placement of exceptional pupils. In keeping with the Ontario *Education Act*, all 38 cases dealt with disputes about either the identification or the placement of exceptional students or both areas together. The published decisions of the Tribunal do not include information that could be used to identify specific families and educators. From the information available, it appears that nearly all disputes were resolved at the Tribunal stage and did not proceed to court.

However, the analysis of Ontario court cases found at least two instances, (*Ismail v. Toronto District School Board*, 2006 and *Clough v. Simcoe County District School Board*, 2005), where disagreements were previously heard by the English Special Education Tribunal after special education appeals to the respective school boards by the parents. Both Tribunal decisions focused on the continuing disagreement between the

parents and the local school board regarding the appropriate classroom placements for their children.

The Tribunal decision in *Ismail*, 2006, upheld the board's decision of a part-time integrated placement for the student. This was contrary to the parent's preference to have her son receive his education in a full-time integrated junior high school placement. The parent's appeal to the Ontario Superior Court of Justice, Divisional Court, upheld the Tribunal's decision regarding placement.

In *Clough*, 2005, the parent objected to the school board decision to place her son in a special education class operated by the board. The parent felt that her son's needs would be better met in a specialized program, specifically an Intensive Behavioural Intervention Program (IBI), for 40 hours per week delivered by an IBI therapist in a separate room away from other students. In this case the Tribunal found that the parent's request was for the provision of a specific type of therapy, which it deemed to be a medical treatment and not an educational program. Thus, the Tribunal ruled that the placement recommended by the board was appropriate and could address the educational needs of the student. The Ontario Superior Court of Justice, Divisional Court, upheld the Tribunal's decision on the placement of this student.

In total, the results from Ontario suggest that the both school board and provincial Tribunal appeal processes are accessible to families and used by them to resolve disputes. In addition, these results also indicate that through the use of the processes outlined in Ontario regulation and policy, parents are able to resolve many disagreements concerning

their child's special education identification and placement without proceeding to courts or human rights tribunals.

Case Categorization

A total of 53 court and six human rights tribunal decisions were analyzed for this study. An analytical research approach was used to examine the records of these 59 cases. The approach used was especially appropriate for this study because it allowed the researcher to explore legal records to describe and interpret events from the past using relevant primary and secondary texts.

The process of analyzing and categorizing the court and human rights tribunal decisions clarified the connection between the courts, human rights tribunals, ministerial appeals, and school board appeals. The review of provincial special education legislation and related regulations found that all provinces and territories provide a process by which parents can appeal decisions about their child's placement or program to their local school board. In addition, all provinces and territories have a mechanism by which parents can request that the provincial or territorial minister of education review the school board decision of a special education appeal. Once the review or appeal to the minister of education processes are exhausted, some parents in the cases included in this study proceeded either to the courts or to human rights commissions for resolution of their differences. In some instances the courts were also used by parents to obtain injunctions to compel a school board or provincial ministry to take specific actions to resolve differences related to special education. As well, some parents used the courts to

make applications for judicial review of earlier decisions by school boards, education ministers, or human rights tribunals.

To determine the commonalities between the 59 cases, a thematic analysis was conducted to identify whether there were particular categories or patterns among and between decisions. The first step of the analysis identified the issues that lead either to a court case or to a complaint being filed with a provincial human rights commission. For each case, the main issues were identified and organized under category headings that best described the primary concerns raised in the case. The majority of cases had more than one concern or issue necessitating the creation of sub-categories and identification of areas of overlap between the cases. This information was noted along with the case citation, province, and date.

Identification of Categories

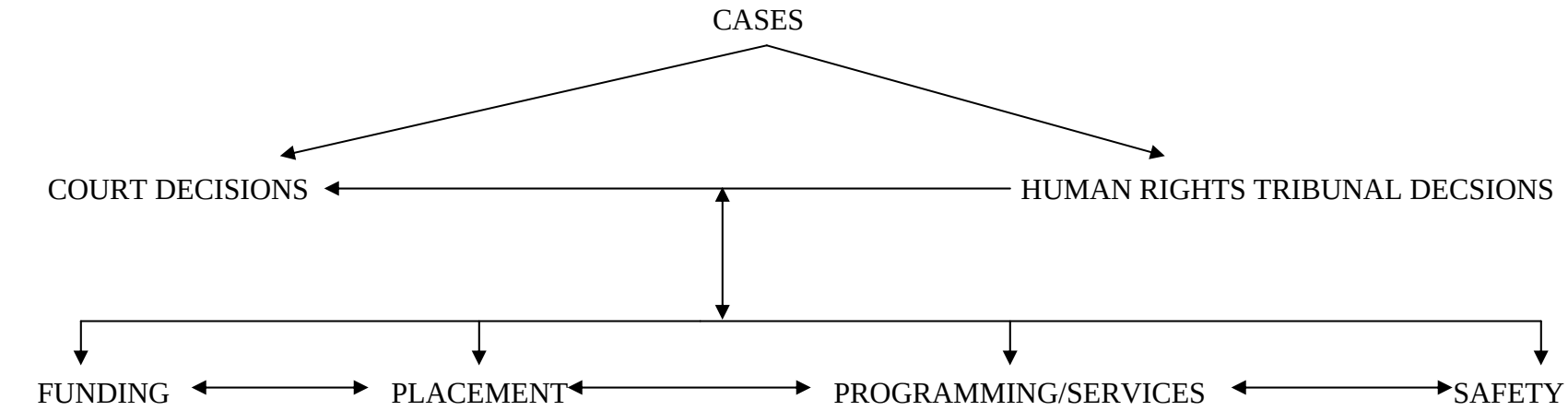
Four categories emerged and were labeled: 1) funding , 2) placement, 3) programming/services, and 4) safety. Each category also contained a variety of secondary issues subject to adjudication through either the courts or a human rights tribunal. The secondary issues were classified under each of the primary categories and connections across the categories were identified as indicated in Figure 4-1 and discussed in the following section.

The majority of the court and human rights tribunal cases dealt with issues related to students with autism. Specifically, the concerns focused on parents' desire to obtain funding for a specific therapy, and that age restrictions on the availability of this funding be lifted by the government department that provided the funding and set the eligibility

criteria. As well, parents turned to the courts to address funding issues such as seeking governments or school boards to pay for tuition to private schools offering special education programming that the parents considered critical to their child's education. These secondary concerns were also identified in those cases where parents sought to have the courts and/or a human rights tribunal rule on both access to and the appropriateness of a particular school special education placement.

The cases in the placement category involved parents seeking either a segregated classroom placement or an integrated classroom placement so that a student could receive specific instruction and/or therapies. In the category of programming and services, a parents' primary concern was using the courts to reverse budget decisions negatively affecting access to educational programs and specific placements such as obtaining orders for school boards and governments to reinstate special education classes and support staff levels. The category of safety primarily involved cases where school board staff received injuries due to the behaviour of students with disabilities. In addition, there were court cases involving school boards requesting clarification of their responsibilities towards educating students with a history of behaviour difficulties.

*Figure 4-1*Categories



Funding

The cases in this category included those where court action or a human rights commission complaint was pursued in situations where concerns arose about the type and amount of funding made available to provide special education programming and services in a school system. The majority of cases related to funding of therapies for children with autism spectrum disorders. Additional cases in this category also dealt with attempts by parents to seek funding for, or reimbursement of, tuition for placement of their child in a special education private school because they felt their children were not receiving services and programming that would lead to improved academic achievement and skill acquisition. Also in this category were cases where parents sought the intervention of the courts to reverse or alter budget decisions where it was alleged the changes would have an adverse impact on students with disabilities.

Specific Therapies and Age Discrimination

There were 35 instances where parents sought intervention by the court to compel the government to continue to fund therapies for their children with autism spectrum disorders. In all of these cases, the issues raised by the parents were similar. Their basic arguments were that once their children reached school entry age, the provincial government department, usually the ministry with responsibility for children and family services funding their child's IBI/ABA therapy, cut these services because the children were now of school age and the responsibility of the Ministry of Education (*Anderson et al. v. Attorney General of British Columbia,* 2003; *Barclay [Guardian ad litem of] v. British Columbia [Attorney General]*, 2005; *Hewko v. B.C.*, 2006; *Dassonville-Trudel*

[Guardian ad litem of] v. Halifax Regional School Board, 2004). In addition, a second group of parents made claims against the Ministries of Children's Services and Education through the Ontario Human Rights Commission, because their children had reached school age but had not been able to participate in IBI/ABA therapy. *Wynberg v. Ontario*, 2006; *Sagharian v. Ontario*, 2008; *Lowery v. Ontario*, 2003; *Burrows [Litigation Guardian of] v. Ontario*, 2003 are examples of parents pursing funding and age discrimination claims against the Ministries of Children's Services and Education. These cases formed the sub-category of age discrimination within the broader funding category. As well, these challenges to government funding of particular therapies for children with a specific disability illustrated the commitment by parents in using both courts and human rights commissions to achieve their goals of demonstrating that ministry and school board policies discriminated against their children based on both disability and age. The outcomes from the most significant autism litigation cases (*Auton, 2004* and *Wynberg et al*., 2006) and human rights tribunals (*Arzem*, 2005) are discussed in Chapter 5.

Private School Tuition

A second area identified under funding was claims made by parents seeking funding from either a provincial ministry of education or school board to enroll their child in a private school. In these cases, the parents argued that the special education programming and services available in the publicly funded school system were not adequate or appropriate. As a result of these perceptions, parents chose to enroll their children in private schools. The private schools in these cases were dedicated only to

providing special education programming and services to students with disabilities. This study analyzed cases that included claims made on behalf of students diagnosed with learning disabilities such as dyslexia (*British Columbia [Ministry of Education] v. Moore*, 2008) and attention-deficit hyperactivity disorder (*New Brunswick Human Rights Commission v. New Brunswick [Department of Education]*), 2005. In these cases, parents argued that their local school board and provincial ministry of education should provide them with the funds the school system would have received for their child, if they had remained in the publicly funded system. The arguments advanced by the parents were very similar in that they took the position that the types and intensity of the educational interventions had not resulted in reducing the impact of the disability for their child. As evidence, the parents in both cases pointed to the lack of measurable gains in academic achievement and reports by professionals attesting to the children's low self esteem because of their weak school performance and poor social relationships. Related to these cases was one where a school board took action through the provincial appeal court requesting a judicial review of the Minister of Education's special education appeal decision to award tuition to the parents of a student with learning difficulties (*Halifax Regional School Board v. Nova Scotia [Attorney General] and Daigle*, 1998).

School Board Budgets

In the final subcategory under funding, parents used the courts to appeal decisions about changes to school board budgets that they felt discriminated and jeopardized their children's education. *Acheson v. New Brunswick (Minister of Education)*, 2000 and *Jimmo v. Ontario (Minister of Education)*, 2002 involved disagreements between parents

of students with disabilities and school systems where school boards were required by provincial education statues to approve balanced budgets. From the perspective of the school boards, to achieve this requirement they needed to closely examine all areas of their budgets and make reductions in staff. These decisions brought scrutiny to special education expenditures and led to decisions to reduce services.

In *Acheson*, 2000, a group of parents pursued a claim of discrimination after a reduction in teacher assistant time, resulting in students with disabilities having to share less teacher assistant time among more students. The court determined that the decision to reduce teacher assistant time did not amount to discrimination nor were the students' equality rights violated.

A similar set of circumstances arose in *Jimmo*, 2002, where the school board experienced an overall budget shortfall which had to be addressed over the summer. In this situation, the parents of students with learning and other disabilities alleged they should have been consulted before there was a reduction of close to four million dollars from the special education budget. The decision in this case was that the board should have consulted with the parents before making this reduction and the court ordered the board to engage in the consultation process. This case illustrates the need for school boards and ministries of education to ensure that regulations and policies related to special education and general education are compatible.

Neiberg [Litigation Guardian] v. Simcoe County District Board of Education, 2004) entailed a situation where the parents asked the court for certification of a class action against their school board. The parents alleged that the school board infringed

upon their children's *Charter* rights by reducing the number of teacher assistants. As well, the parents further alleged that the school board failed to provide a safe physical environment for the students with disabilities during renovations to the school during the fall term, and by placing a student with significant behavioural issues into the special education class. In this case, the parents were not successful in having their case certified as a class action nor did they succeed in providing sufficient documentation to support the allegation that the principal acted irresponsibly in addressing the concerns around the physical safety of their children. Although there were not a large number of cases in this subcategory, they do speak to challenges faced by school boards as they attempt to balance their overall budgets and maintain special education services.

Placement

In several instances, the results of the analysis of cases in the placement category showed an overlap with funding. A common feature of such cases is that parents in these proceedings tended to use the courts to obtain decisions supporting their preference of classroom placement. Funding connected to those cases where parents wanted school boards to pay the costs associated with tuition so that their children could access the special education programming they felt was not available in the publicly funded system. There was no clear trend toward either integrated or segregated placements, which Williams and McMillan (2005) referred to as the polarized positions on placement. In this study, nine court cases and two human rights tribunals dealt with school and classroom placement. This section references only cases not previously mentioned under the funding category.

Segregated Placement

In this sub-category, segregated placement refers to a request for placement in a self- contained special education classroom or school, such as those serving only students with disabilities. The common theme in these cases was that parents often expressed the desire to have their children educated either in a setting that was not available in their school system or not recommended by educators. To resolve the disagreements, some parents filed human rights complaints on the grounds of discrimination in the provision of goods and services based on disability (*Margaret Dewart [on behalf of James Dewart] and Calgary Board of Education*, 2004; and *Frederick Moore on behalf of son Jeffery Patrick Moore and Her Majesty the Queen in the Right of the Province of British Columbia, as represented by the Ministry of Education, and North Vancouver School District No. 44*, 2005).

In *Margaret Dewart [on behalf of James Dewart] and Calgary Board of Education*, 2004, an Alberta Human Rights and Citizenship Commission complaint, the parent alleged that the school system discriminated against her son in the provision of goods and services due to his disability. Ms. Dewart advanced the position that her son had acquired a head injury after reaching school age and that the local school board refused to accommodate his disability by not providing a one-on-one, specialized placement. Because the parent felt that the school board was not addressing her concerns or her son's educational needs, she enrolled him in a private school for students with disabilities. Although the parent had previously been awarded tuition fees for one school year by a Ministerial Review of a special education matter she sought tuition fees for

three additional years as damages as part of her Human Rights complaint. The Human Rights Tribunal determined that the local school board had not done all it could to address the educational needs of the student. Further, it found that Ms. Dewart also contributed to the difficulties experienced by the school board in accommodating her son's needs. As a result, the request for damages, in the form of tuition, was reduced in total and shared between the parties.

Other families (*Hewko v. BC*, 2006; *HMTQ v. Moore et al*., 2001; *Clough v. Simcoe County District School Board*, 2005; *Concerned Parents of Children With Learning Disabilities Inc. v. Saskatchewan [Minister of Education]*, 1998) choose to pursue their claims of discrimination through the courts. The concerns in *Clough*, 2005, represent a case where a parent had gone through the Ontario Special Education (English) Tribunal process and as a result of the decision which was not in the parent's favour, the parent sought to have the Tribunal's decisions reviewed by the court. The issues in dispute focused on the disagreement between the parent and school board regarding the special education placement and programming for a child with autism. Specifically, the parent wanted the school board to provide her son with an Intensive Behavioural Intervention (IBI) program on an individual basis, delivered by an IBI therapist and supervised by an IBI trained psychologist in a separate room away from other students for 40 hours a week. The school board had offered a special education class placement, and took the position that the Tribunal decision was correct and should be upheld. The Court upheld the decision of the Tribunal and stated that the parent's request for placement and programming, using a specific form of therapy, was not reasonable.

Although the parent's counsel argued that the Tribunal had been unreasonable in making its decisions because it did not use an explicit *Charter* or *Human Rights Code* analysis in arriving at the decision, the Court did not agree with these arguments. Instead, the Court noted that although the Tribunal's reasoning in arriving at its decision did not state it had applied a *Charter* or *Code* analysis, it did recognize that her son had a disability and had related needs which were duly considered in arriving at its decision.

Integrated Placement

Unlike the results of the study conducted by Williams and McMillan (2003) discussed several proceedings where parents sought an integrated placement for their child, only two cases (*Ismail v. Toronto District School Board*, 2006 and *V.G. v. Wetaskiwin [Regional Division No. 11]*, 1998), related to the parents seeking intervention by the Courts to obtain such a placement for the child within the timeframe of this research. In *Grimm*, 1998, the case centered on the parent's request that her son be placed in a regular classroom and be educated along side his peers. The school board rejected her request and determined that a special education class placement would more appropriately address his educational needs. Once the local appeals process was exhausted, the parent chose not to avail herself of the provincial Review by the Minister of a special education matter, and proceeded directly to court for intervention and resolution to the disagreement. Throughout the course of a year, there were numerous attempts by the parent and board to resolve their disagreement resulting in an out of court settlement and the integration of the student into a regular classroom. This case is noteworthy in that the court ruling did not support the argument advanced by the school

board that the parent should have exhausted all administrative review processes before proceeding to court. Instead, the court determined that it was not a necessary requirement for a parent to exhaust the appeal and review provisions of the Alberta *School Act* before requesting that a court review a decision about special education made by a school board.

Programming/Services

The programming/services category included several cases, *Margaret Dewart (on behalf of James Dewart and Calgary Board of Education*, 2004; *British Columbia (Ministry for Education) v. Moore*, 2008, previously described under the funding category. In this category, programming /services refers to requests from families for schools to provide specific therapies, such as Applied Behavioural Analysis (ABA) or IBI, throughout the school day. In addition, some families alleged that their children did not receive appropriate interventions to reduce the impact of their disability. Similar arguments were presented in the cases of students diagnosed with a learning disability.

Specific Instruction/Therapies

One of the more high profile cases was heard before the British Columbia Human Rights Tribunal in 2005. The parents in *Moore*, 2005, claimed that their son's school board should have provided him access to teachers using specific interventions, which they understood would positively address the impact of his learning disability. The primary issue in cases focusing on programming/services was that the parents felt that their children were being discriminated against in the provision of mandated public education.

In this category, the majority of cases involved parents of children with autism, who filed complaints with their provincial human rights commissions. In the complaints filed by *Arzem v. Ontario (Community and Social Services)*, 2005 and *Sigrist and Carson v. London District Catholic School Board et al*., 2008, parents alleged that their children were discriminated against because they had been diagnosed with a disability that resulted in the school systems not providing goods or services, specifically special education programming.

School Attendance

The circumstances in *Habetler obo Habetler v. Sooke School District and B.C. (Ministry of Education)*, 2008 illustrate how extended family members can become involved in advancing claims of discrimination. In this British Columbia case, the grandfather of a student with multiple severe disabilities filed a Human Rights complaint on behalf of his daughter, who was the mother of the student. The case involved the allegation by the grandfather that his daughter was discriminated against due to family status in that she was a single parent unable to maintain employment because she felt she had to remain at home to care for her son. The grandfather and mother alleged that the school system had failed to accommodate the student thereby forcing the mother to withdraw him from school. In this case, the grandfather argued that because his grandson required a considerable amount of care and that such care should have been provided by the school district, the mother relied more heavily on the school district for help. It was argued that the failure of the school system to provide the help at the school negatively affected the student and mother more than other families because of her substantial

obligation to act as her son's caregiver. Thus, the grandfather argued that this should have been considered discrimination because the family could not avail themselves of the school services resulting in undue hardship for them. Although the complaint was dismissed, this case illustrates the need for families and school systems to work together and with external agencies to act in the best interest of the child so that parents do not feel the only recourse they have is to leave their employment to educate their disabled child at home.

Safety

The category of safety emerged as a result of finding cases dealing with the behaviour of students with disabilities and the general application of school discipline policies. What makes this category of cases of particular interest is that several provinces, such as Ontario and Nova Scotia, have enacted provincial policies on student discipline. In addition, it is common for sections of provincial school acts legislating the need for school principals to provide a safe environment for all students. These statutory provisions and related regulations do not make explicit reference to addressing the discipline of students with disabilities. The majority of cases, (*Gloria and Mike Mahussier and Prince Albert Roman Catholic School Division No. 6,* 2006; *Bonnah [Litigation Guardian of] v. Ottawa-Carleton District School Board*, 2003; *Walker Youth Homes Inc. v. Ottawa-Carleton District School Board*, 2004; *Jackson v. Toronto Catholic School Board*, 2006) focused on the application of a school system's disciplinary code.

Student Suspension

The cases in this category focused on the application of Education Act and Regulation provisions in matters related to the expulsion and/or suspension of a student with a disability. In these cases, the procedures followed by principals in arriving at their decisions to suspend or expel a student with a disability were subject to both school board appeals of their decisions. Where parents disagreed with the outcome of these processes, they made application for judicial review of the school board's decision to uphold the actions taken by the school principal.

The circumstances of *Jackson v. Toronto Catholic School Board*, 2006 illustrate the complexities associated with the application of school and board discipline policies. This case also serves as an example of how school administrators should take a student's disability into consideration when applying disciplinary measures. The focus of this case was on the actions taken by the principal in determining the type of expulsion that would be given to a student who had been identified according to the provincial special education policy. In this case the student had been identified as an exceptional pupil due to his language impairment.

Records produced by the school described the student as "cooperative, polite and fair – a boy who had not allowed his impaired language skills to discourage him from not trying to do well" (*Jackson*, [6], 2006). During the proceeding months, however, he began to exhibit behavioual problems that were concerning to school personnel. A record was also produced that outlined numerous incidents of actions that were inappropriate. Due to these concerns the principal recommended to the parent that she avail herself of

the services of the school social worker for assistance with her son's behaviour. According to the record, the parent chose not to access this service. Although the behaviour incidents were concerning, the student was not suspended or expelled from the school.

On the day in question the student brought a pen to school that contained a concealed knife and allegedly threatened two peers on the playground. After his investigation of the incident the principal determined that the appropriate response to the incident was to invoke a limited expulsion of the student with a recommendation that he be transferred to another school rather than be expelled for the remainder of the school year. In this way the student could continue to receive the necessary special education programming and services he was entitled to receive given that he had been identified as a students with a communication: language impairment. The parent objected to the principal's decision and appealed to the school board. The school board upheld the principal's decision to award a limited expulsion causing the parent to request a judicial review of the board's denial of a hearing as well as seeking to quash the limited expulsion.

The application for judicial review focused primarily on matters of procedural fairness. However the decision of the principal to award a limited expulsion was at the core of the proceedings. The Divisional Court determined that the parent had received a fair hearing on the matter. As well the court noted that the principal had taken into consideration the special needs of the student and had acted prudently by administering a limited expulsion thus demonstrating he had taken into consideration the student's

communication disability, as required by the regulations related to the explusion of a student. In Ontario, the section of the relevant regulation requires that consideration be given to not expelling a student under certain circumstances which include whether the student has the ability to control their behaviour, whether the student has the ability to understand the possible consequences of their behaviour and whether the continued presence of the student creates an unacceptable risk to the safety of others. The court found that the principal had considered the special needs of the student in making he determination that a limited expulsion that included a transfer to an alternative special education class in another school in the district was reasonable and fair in this situation.

Student Transfer

Education legislation in all provinces and territories allows students who are residents of a particular geographic area to access a free publicly funded education. Under these provisions the residency of a student is typically determined by where their parents or guardians live. In many situations these provisions benefit students and their families. However, situations may arise where students come under the care and custody of government through provisions in child welfare legislation. When this occurs it is sometimes necessary for students to be placed in foster or group homes that are not within the immediate area where their parents reside.

The circumstances in *Walker Youth Homes Inc. v. Ottawa – Carleton District School Board*, 2004, illustrates the complexities that can surround addressing the needs of students with disabilities who are placed in homes other than in the area where their parents reside and the ensuing challenges sometimes faced by social services agencies in

obtaining access to an appropriate school placement. In this case the student was denied access to a school in the area where he was placed by a child welfare agency because he was deemed to be a non-resident because his parents resided elsewhere in the province. The actions taken by the school district significantly impacted the student as it took almost an entire school year to obtain registration in the school district. This case also raises the question of whether or not the school district would have been as resistant to registering a non-disabled student who was transferred to a group home that was not where their parents resided.

Negligence

In two court actions by *Kendal v. St. Paul's Roman Catholic Separate School Division No. 20*, 2003 and 2004, a teacher alleged negligence on the part of the school division and its staff, when a student struck her. The student, identified as being eligible for special education based on diagnosis, was placed in a special education class taught by the teacher. The teacher sought damages for injuries obtained while trying to restrain the student.

In her complaint, the teacher argued that the school division failed to provide a safe work environment, which she alleged was not only negligent, but in breach of her employment contract. Specifically, the teacher alleged that the student posed a danger to her and to others, and the school division had not taken all necessary steps to ensure their safety. In response, the school division presented evidence related to the types of assessments and programming it had put in place for this student, including providing additional training for the teacher and access to professionals to assist in the design and

delivery of that student's educational program. As well, the school division noted they made the teacher explicitly aware of the possibility of there being behavioural outbursts by this student. The decision in this case found that the school division had not knowingly placed the teacher in an unsafe position and had provided support through training and staffing so that she could carry out her duties.

In *Kendal*, 2004, filed the teacher filed an appeal but was unsuccessful in winning her case; however, the circumstances in this case perhaps represent the daily experience of many Canadian educators and paraprofessionals. Although many of these types of cases entailing injury in the workplace tend to be dealt with through insurance and workers' compensation claims, it does bring to light the need for provinces and school boards to ensure that the legislation, regulations, and policies they enact consider potential claims due to the interaction between students with disabilities and school staff. As well, this case speaks to the need for schools to maintain accurate documentation about the steps they take to manage potential risk. This case illustrates the challenges associated with providing an educational program to students whose disability may embody as behavioural component that is not always under their control.

Chapter Summary

The data collected for this study involved a process of searching two of the most used legal databases to obtain relevant cases for this project. Search terms and case citations were selected from a review of existing literature on litigation on the equality litigation that focused on cases dealing with parents seeking to ensure that their children's *Charter* rights were acknowledged by schools and ministries of education. The results

show that between 1998 and 2008, four categories of concern have been subject to review and decision by Canadian courts and provincial human rights tribunals. A discussion of the implications of these decisions for Canadian special education policy is presented in Chapter 5.

Chapter 5: Discussion

Chapter Overview

In this chapter, I will discuss the four categories of cases: 1) funding, 2) placement, 3) programming/services, and 4) safety, identified through the research for this study. I will also discuss the implications for special education policy development at the provincial and school board level with a focus on the province of Alberta. I will identify recommendations for improvements to the process of special education policy development and implementation. The final section of this chapter will include recommendations for future research that support making equality an integral part of the education system.

Education and Equality

Canadian parents, educators and ministries of education face many challenges in determining the how to make equality in education a reality for students with disabilities. In situations where parents and school officials are unable or unwilling to resolve their differences regarding the education of students with disabilities, parents have turned to the courts and human rights tribunals to adjudicate and resolve their issues (Howard, 2004; Howlett & Ramesh, 1995). Provincial ministries of education and school boards have also brought proceedings before the courts to clarify decisions from human rights tribunals and lower levels of court (*HMTQ v. Moore et al*., 2001 and *Halifax Regional School Board v. Nova Scotia [Attorney General] and Daigle*, 1998). These processes can be time consuming, costly, and stressful to all participants but worthwhile in clarifying what equality means for students with disabilities.

Between 1998 and 2008, Canadian parents have increasingly turned to the courts and provincial human rights commissions to clarify and give operational meaning to the equality provisions of the *Charter* for their children (Bogie, 1997; MacKay & Sutherland, 2006; Watkinson, 1999; Williams & McMillan, 2005). The court and tribunal decisions reviewed and analyzed for this study illustrate that in most instances, there is rarely just one issue brought to a court or tribunal for decision. As noted previously the cases in this study do not form discrete categories; rather, they connect to each other across categories and often pose similar questions, but in different provinces. For instance, in several cases dealing with funding for services to school age students with autism, litigation was heard in British Columbia, (*Auton [Guardian ad litem of] v. British Columbia [Attorney General]*, 2002, Nova Scotia, (*Dassonville-Trudel [Guardian ad litem of] v. Halifax Regional School Board*, 2004) and Ontario, (*Wynberg v. Ontario*, 2006). The central issue in all of these cases was the assertion by the parents that the respective ministries of education had a responsibility to provide specialized therapy and services to students once they entered school. The parents were requesting that the various provincial courts rule in their favour by requiring ministries of education to continue the same types and levels of services that their children had received before entering the publicly funded school system. All of these cases involved allegations of age discrimination, denial of funding, and violation of section 15 equality provisions, which connect the broader categories of funding and programming/services.

This interconnection and identification of similarities among the questions and issues coming before courts and human rights tribunals have served to create the legal

interpretation of the meaning of equality as envisioned in the *Charter*. As discussed in Chapter 2, the *Charter* does not provide an absolute right to access a public education meeting the specifications of a child's parents. However, the research and commentary in this area increasingly support the idea that education is a public service striving to increase opportunities for individuals with disabilities to have their educational needs met so that they enjoy an improved quality of life, and may contribute to Canadian society (MacKay & Sutherland, 2006; MacKay & Burt-Gerrans, 2003; Bastarache, 2000).

In this study, four categories (funding, placement, programming/services, and safety) of cases emerged as most relevant to the development of special education policy. These findings are congruent with those identified by Williams (1999). The consistent identification of these categories as the source of litigation and human rights tribunal reviews demonstrates the continuing search for clarification and interpretation of the *Charter* provisions articulating equality. However, while the courts and tribunals can render decisions on a specific set of issues, they do not always provide the answers educators and parents are seeking.

Discrimination and Equality

The leading examples of using the *Charter* to pursue claims of discrimination involve students with autism. This is illustrated through an examination of the decisions in cases focusing on students with autism where it was alleged that the age requirements in funding policies of government ministries discriminated against children with autism and denied their section 15 *Charter* rights.

During the 1990s, the focus of cases involving students with autism was on parents pursuing claims for funding of intensive behavioural intervention (IBI) or applied behavioural analysis (ABA) (Williams & McMillan, 2005). In these cases, parents argued that the policies of government ministries discriminated against their children through the denial of funding when they reached school age. Parents argued that the age limits denied their children access to a specific intervention believed to increase the possibility of improving the quality of their children's lives. These arguments advanced the position that the funding schemes lead to a denial of rights under section 15 and therefore the policies were in breach of the *Charter*.

It was in Ontario and British Columbia where parents most actively pursued claims for funding for these interventions. In these cases, attempts were made to demonstrate that these interventions, IBI or ABA, were medically necessary for students with autism to learn. The Supreme Court of Canada decision in *Auton v. British Columbia (Attorney General)*, 2004 determined that the interventions were not medical services as described in the provincial Health Act. This decision had ramifications for the entire country and shifted the focus of parent driven litigation from ministries providing funding for pre-school programs into the realm of public education (Williams & McMillan, 2005). Although the decision in *Auton*, 2004 brought some clarity to the arguments around *Charter* violations, parents have continued to pursue claims through the courts and human rights tribunals to obtain decisions that would see these interventions delivered in schools with funding provided by ministries of education. A 2005 case from Ontario illustrates this situation. In *Clough v. Simcoe County District*

School Board, 2005, the parents sought a judicial review of the Ontario Special Education (English) Tribunal decision. The parents wanted the school district to provide their son with an IBI program on an individual basis, delivered by an IBI therapist and supervised by an IBI trained psychologist in a separate room at the school for 40 hours a week. Their expectation was that the school district should provide the funding for this program. The decision in this case determined that the parents' request was not reasonable in that the parent was requesting the school system fund a therapy program and not an educational program.

It is noteworthy that while two cases from Alberta courts, *D.J.N v. Alberta (Child Welfare Appeal Board)*, 1999 and *L.S. v. Alberta (Child Welfare Appeal Board)*, 2002, determined that the education ministry bears the responsibility for funding these interventions for school age children, there have been no court challenges by parents to demand the education ministry fund, and school systems deliver, these services in classroom settings. This could be due to the policy decisions made during the early 2000s, by the province of Alberta to provide funding for IBI/ABA therapy through the Ministry of Family Services to at least age 12 years. This was in contrast to the pre-school child welfare policies in British Columbia and Ontario, which both ceased funding of IBI/ABA for children when they reached 6 years of age and entered the publicly funded school system.

Further it is noted that after the 1998 to 2005 period of litigation around autism services, beginning in 2006, some provinces responded, at least in part, to the continued threat of court action by parents of school age children with autism, by changing their

public school special education funding requirements. For example, in 2006, both the British Columbia and Ontario governments announced changes to funding for ABA/IBI therapies for school-age children. In British Columbia, the Education Minister announced funding for all students diagnosed with autism spectrum disorder at the same rate, $16,000 per student, as those students diagnosed with autism (Ministry of Education, British Columbia, 2006). The expansion of funding in British Columbia also included the provision for families of students between the ages of 6 through 18 years, to access up to $6,000 per year to assist with the cost of purchasing out-of-school autism intervention (Ministry of Education, British Columbia, 2006).

In contrast, the Ontario Minister of Children and Youth Services, not the Ministry of Education, announced in the summer of 2006 that children would no longer be discharged from ABA therapy upon reaching 6 years of age (Ministry of Children and Youth Services, 2006). Concurrent with this announcement, the Ministry of Education announced that it would provide an additional 10 million dollars over 2 years to provide training for teacher assistants working with students with autism spectrum disorders (Ministry of Children and Youth Services, 2006). The two ministries also agreed to work collaboratively to provide recommendations on effective practices that school boards could use to improve the educational experiences and opportunities available to students with autism spectrum disorders across the province. These policy decisions by the Ontario government were a comprehensive response to the decision in *Wynberg v. Ontario*, 2006 and most likely contributed to reducing the number of human rights discrimination complaints and court proceedings on this topic.

It is in the area of alleged discrimination against students with disabilities that some parents have chosen to use provincial human rights legislation to advance the education of their children. Unlike the court system, human rights tribunal proceedings typically do not require a lawyer to present the parents' case (MacKay & Sutherland, 2006; MacKay, 2007). This can be a significant cost savings for parents who can present their evidence in a setting sometimes perceived as friendlier than the typical courtroom. The common theme in the cases analyzed for this study were allegations of discrimination in the delivery of goods and services, specifically, special education.

Along with being an accessible system for parents to advance claims of discrimination on behalf of their children with a disability, decisions of provincial human rights tribunals have shown less deference to school boards and ministries of education than courts (MacKay & Burt-Gerrans, 2004). Therefore, for some parents there is a greater possibility for success in obtaining decisions supporting their preferences concerning how their children should be educated. However, school boards and ministries of education have demonstrated a tendency to turn to the courts for judicial review of human rights tribunal decisions that they believe have not been appropriately adjudicated.

A provincial human rights tribunal decision from Alberta illustrates these points. In *Margaret Dewart (on behalf of James Dewart) and the Calgary Board of Education*, 2004, the focus of the human rights complaint filed by the parent was that the school board had discriminated against her son in the area of goods and services on the ground of mental disability. The parent alleged that after her son sustained a head injury, the

school board did not offer him an appropriate special education placement. Specifically, she was seeking a one-on-one specialized placement that she claimed had been provided for other students, but not to her son. As well, since the parent had placed her son in a special education private school that offered the placement she preferred, she also sought reimbursement for the tuition costs by the board.

In deciding this case, the human rights tribunal determined that the board had in fact discriminated against the child and ordered the board reimburse the parent for a portion of the private school tuition. In their submission, the board maintained that under the Alberta special education statutes, they were required to have a diagnosis on file as a first step in determining the eligibility of the student for a special education placement and resulting programming. The Board noted that it was difficult to communicate with the parent and that the parent refused to consent to share existing medical assessments. In consequence, the Board could not make informed decisions about how the student should be educated. The decision of the human rights tribunal noted that the child had previously been diagnosed with other disabilities, therefore even without additional medical documentation, the Board should have recognized this student's eligibility for special education placement and programming. The panel also pointed out that given the power imbalance between the parent and the large Board, the Board should have accommodated the parent's request for placement to the point of undue hardship. In other words, the panel recognized that Board would not exhaust all of its monetary or human resources nor would it cease to be able to operate, if it had conceded to the request of the parent.

The outcome in this case suggests that school boards need to ensure that their staff act on parental requests and accommodate them to the point of undue hardship. In addition this case points out the need for school board staff always to respond to communication from parents even when particular circumstances are challenging. Finally, this decision illustrates the need for school board staff to make decisions about a student based on the best available information they have about a student, even if they desire additional information, as required by provincial special education statutes. Therefore, the lack of access to information withheld by a parent is not sufficient enough reason for schools and boards not to accommodate a student.

These cases are important to educators and governments because they illustrate the need to develop systems of funding that allow for smooth transitions between government ministries as well as transition into schools and across placements in schools. They also raise significant issues for schools and ministries of education in terms of what an educational program means. In particular, these cases raise questions about how provincial ministries define or fail to define what they mean by special educational programming and what is meant by the delivery of therapy services in school settings. On one level, school boards in Canada are typically responsible for providing access to special education programming and services delivered on a student-by-student basis (Smith & Foster, 1996; Lupart, 1998). A variety of policy instruments that include provincial school acts and accompanying regulations and/or statutes provide this access. The consistency of provincial expectations in these areas was identified in Table 3, which outlined the status of special education legislation across Canada.

Conflicts between parents and school systems regarding what constitutes special education programming and what age groups should have access to that publicly funded programming is the subject of vigorous debate and discussion (MacKay & Sutherland, 2006; Williams & McMillan, 2005). While the courts and human rights tribunals can play a role in responding to these concerns, this is typically done on an individual student basis which can be time consuming and costly in terms of financial resources and often straining relationships between parents and education personnel (Tymochenko & Keel, 2002).

In this study, the cases dealing with issues around the funding of services and interventions for students with autism illustrate these points. The majority of cases involving students with autism (*Auton [Guardian ad litem of] v. British Columbia [Attorney General]*, 2002/2004); (*Dassonville-Trudel [Guardian ad litem of] v. Halifax Regional School Board*, 2004); (*Wynberg v. Ontario*, 2006), focused on which government department should pay for continued access to intensive behavioural intervention once a child reached school age. All of the decisions in these cases pointed to the need for government departments to work together to ensure funding does not become a barrier to continuous programming. However, these cases also illustrate that even if funding is in place or courts order the extension of funding, new challenges emerge for school systems and ministries of education. The most often reported challenge, as outlined in the defense documents filed by governments and school systems (*Clough v. Simcoe County District School Board*, 2005; *Hewko v. BC*, 2006), was the perception that the requested therapy could not be effectively delivered in the typical

school and classroom settings. Closely related to this challenge was the lack of available trained personnel to deliver the services even when funding was in place (*Fleischman v. Toronto District School Board*, 2004). Thus, while courts and human rights tribunal rendered decisions about what should occur, they stopped short of ordering that the preferred interventions for autism had to be delivered in classroom and schools (*D.J.N. v. Alberta [Child Welfare Appeal Panel]*, 1999; *L.S. v. Alberta [Child Welfare Panel]*, 2002).

Funding and Equality

Parents have used the courts to advance claims for funding for their child with a disability. Between 1998 and 2008 there have been cases that addressed parental claims for funding to secure specific therapies and treatments for students other than those diagnosed with autism. Many of these cases focused on parents using the courts and provincial human rights tribunals as venues for securing funding of special education services and programming (*St. Albert and Area Student Health Initiative Partnership v. Polczer*, 2007; S. *(J.) [Litigation Guardian of] v. Nunavut*, 2006). Other cases have involved parents filing for injunctions through the courts to maintain levels of support services that had been changed because of school board budget decisions (*Acheson v. New Brunswick [Minister of Education]*, 2000; *Jimmo v. Ontario [Minister of Education]*, 2002). In several instances, parents, concerned their children were not receiving an appropriate education through their publicly funded school system, sought to recover the costs of tuition fees to a specialized private school (*British Columbia [Ministry of Education] v. Moore*, 2008; *Frederick Moore on behalf of his son Jeffery*

Patrick Moore and Her Majesty the Queen in the Right of the Province of British Columbia, as represented by the Ministry of Education and North Vancouver School District No. 44, 2005; *New Brunswick Human Rights Commission v. New Brunswick [Dept. of Education]*, 2005).

The decisions in cases where parents requested funding for their child with a learning disability generally resulted in specific direction from the courts and human rights tribunals for ministries and school systems to provide funding for the education of individual students with this diagnosis. In some of these cases (*Dauphinee v. Conseil Scolaire Acadien Provincial*, 2007*; New Brunswick Human Rights Commission v. New Brunswick [Dept. of Education]*, 2005; *Margaret Dewart [on behalf of James Dewart] and Calgary Board of Education*, 2004; *HMTQ v. Moore*, 2001), parents sought to have their local school system provide funding for specific placements that were usually outside the publicly funded system. Typically, the funding was for payment of tuition to private schools because parents felt their local school systems were not providing the type of special education programming they felt their children required. Decisions in these cases awarded either partial or full tuition funding to the parents because they were able to demonstrate that the best educational interests of their children could be met in these special schools. For school systems and ministries of education, these cases illustrate the need to have a range of placement and programming options available that use a range of researched instructional strategies readily accessible and available for students who require them. However, in one case from Saskatchewan, parents were not successful in using the courts to require their local school systems to provide special

education programming that was comparable to that offered by a special education private school. In this case, *Concerned Parents for Students with Learning Disabilities Inc. v. Saskatchewan (Minister of Education)*, 1998, the court determined that provincial and local special education policies and funding levels did not require these bodies to provide the more extensive and specific programming being requested by these parents to be provided at public expense. This case illustrates that courts are prepared to enforce limits on parental preferences for their children with disabilities if the policies of the ministry and school board are rationally conceived and justified.

Finally, in the area of funding, parents have sought to have courts overturn budget decisions of school boards where they felt that the education of their children was jeopardized. The first of these cases occurred in New Brunswick where parents sought an injunction that would require the Minister of Education and their school district to maintain and fund the services and programs at the same level as the previous school year. In *Acheson v. New Brunswick (Minister of Education)*, 2000, the parents argued that they had not been consulted about the reduction in the number of teacher assistants as required by the provincial Education Act. Furthermore, they also contented that this action was discriminatory and contrary to section 15 of the *Charter*. The judge decided that it was not the role of the court to determine how the school board should allocate its resources. He also outlined that the only way he could intervene was if the facts of the case demonstrated that the reduction in overall funding was done on a disproportionate basis, in that more funding was being removed from special education than other areas of the budget. This case illustrates that when school boards reduce special education

funding, to be considered discriminatory, the results of the decision must have a greater impact on students who require special education than on other students in the system. In addition, this case also reinforces the apparent reluctance of courts to interfere with government decisions regarding public policy and public spending. As well, the judge noted that a decision in favour of the parents' application would have an adverse impact on other students with disabilities in that school system because they would have fewer resources available to provide for their educational needs.

A second case, *Jimmo v. Ontario (Minister of Education)*, 2002 also involved decisions made to balance the overall budget of the school board. In this case, the school board, facing an urgent need for a balanced budget, decided to make significant reductions of several million dollars in the special education budget without consulting the parents. A decision was made to reduce the special education budget by several million dollars. Under the Ontario special education policy scheme, this was a serious oversight and resulted in the judge overturning the budget decision and ordering that the levels of staffing be maintained until the parents were given the opportunity to be involved in the process as provided for in the statutes.

While the cases outlined above had funding as a primary issue, they also contained elements relating to the provision of placement, special education programming, and services. The interconnectedness of these three categories created an overlap during the analysis of cases for this study. While decisions related to funding can impact on other areas of special education, cases involving placement, and programming/services can also have implications for funding.

Placement, Programming/ Services and Equality

The interplay between funding, placement, and programming /services can create tension for ministries of education, school boards, and parents. In some respects, each of these areas can be examined as discrete categories. However, for educators the connections between the three areas are often difficult to separate, often leading to policy and practice decisions that result in disagreements with parents. Added to this is parents advocating for a variety of placement and programming/ services options for their children (Williams & McMillan, 2005; MacKay & Sutherland, 2006). In response to this advocacy, ministries of education and school boards attempt to balance the competing views of parents within their special education policies.

Between 1998 and 2008, there have been several instances where parents sought the assistance of courts and human rights tribunals in determining whether provincial special education policies supported their placement preferences. One of the earliest cases was *V.G. v. Wetaskiwin,*1998, in which the parent sought to have her child placed and educated in a regular junior high school classroom. The relevant Alberta education statute allowed for a parent to seek the Minister's assistance to review board decisions related to special education. Specifically, the statute stated that a parent could request that the Minister review a board's decision to place a student in a special education program. A unique aspect of this case is that the parents bypassed this statutory requirement and pursued their claim to have their child integrated full-time, directly through the court.

These circumstances resulted in an interim court ruling that the disposition of the parents' legal action needed a full trial. While waiting for this case to come to trial, the

parents and school board were able to come to an agreement resulting in the child's integration, in keeping with the parents' preference. Since the court did not adjudicate this case, it opened the possibility that parents of children with disabilities do not need to use the review by the Minister of Education process provided through the provincial education act. Therefore, school boards in Alberta could find that the first opportunity they have to address issues with parents of children with disabilities is through a court proceeding. The option of parents proceeding directly to the courts to resolve special education issues could occur in other provinces; however, there were no other cases found where parents were directed by the courts to exhaust provincial or territorial appeal processes before pursuing court action.

Another case dealing with parents requesting the integration of their child was *Ismail v. Toronto District School Board*, 2006. The parents requested that their son be educated in a regular classroom full-time with supports. In response to this request, the school board determined that the appropriate action would be a split placement of part-time in a special education class and part-time in a regular class. After using the school board and ministry special education appeal processes, the parents sought a judicial review of the provincial appeal board decision. In deciding this case, the court determined that for this student, full-time integration would not be in his best interests. The court noted that at both the school board appeal and provincial appeal board had conducted a thorough examination of the facts and made appropriate decisions within the legislative scheme for special education. This ruling suggests that school boards and related decision-making bodies are more likely to prevail when they follow the legislative

framework for conducting their work. Therefore, provincial ministries of education can best support school boards in the area of special education by enacting legislation that clearly outlines the expectations for the delivery of special education.

As well as program and classroom placement issues, courts have been used to establish the residency of students with special needs so they can attend school. This was the situation in *Walker Youth Homes Inc. v. Ottawa-Carleton District School Board,* 2004. In this case, a student from Toronto was placed in an Ottawa-area group home within the school attendance boundary for Ottawa-Carleton District School Board. The student's parents maintained their residence in Toronto. While in the Toronto school system, the student had been identified as presenting with special education needs and diagnosed with a mild developmental disability. As well, his student record indicated a history of behaviour problems considered significant. The group home attempted to register him in a school under the jurisdiction of the Ottawa-Carleton District School Board. The school board refused to register the student, citing that he was a non-resident because his parents lived in Toronto and that the most appropriate special education placement was filled by their resident students, therefore they had no school placement available for him. In their arguments, the group home stated that because the student was in their care and custody while living in Ottawa, he was in fact a resident student and therefore entitled to a school placement and the necessary special education programming and services.

Based on the evidence submitted to the court, the judge ruled that the School Board's decision to exclude the student from attending school was for safety reasons,

which were patently unreasonable. Therefore, he ordered that the student be admitted to the home school for the attendance area of the group home, or an alternative appropriate Board school. The court also ordered that the School Board immediately convene an Identification Placement and Review Committee meeting, as outlined in the Ontario Special Education Regulations, to identify the student's special education needs and arrange for necessary programming and supports. The outcome in this case suggests that school boards should consider not just their own policies in the areas of school registration and special education. They would be in a stronger position to address challenges to their locally developed policies and procedures when they develop those polices in ways consistent with the intent of provincial special education policies, school act regulations, and consider the effects of legislation from other government ministries working with families and children.

When school boards have difficulty clearly articulating the levels and types of special education programming and services they can provide, the result is that they may be involved in litigation with parents. This was the situation in *Fleischman v. Toronto District School Board*, 2004. In this case, the parents sought a juridical review of a school board decision to remove their daughter's special needs assistant and replace that individual with another whom the parents felt was not trained to support their child's special education needs. The child had been diagnosed with autism and the parents preferred the use of ABA as the primary instructional strategy. The position of the School Board was that other instructional approaches could be beneficial to students with autism but the Board initially hired a special needs assistant trained in ABA to provide

programming support to the student. Further, the School Board argued that the first special needs assistant had been hired by the principal of the school on a temporary basis and that the parents were interfering with the authority of the principal and board to hire staff. As well, the school principal did not consult with the parents about the change in special needs assistant nor provide them with an opportunity to discuss how the change in personnel might affect their daughter.

The decision in this case resulted in the parents' application for the ABA trained special needs assistant to remain in place until the main application for judicial review was heard. In his decision, the judge noted that that the unplanned change in special needs assistant would have a negative impact on the student. As well, he noted that the Board did not produce any information to advance their arguments that the student would not suffer harm because of the unplanned change in the special needs assistant. He also noted that the evidence produced by the parents did not support the Board's insistence that the transition would be smooth, nor did the school Board provide any documentation to support its position. Therefore, the judge concluded that the student would experience irreparable harm if the change in special needs assistants were to proceed as planned by the school district.

This outcome in this case reinforces the need for school boards and their personnel to be clear and consistent in describing what they can and cannot offer for special education programming. In addition, school staff must follow not just the wording of provincial special education legislation but also the intent when working with parents

and ensure that meaningful consultation takes place and that they maintain a record of these discussions for future reference.

The need for ministries of education and school boards to consider other pieces of legislation and sections of the *Charter*, are areas for policy developers to be aware of and incorporate into their final policy directions. One case that demonstrates this is *Dauphinee v. Conseil Scolaire Acadian Provincial*, 2007. This case was previously discussed in terms of the use of courts by parents to attempt to compel school boards and provincial ministries to cover the costs of alternative school placements. Another aspect of this case dealt with the interface between various sections of the *Charter* and the need to consider the rights of individuals as outlined in that document, as a whole. As well as being concerned about the provincial scheme for private special education school tuition arrangements, the parents were also concerned that their French language rights under section 23 of the *Charter* were violated. Specifically, the parents argued that while the province had developed a discretionary framework for private special education school tuition agreements, it had failed to consider the section 23 minority language rights of Francophones, in that the tuition scheme only considered schools that provided special education instruction in English. In their submission, the parents noted that the failure of the provincial department of education to accommodate the needs of Francophone students in the tuition scheme amounted to discrimination under section 23.

In deciding this aspect of the case, the court determined that the provincial department of education had failed to make provisions to accommodate the special needs of French language students and that such a failure infringed upon section 23. Although

the province of Nova Scotia did not have any special education private schools that offered programming in French, the court advised that the province should have explored other options such as placement in a French language special education private school in another province, as part of the overall tuition scheme. While the practicality of arranging for a student to leave their family and community to have their disability needs accommodated could result in other issues, the fact remained that the province should have considered all options as part of the scheme. Being able to demonstrate that it had at least considered the possibility that the family of a Francophone student with a disability might want to avail themselves of the provincial tuition arrangement would have placed the ministry in a stronger position in its arguments before the court that it had not discriminated. The outcome in this case illustrates the unintended consequences of developing provincial policies that, on their face, appear neutral but have the effect of discriminating against those it failed to consider when the policy was implemented, which is contrary to the reasoning outlined in *Eldridge v. British Columbia (Attorney General)*, 1997.

Safety, Suspension and Special Education

The final category emerging from the analysis of court and human rights cases was safety concerns that have been subject to litigation. Over the past decade, there has been an increased focus on creating safe schools as evidenced by provincial initiatives to curb bullying and develop security plans for schools. As well, provincial and territorial legislation in the area of Occupational Health and Safety include clauses requiring employers such as school boards to provide safe work environments for staff. Against

this backdrop, school boards have faced challenges to their policies in these areas from staff and parents who have felt that their rights under these pieces of legislation have been violated. While most provincial governments and school boards have become familiar with being subject to cases involving liability, interpretations of what this may mean for them relative to the treatment of students with disabilities and staff working with these students is a relatively new aspect of litigation in Canada.

In this study, two cases illustrate the potential impact of these types of legislation on the actions of schools and school boards. One case from Ontario, *Bonnah v. Ottawa-Carleton District School Board,* 2003, centered on the decisions of the school board to transfer a student with disabilities to another school for safety reasons. Under the Ontario special education legislation, the student had been identified as an exceptional pupil, providing the parents with access to the school board appeal process in relation to placement. The parents argued that the school board should not have transferred their son to another school placement while they were waiting to access the special education appeal process. In their submission, the school board argued that it acted within the scope of the *Education Act* by making the transfer even though the parents did not agree in writing to the new placement.

The appeal court judges had to determine if two distinct pieces of Ontario legislation, should be read together or whether one set of provisions overrode the other, and if so, which one. One piece of legislation dealt with the identification as an exceptional pupil, *Education Act, R.S.O,* 1990, s.1 and the other related requiring a principal to maintain a safe school environment found in the *Safe Schools Act,* 2000 of

the *Education Act*. In their decision, the judges determined that both sets of provisions must be read together. They noted that while principals must provide a safe school environment, they must also bear in mind the significance of the special education placement provisions and minimize any interference with that placement. In addition, they clarified that exceptional pupils are included under the safe schools provisions. However, they deemed that it was not appropriate to transfer an exceptional student for safety reasons while a special education placement appeal was pending. Thus, the parents were successful in having their son remain at his current school until their special education placement appeal was heard.

This case raises several questions about the process used by the Board and school staff in determining the placement of students with disabilities. In *Bonnah,* 2003, the Board's initial placement decision was to have the pupil, who was 12 years old and physically larger than most of his school peers, enroll in a grade two elementary school class. Although he was probably functioning at or below that academic level, it is reasonable to assume that issues of safety, among others, would be a natural result of placing him in an early elementary setting and the educators and Board should have considered that fully before arriving at this decision. The Special Education Appeal Board's decision of a grade 7 age-appropriate placement with part-time integration, made much more sense, and if acted on, might have led to avoiding this situation. Because of the actions of the elementary school principal and the Board, the pupil missed a year of school. Therefore, principals and school boards should consider the best interests of a student in their totality when making placement decisions.

In *Jackson v. Toronto Catholic School Board,* 2006, the circumstances around the suspension a student with a disability illustrated the challenge for educators of applying disciplinary measures. Specifically concerns exist related to whether or not policies and procedures for suspension should be the same for students with disabilities as their typical peers. Related to this is the fact that most codes of student behavior do not explicitly take into consideration the potential impact of a disability on the actions of a student. However, there are some examples of Education Acts that contemplate the need for considering the impact of a disability when school administrators. For example, in the Ontario *Education Act*, s. 309 outlines the actions a principal must take when addressing behaviour that is deemed inappropriate and could lead to a suspension or expulsion from school. In addition, in the Regulations related to section 309 of the Education Act, outlines the circumstances under which an expulsion is not mandatory. Guidance such as that provided in the Ontario statues assist school administrators in their decision making by highlighting the need to consider the special needs of a student when rendering a decision that could result in exclusion from school and access to an education as the consequences of the decision might have a more significant impact of student with a disability than a nondisabled peer.

Another case in this category, *Kendal v. St. Paul's Roman Catholic Separate School Division No. 20*, 2003, involved a special education teacher who was employed at a school designated as a district site for teaching students with a range of disabilities. In her submission, the teacher argued that she sustained injuries from being struck by a

student while she and a teacher assistant attempted to restrain him. The allegation was that the school division failed to provide her with a safe work environment. In her submission, the teacher's counsel contended that because the history of behaviour problems exhibited by the student was known, it was a reasonably foreseeable risk that sooner or later someone would be hurt. Therefore, they argued that the defendant school division should have taken steps to remove the student from the school before such an incident occurred. In responding to this claim of negligence, the school division outlined the steps it had taken to make staff, including this teacher, aware of the student's history and unique characteristics. As well, the school had access to a team of specialists to assist the teacher in the education of this student and regularly met to discuss issues and problem-solve solutions for implementation in the classroom.

In his ruling, the judge noted that while the school division had a responsibility to protect employees from unreasonable risk, this did not mean it could protect them from every possible risk. The judge indicated that the steps taken by the school and school division, such as providing a one-to-one teacher assistant for the student, access to specialists, a reduced pupil-teacher ratio, and staff awareness of the student's behavioural history, acknowledged there was an element of risk but their actions were appropriate to ameliorate that risk. Therefore, the teacher's action of negligence was dismissed. The provincial court of appeal later upheld this decision. The outcome of this case suggests that special education teachers and other teachers who have students with disabilities in their classrooms may not be successful in suing their employer if they sustain an injury in the course of providing instruction. In essence, this decision indicates that teachers

assume an element of risk when working with students with disabilities, and they must ensure they have made use of the support services and specialists in their school system to assist them in carrying out their duties. This case also outlines the practical steps a school board can take to mitigate the potential risks posed by a student with a disability exhibiting aggressive behaviour and the need for documenting the processes used to inform and support teachers.

Discussion Summary

The decisions in the cases reviewed for this study illustrate that the development of special education policy is multifaceted and complex. Special education policy developers must consider multiple levels of legislation including the *Charter of Rights and Freedoms* and provincial human rights codes. The policy development process must consider the practical application of this legislation. In addition, decisions from courts and human rights tribunals can be instructive in determining the policy direction for a provincial ministry of education and the school boards under its jurisdiction. The principles established under case law dealing with equality are pivotal to developing strategic special education policy that is applicable across all sectors of the public education system.

Research for this study identified established case law principles that should inform the special education policy process. The Supreme Court of Canada decision in *Eaton v. Brant County Board of Education,* 1999, established that school systems must act in the best interests of the child as well as confirming that there is not a presumption in favour of integration for students with disabilities. In *Eldridge v. British Columbia,*

1997, the Supreme Court of Canada found that neutral policies might discriminate if they have an adverse impact on individuals with disabilities. Therefore, policies that omit or fail to do something may violate section 15 of the *Charter*. The *Meiorin,* 1999 and *Grismer,* 1999 cases clarified the issue of accommodation of individuals with disabilities.

As discussed in Chapter 2, these cases established that the duty to accommodate exists and that governments and their agents must accommodate disability needs to the point of undue hardship. In these cases, the concept of undue hardship as established by the Supreme Court of Canada means the level of hardship must take the form of impossibility, serious risk, or excessive cost (MacKay, 2007). Recently in a British Columbia Court of Appeal decision, (*British Columbia (Ministry of Education) v. Moore*, 2008), the court confirmed that individuals with disabilities have a right to reasonable accommodation but not perfect accommodation. This case also distinguished between accommodations on an individual basis versus accommodation achieved through systemic or institutional change. Finally, as new research expands the availability of various intervention techniques and strategies, cases such as *Auton v. British Columbia*, 2004 and *Wynberg v. Ontario,* 2005 have established that there can be limits placed on the types of therapies and interventions made available by governments. In these cases, courts determined that if a service or benefit is sought, such as ABA/ IBI therapy, which is not already provided by law, there is no obligation for the government to provide it thus articulating a limit to equality. However, once a government decides to provide the service, it cannot later attempt to offer that service in a manner that discriminates.

The decisions in the cases discussed in this study illustrate how the elaboration and clarification of the *Charter*, section 15 equality provisions provide both philosophical underpinnings and practical advice for special education policy development. Taken together, special education policy developers have the task of ensuring that *Charter Rights* are protected in provincial special education legislation, policies, and programs flowing from them into school systems. In addition, although not all court and tribunal decisions are applicable to every province and territory, they can inform the inter-jurisdictional special education policy process. This is an important consideration for educational policy makers and can assist with the crafting of the implementation and evaluation phases.

Implications for Special Education Policy Development

Results presented in this study identified five areas that should be considered when developing special education policy by provincial and territorial ministries of education. The anchor for special education policy development must continue to be the *Charter of Rights and Freedoms*, especially section 15, if equality of educational opportunity is to be realized for students with disabilities.

First, provincial and territorial special education policy developers must bear in mind that governments are not limited to simply funding special education. Funding mechanisms must support the education of students with disabilities while not constraining the ability of school boards to meet the many and varied educational needs of all students. MacKay and Sutherland, (2006) noted that “courts may consider scarce public resources as a factor in determining whether a limit placed on an equality right in

the educational sphere is reasonable within the meaning of section 1 of the Charter; however, this is not always a reliable 'reasonable limits' argument" (p. 78). Ministries also have a responsibility to support and monitor the implementation of the special education policies and use of funding they provide to school boards for the education of students with disabilities.

Second, when developing special education policy, ministries must ensure that their policies consider other sections of their provincial education legislation to ensure that there are no conflicts between various parts of the act as identified by the court in *Bonnah*, 2003.

Third, special education policy makers should review their legislation in relation to that of other government ministries also providing services and funding to students with disabilities as presented in the numerous cases dealing with autism, and definitively articulated in the Supreme Court of Canada decision in *Auton*, 2004. This type of review process would reduce situations where conflicting statutes create barriers to school boards and families working collaboratively to develop special education programming.

Fourth , provincial and territorial special education policies should provide clear and concise descriptions for the implementation of new and emergent instructional strategies. This may require provincial and territorial ministries to become more actively engaged in reviewing current research and directly supporting implementation of evidence-based practices by school boards, such as those related to students with learning disabilities as discussed in *Moore*, 2001 & 2008 and students with autism, as found in *Auton*, 2004 and *Wynberg*, 2005.

Fifth, while conflict between school boards and parents of students with disabilities may be inevitable, (MacKay & Sutherland, 2006), attention to the areas noted above will assist in clarifying government legislation and policy intentions which could result in less need for parents to access courts and human rights tribunals to arbitrate disputes. While the tension between some parents and some school systems will continue to occur, it was noted during the research for this study that there tends not to be provisions in Canadian education legislation for alternative methods by which to resolve special education related disputes.

The reasons for this lack of alternatives is not clear and raises questions as to why other possibilities for dispute resolution have not yet made their way into this area of education. It could be suggested that while arbitration and mediation are frequently used to resolve labour disputes, efforts have not been taken to modify the techniques of these processes for use in the educational context. The only example of the use of a negotiated settlement of a special education dispute was that of *Elwood v. Halifax County – Bedford District School Board,* 1987. As a result of this settlement the student was ensured continued placement in a regular classroom until reaching the school leaving age. Given that ministries of education tend to design their legislation and special education policies to take into consideration the recognition that students with disabilities have strengths and needs that change over time, the possibility of a prescribed multi-year requirement to provide a particular classroom placement and/or specific services, as agreed to in *Elwood*, could be cause for concern among government officials and educators. However, this does not mean that alternatives to the present system of appeals and reviews by courts

and human rights tribunals should not be considered. It is perhaps time to explore the use of alternative disputes resolution processes within the educational context as a strategy to address concerns and reduce the acrimony often associated with more formal proceedings such as appeals, reviews, and court and tribunals. Through enabling legislation in this area both parents and school systems could be provided with additional methods by which they could resolve disagreements.

Limitations of the Study

The use of documents in research studies such as this one involved a reliance on written text to obtain data for analysis. Due to this, I encountered several challenges. In this type of study, the researcher needs to be aware of the fact that some documents are restricted and not available to be reviewed (Creswell, 2003), a situation I encountered in several instances. As well, due to the nature of provincial reporting restrictions, decisions from several provincial human rights tribunals as well as special education appeals either to school boards or to a Minister of Education were not available. In some instances, court decisions involving minor children were not accessible in the public domain to protect the interests and identity of the student. Therefore, some decisions were not included in the analysis and limited the researcher's ability to provide a full review and analysis of all potentially relevant cases. In addition, some of the decisions consisted of legal motions that did not inform the analysis of the case for this study. These decisions would be of greater interest to lawyers who prepare arguments for parents, school boards, and governments but they did not provide direction for the special education policy development process.

Future Directions

Several topics for future study emerged from this study. First, research in the area of what constitutes educational programming versus therapy in school settings requires additional exploration. This is an area of critical need as various other ministries such as health and children's services increasingly call upon schools to provide better coordination of services. As well, this situation raises questions about what are, or whether there are, reasonable limits to defining an educational program for students with disabilities. If there are reasonable limits, then how can they be best set within the context of the *Charter*?

A second area requiring additional research is determining the best ways for governments to monitor the implementation of special education policies. Research on this topic should focus on identifying the most efficient and effective methods to ensure school boards implement special education policy in the manner intended by government.

Thirdly, Canadian special education legislation and policy tends to suggest that one model of programming is appropriate across all levels of the public education system. Typically, the model emphasizes the identification of the student as having a disability and the development of an individualized program plan (IPP) created by a school team that allows for parental involvement and student input, if appropriate. This model is usually outlined in various policy documents including legislation and related regulations, (see Alberta *Standards for Special Education*, 2004; Ontario, *Identification and Placement of Exceptional Pupils*, Regulation 181/98, O. Reg., 402/05).

However, based on the research for this study, there is concern that there is not sufficient flexibility in the model to allow for the changes that occur because of the different structures across grade levels. Future research should explore how effective special education program delivery can be adapted to accommodate different methods of individual program development across the various levels of public education. This is especially evident at the secondary level where a greater number of teachers are involved in the process and there is an expanded course selection available. Research could focus on how to create a program planning process capitalizing on the differences between elementary school and secondary schools but still meeting the needs of students with disabilities.

A final area that warrants additional research centers on how to incorporate alternative methods of dispute resolution into special education legislation and polices at both the provincial and local levels.

Conclusions

This study furthers the knowledge of the relationship between litigation and policy development in special education in Canada. By identifying and analyzing the factors leading to and resulting from special education litigation and tribunals in conjunction with an examination of current provincial special education legislation, regulations, and policies, it provides additional information to school systems and government policy designers. The results of the study confirm that the process of clarifying what equality rights mean for students with disabilities is ongoing, and dynamic.

During the course of the last 25 years, the meaning of equality rights for students with disabilities attending publicly funded schools in Canada have been to some extent clarified. Through the efforts of parents, provincial school systems and governments have clarified several of the responsibilities of the respective parties to educate students with disabilities. For example, through the process of litigation, it is now a matter of special education public policy that parents should be consulted about the type of programming that their children receive. However, the courts have been reluctant to prescribe a specific form and process that should be used by school systems when they consult with parents. Therefore, government policy designers must craft special education policy that allows for parent consultation, and outline in the policy the parameters of the process. In addition, because of its role in developing special education policy, government must take into consideration its responsibility to comply with the spirit and interpretation of *Charter* rights in those sections that specifically relate to people with disabilities. This has lead to the development of legislation and supporting policy that clearly outline expectations of educators of all levels of the public school systems. These policies should provide sufficient guidance and support to these educators so that they can act in the best interests of the student even when their actions may run counter to parental preferences. As suggested by the review of current provincial and territorial special education legislation for this study, Canadian jurisdictions have also outlined the process and conditions under which parents may appeal the decisions of educators in relation to students with disabilities.

While there are many issues that continue to be of concern, the design of provincial funding schemes for students with disabilities remains an area of special education policy development that continues to come before courts and human rights tribunals. As demonstrated by the number of cases involving funding for programming and services for students with disabilities, this area can be a source of disagreement between governments and school boards and school boards and parents. Although Canadian courts have established the key principles related to accommodation to the point of undue hardship, it is perhaps an aspect of *Charter* compliance that governments and school boards have been slow to implement.

Throughout the cases reviewed for this study focusing on funding, a common theme was the defense strategy used by government to limit its responsibility by claiming that while its role is to provide funding to school boards, it usually does not have a direct primary role or responsibility to actually provide programming or services to students. The courts have not upheld this position and this should serve as a warning to governments that they cannot be absolved of responsibility for the various services and programs they create through legislation and regulation. Parents of students with disabilities can view the position of the courts in this area as a positive in that it confirms that governments and the school boards they create through statute are less likely to prevail when funding of special education is the focus of litigation. In addition, the courts have clarified that both governments and school boards must accommodate the needs of students with disabilities to the point of undue hardship. The courts' clarification of what constitutes undue hardship should be given serious consideration by government policy

designers and school boards because it extends beyond mere perceptions of inconvenience or preference for funding other programs. For policy makers, accommodation to the point of undue hardship requires them to ensure that sufficient funding is available to address the needs of students with disabilities. This will require development of funding and budget schemes by government and school boards that give meaning to individual accommodation as the courts have interpreted the provisions of the *Charter*, specifically those codified in section 15. Therefore, governments must ensure their fiscal and educational policies do not have a disproportional negative impact on students with disabilities within the reasonable limits they set on the amount of funding available overall for education.

Closely associated with fiscal policies related to education, the courts have also articulated that there can be limitations placed on equality rights. Much of the litigation around determining eligibility for services to students with autism has served to clarify that government education policies must take into consideration that if the benefit sought is not already provided by law, there is no obligation to provide it. Therefore, special education policies and the companion regulations and guidelines, must clearly outline what services are to be provided from public funding so that educators and parents are aware of what can reasonably be offered to students with disabilities in school settings. Related to this position is the need for governments and school boards to ensure that once it is determined that services will be provided, they cannot be provided in a manner that discriminates. Therefore, government policies that provide specific services only to students in a particular age group and not to other students who have similar

characteristics could be deemed discriminatory and subject to review by either a human rights tribunal and/or courts. The implications for policy development related to the provision of special education services will continue to require careful attention by policy designers. Particular attention to special education policy design in relation to service provision will be necessary to achieve the balance between allocating finite fiscal resources and setting reasonable limits while ensuring that students with disabilities can access the education they require to become productive and contributing members of society.

A final area that warrants attention relates to the role government special education policy can play in offering direction to school boards in the areas of exploring and implementing new interventions and research. As evidenced by the court cases related to autism and learning disabilities, parents have sought the opinion of courts and human rights tribunals to require government education ministries and school boards to provide particular therapies and interventions for their children. A challenge for government policy makers is to systematically examine the value and merit of the various therapies and interventions as new research in the field of disability methodologies emerge. The government ministries and school boards that have faced litigation in the cases analyzed for this study had a common feature. In nearly all cases, governments and school boards were usually not able to justify why one type of intervention was more appropriate than another type. This situation highlights the need for policy designers to work closely with personnel in their education ministries. These personnel should have the program area expertise and training to provide unbiased assessments of the proposed

interventions and offer guidance about the practicality of implementing them in school settings. When combined with the legal expertise available through provincial attorney general offices, which defend governments in special education lawsuits, both education ministry staff and lawyers can support the work of designing special education legislation and policy that is consistent with the *Charter*'s equality provisions.

It is likely that even with close examination of these areas, there will continue to be situations where parents, governments and school boards will find themselves offering differing and sometimes conflicting opinions about what is appropriate for a specific student or group of students. To defend against challenges, governments and school boards must develop transparent and credible review processes. Without such processes in place, the costs associated with litigation to defend against requests from parents for specific therapies and interventions will continue to escalate and consume disproportionate amounts of staff time. The emotional toll on families and educators will also contribute to strained relationships and communication breakdowns that will make providing special education programming and services difficult at the local school level. To mitigate this type of challenge, governments should provide sufficient details about what can be offered, to whom, and in what situation, in their special education policy and related regulations. Periodic review of legislation and policy can serve to update outdated information and provide the opportunity to implement new and improved interventions and therapies, thereby reducing the probability of legal action to settle differences between parents and educators.

Consideration of these points should better prepare governments and school boards to defend their actions when challenged by parents. The results of this study can support governments and school districts in ensuring that personnel understand their responsibilities so that they are prepared should a legal challenge to their placement, programming, and funding decisions occur.

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Appendix A

Human Rights Tribunal Special Education – Cases 1998 – 2008

Province/ Commission	Year	Citation	Legislation Cited	Ground(s)	Disability	Age/Gender
The Alberta Human Rights and Citizenship Commission	2004	Margaret Dewart (on behalf of James Dewart) and Calgary Board of Education, 2004, AHRCC S0101261	*Human Rights and Citizenship Act*, R.S.A. 2000, c. H-14	Discrimination Goods and services Disability	Attention deficit hyperactivity disorder Brain injury	14 yrs./ male
British Columbia Human Rights Tribunal	2005	Frederick Moore on behalf of his son Jeffery Patrick Moore and Her Majesty the Queen in the right of the Province of British Columbia, as represented by the Ministry of Education, and North Vancouver School District No. 44, 2005 BCHRT 580	*Human Rights Code*, R.S.B.C. 1996, c. 210 (as amended)	Discrimination Goods and services Disability	Dyslexia (severe learning disability)	Age not stated/ male
British Columbia Human Rights Tribunal	2008	Habetler obo Habetler v. Sooke School District and B.C. (Ministry of Education), 2008 BCHRT 85	*Human Rights Code*, R.S.B.C. 1996, c. 210 (as amended)	Discrimination Family status Disability	Severe mental and physical disabilities	Age not stated/ male
Human Rights Tribunal of Ontario	2005	Arzem v. Ontario (Community and Social Services, 2005 TRTO 42 * *This complaint was brought in 2004 however this is the first reference to education being a party to that complaint.	*Education Act*, R.S.O., 1990, c. E.2 *Human Rights Code*, R.S.O. 1990. C. H.19	Discrimination Age Disability Goods and services	Autism	245 complaints by families of children with autism all over age 6 years were

						combined in this case between 2003 and 2005
Human Rights Tribunal of Ontario	2008	Sigrist and Carson v. London District Catholic School Board et al., 2008 HRTO 14	*Education Act*, R.S.O., 1990, c. E.2 *Human Rights Code*, R.S.O. 1990. C. H.19	Disability Failure to accommodate	Disabilities not specified	Ages not stated/ 2 males
Saskatchewan Human Rights Tribunal	2006	Gloria and Mike Mahussier and Prince Albert Roman Catholic School Division No. 6, 2006	*Saskatchewan Human Rights Code*, *School Act*,	Discrimination Disability	William's syndrome	12 yrs. at time of complaint/ male

Appendix B

Canadian School/ Education Act Special Education Provisions – Adapted from MacKay (2006)

Province	Legislation/ Provisions
Alberta	In Alberta, only public, separate and Francophone school boards are required to provide special education programs. The *School Act*, s. 47(1) states "A board may determine that a student is, by virtue of the student's behavioural, communicational, intellectual, learning or physical characteristics, or a combination of those characteristics, a student in need of a special education program." Under s. 48 (1) "A board may determine that a student has special needs that cannot be met in an education program that can be provided by the board under any other provision of this Act. (2) If a board makes a determination under subsection (1) in respect of a student, the board shall refer the matter to a Special Needs Tribunal, which shall confirm the board's determination or determine that the board is able to provide the student with an education program that is appropriate to the needs of the student." Parents may also seek the assistance of the Minister to review board decisions related to special education. In s. 124(1) "If a board makes a decision on an appeal to it or otherwise with respect to (a) the placement of a student in a special education program…the parent of a student affected by the decision…may request in writing that the Minister review the decision of the board."
British Columbia	In September 2007, British Columbia updated its *School Act* through the *Special Needs Student Order*. Ministerial Order M235/07 s.1 states that "'student with special needs' means a student who has a disability of an intellectual, physical, sensory, emotional or behavioral nature or has exceptional gifts or talents." In addition, s. 2 (1) "A board must ensure that a principal, vice principal or director 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 educational 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."

Manitoba	The *Public Schools Act* was updated in 2005 requiring that appropriate educational programming is to be provided. Under s. 41(1.1) "The minister may make regulations respecting appropriate educational programming to be provided by school boards under clause (1) (a.1), including, but not limited to, establishing (a) programming standards respecting resources and other support services to be provided by school boards; (b) a dispute resolution process to be followed if there is a disagreement about the appropriateness of the educational programming being provided to a pupil by the school board." To support this section of the *Act*, in 2006 two companion documents were published, the *Standards for Student Services* and *A Formal Dispute Resolution Process*, that articulate the expectations for the education of students with special education needs.
New Brunswick	S. 12 of the *Education* Act outlines the expectations for the programs and services for exceptional pupils "12(1) Where the superintendent concerned, after consulting with qualified persons, determines that the behavioural, communicational, intellectual, physical, perceptual or multiple exceptionalities of a person are contributing to delayed educational development such that a special education program is considered by the superintendent to be necessary for the person, that person shall be an exceptional pupil for the purposes of this Act. 12(2) The superintendent concerned shall ensure that the parent of a pupil is consulted during the process of the determination referred to in subsection (1), and in the process of developing special education programs and services for the pupil. 12(3) The superintendent concerned shall place exceptional pupils such that they receive special education programs and services in circumstances where exceptional pupils can participate with pupils who are not exceptional pupils within regular classroom settings to the extent that is considered practicable by the superintendent having due regard for the educational needs of all pupils. 12(4) Where an exceptional pupil is not able to receive a special education program or service in a school due to (a) fragile health, hospitalization or convalescence, or (b) a condition or need which requires a level of care that cannot be provided effectively in a school setting, the superintendent concerned may deliver the program or service in the pupil's home or other alternative setting. 12(5) The Minister may issue policies to District Education Councils for the declaration of exceptional pupils under subsection (1) and the placement of exceptional pupils under subsection (3).

	12(6) A decision made by a superintendent under subsection (1) or (3) shall be made (a) subject to any policies or directives of the District Education Council concerned, (b) subject to any policies issued by the Minister under subsection (5), and (c) only with respect to pupils who are enrolled in a school in the school district or who reside in the school district for which the superintendent is appointed or reappointed." 1997, c.66, s.2; 2000, c.52, s.13.
Newfoundland And Labrador	The *Schools Act*, 1997, S.N.L. 1997, c. S-12.2 states in s.117, "The minister may (b) issue policy directives, including policy directives with respect to (v) special education," and s. 75. (1): "A board shall (d) ensure that policies and guidelines issued by the minister relating to special education for students are followed in schools under its jurisdiction." Although specific reference is not made to a special education appeal process, s. 22. states that (1) "Where a decision affects a student, the parent of the student or the student, if the student is 19 years of age or older, may appeal the decision (a) of a board employee employed in a school, to the principal and his or her decision may be appealed to the board; (b) of the principal, to the board; and (c) of a board employee not employed in a school, to the board, and the board's decision on the appeal shall be final. (2) An appeal under subsection (1) shall be commenced within 15 days from the date that the parent or student is informed of the decision. (3) An appeal under this section shall be made in accordance with this Act and the by-laws of the board. (4) A decision made under this section that is final or that is not appealed within the appeal period is binding upon the student, school, board and other persons affected by that decision. (5) This section shall not apply to expulsion decisions under section 37."
Nova Scotia	The *Education Act*, S.N.S. 1995-96, c.1 legislation governing the education of students with special needs is found in the *Regulations Under the Education Act*, 2002. Placement of students, s. 6 (1) states that "Subject to subsection (2), a school board shall determine the appropriate placement of students. (2) The obligation of a school board pursuant to subsection (1) is, in the case of the placement of a student with special needs, subject to (a) any appeal procedure established by the school board; and (b) the appeal procedure prescribed in section

	53." S. 53 through 61 prescribe the circumstances and procedures for the Minister to establish an appeal board. S. 53 states that "Where a dispute has occurred between the parent of a student with special needs and the school board respecting the proposed or existing individualized program plan for the student, the dispute (a) concerns (i) outcomes of the proposed plan, or (ii) placement of the student; and (b) has not been resolved by means of the school board appeal process, the parent or school board may make a request in writing to the Minister to establish a Board of Appeal to provide a ruling on the program."
Northwest Territories and Nunavut	The Northwest Territories and Nunavut both use *Education Act*, S.N.W.T. 1995, c.28. Special education is included in s. 7, Inclusive schooling. Under s. 7 (1) " Every student is entitled to have access to the education program in the regular instructional setting in a public school or public denominational school in the community in which the student resides. (2) An education body shall provide a student with the support services necessary to give effect to subsection (1), in accordance with the direction of the Minister." Exceptions to are found in s.7 (3) and include those students who are medically unable to attend school as determined by the Chief Medical Health Officer, students for whom the board cannot provide a program and has arranged for schooling outside of the resident community, those who attend a private school or are home schooled, students who are in a medical long-term care facility or treatment facility outside of their community and situations where "(f) the presence of the student in a regular instructional setting would unduly interfere with the delivery of the education program to other students." Allowance for appeals is made in s. 9 (5) where "If a parent of a student or a student disagrees with a decision of the principal as to whether an individual education plan is appropriate for the student, the parent or the student may lodge a written disagreement with the principal's decision under section 39." In s. 39 (2), the principal is required to attempt to resolve the disagreement. If unable to do so, the principal may refer the matter to District Education Authority.

Ontario	The Interpretation and other general matters section of the *Education Act*, 1990, states that *"exceptional pupil* means a pupil whose behavioural communicational intellectual, physical or multiple exceptionalities are such that he or she is considered to need placement in a special education program by a committee, established under subparagraph iii of paragraph 5 of subsection 11(1), of the board, (a) of which the pupil is a resident pupil, (b) that admits or enrolls the pupil other than pursuant to an agreement with another board for the provision of education, or (c) to which the cost of education in respect of the pupil is payable by the Minister. As well, *special education program* means, in respect of an exceptional pupil, an educational program that is based on and modified by the results of continuous assessment and evaluation and that includes a plan containing specific objectives and an outline of the educational services that meets the needs of the exceptional pupil." The roles and responsibilities of Special Education Tribunals are outlined in s. 57. The expectations for school boards to identify exceptional pupils and the process for parent appeal of board decisions are found in *Identification and Placement of Exceptional Pupils, O. Reg. 181/98.* Under this regulation s. 26.(1), "A parent of a pupil, may by filing a notice of appeal…require a hearing by a special education appeal board in respect of, (a) a committee decision…that the pupil is an exceptional pupil; (b) a committee decision…that the pupil is not and exceptional pupil; or (c) a committee decision…on the placement of the pupil."
Prince Edward Island	section 7(1) (e) of the *School Act* states "The Minister shall establish policies for the provision of special education services." Minister's Directive No. MO 2001-08, s. 1 states that (a) "Special education means programming and/or services designed to accommodate students within the public school system whose educational needs require interventions different from, or in addition to, those which are needed by most students. Assessments of students are the basis for determining appropriate special education programs and services. These programs and services may involve the use of adapted or modified curriculum, materials and facilities, and/or alternative methodologies, and/or additional assistance from student support staff within school settings. (b) *Special educational needs* refers to: i. educational needs of students where there is substantive normative agreement – such as blind and partially sighted, deaf and partially hearing, severe and profound mental handicap, multiple disabilities. ii. educational needs of students who have significant difficulties in learning which do not appear attributable to (i) or (iii). iii. educational needs of children which are significant and are considered to arise primarily from socio-

	economic, cultural and/or linguistic factors." In response to concerns of teachers' and administrators' Ministerial Directive No. MD 2003-02 Special Education Issues Resolution Procedure was established to "…discuss teachers'/administrators' concerns, and provide advice to teachers, administrators, school boards and/or the Minister of Education regarding issues, policies, procedures and resources for the education of students with special needs."
Quebec	The *Education Act* stipulates in s.234. that "Every school board shall, subject to sections 222 and 222.1, adapt the educational services provided to a handicapped student or a student with a social maladjustment or a learning disability according to the student's needs and in keeping with the student's abilities as evaluated by the school board according to the procedures prescribed under subparagraph 1 of the second paragraph of section 235." 1988, c. 84, s. 234; 1997, c. 96, s. 72. In addition, for handicapped students, 235. "Every school board shall adopt, after consultation with the advisory committee on services for handicapped students and students with social maladjustments or learning disabilities, a policy concerning the organization of educational services for such students to ensure the harmonious integration of each such student into a regular class or group and into school activities if it has been established on the basis of the evaluation of the student's abilities and needs that such integration would facilitate the student's learning and social integration and would not impose an excessive constraint or significantly undermine the rights of the other students. The policy shall include 1) procedures for evaluating handicapped students and students with social maladjustments or learning disabilities; such procedures shall provide for the participation of the parents of the students and of the students themselves, unless they are unable to do so; 2) methods for integrating those students into regular classes or groups and into regular school activities as well as the support services required for their integration and, if need be, the weighting required to determine the maximum number of students per class or group; 3) terms and conditions for grouping those students in specialized schools, classes or groups; 4) methods for preparing and evaluating the individualized education plans intended for such students."

	The *Education Act* also requires in s. 265, "Every school board shall appoint a person responsible for educational services for handicapped students or students with social maladjustments or learning disabilities." 1988, c. 84, s. 265. As well, in s. 277, "Every school board shall adopt its operating, investment and debt service budget for the following school year and transmit it to the Minister before such date and in such form as he determines. Content. The budget of every school board shall indicate the financial resources allocated to its committees and the financial resources allotted to services for handicapped students and students with social maladjustments or learning disabilities." Finally, for a Decision affecting a student, in s. 9, "A student or parents of a student affected by a decision of the council of commissioners, the executive committee or the governing board, or of an officer or employee of the school board may request the council of commissioners to reconsider such decision. 1988, c. 84, s. 9; 1997, c. 96, s. 8. Request for reconsideration. s. 10. The request of the student or his parents shall be made in writing and shall briefly set forth the grounds on which it is made. It shall be transmitted to the secretary general of the school board."
Saskatchewan	The *Education Act*, 1995, S.S. 1995, c.E-0.2, states in s. 141(1) "… no teacher, trustee, director or other school official shall, in any way deprive, or attempt to deprive, as pupil of access to, or advantage of, the educational services approved and provided by the board of education or the *conseil scolaire*." In s. 146, "Except as otherwise provided in this Act, services approved by a board of education or *conseil scolaire* with respect to pupils who are eligible for the special educational services mentioned in section 178 or who are otherwise entitled to services of benefit to their general health and well-being, are to be provided without cost to those pupils or their parents or guardians." S. 178(1) states that "*pupil with intensive needs* means a pupil who has been assessed by a board of education or the *conseil scolaire* in accordance with this section and the regulations as having the capacity to learn that is compromised by a cognitive, social-emotional, behavioural or physical condition." This section of the *Act* further elaborates the procedures and process for assessing students so that they can be identified as a pupil

	with intensive needs. Finally in s. 178.1 (1), "The parent or guardian of a pupil may request that the principal of the pupil review the matter if the parent or guardian of the pupil disagrees with the board of education or *conseil scolaire* with which the pupil is registered with respect to the following: (a) the results of an assessment conducted pursuant to subsection 178(5); (b) a failure to conduct an assessment of a pupil to determine if the pupil is a pupil with intensive needs; (c) the educational services provided pursuant to section 178 to a pupil with intensive needs."
Yukon	The *Education Act*, R.S.Y. 2002, c. 61, states an "Individualized Education Plan" (IEP) is a document which outlines the educational program for a student as determined by a school based team, containing a description of the student's present level of functioning; long term or annual goals; short term goals or specific behavioural objectives; special resources required; suggested instructional materials, methods and strategies; IEP review dates; persons responsible for the implementation of the IEP, including parents; and parents' written, informed consent for implementation;" Division 2 of the *Act*, addresses special education and identifies those students who are eligible to receive special education programming and services as 15(1), "Students who, because of intellectual, communicative, behavioural, physical, or multiple exceptionalities are in need of special education programs, are entitled to receive a program outlined in an Individualized Education Plan. (2) A student who is entitled to an Individualized Education Plan shall have the program delivered in the least restrictive and most enabling environment to the extent that is considered practicable by the deputy minister or by a School Board in consultation with professional staff and parents, having due regard for the educational needs and rights of all students. (3) The Minister shall issue guidelines for the implementation of this Division." S.Y. 1989-90, c.25, s.15. The expectations for determining if a student has special education needs are detailed in s. 16 (1) through (5) while the procedures for Special Education Appeals are outlined in s. 17 (1) and (2). Local appeals 156(1) If a decision of a person employed in a school significantly affects the education, health or safety of a student, then the parent of the student, a responsible adult chosen by the student, or the student if that student is 16 years of age or older may, within 30 days from the date the parent or student was informed of the decision, appeal the decision to the superintendent or, if there is a School Board or Council, through the procedure

	established pursuant to paragraphs 113(1)(d) and 116(1)(h). (2) The failure to make a decision is a decision for the purposes of this section. (3) A decision on the appeal shall be made as soon as practicable but not until the parents, students and affected persons have had an opportunity to be heard. (4) An appeal under this section is an administrative proceeding, not a quasi-judicial or judicial proceeding. (5) This section does not apply to matters that may be appealed to the Education Appeal Tribunal pursuant to the provisions of this Act. S.Y. 1989-90, c.25, s.156. Education Appeal Tribunal 157(1) The Minister shall appoint a chair, a maximum of nine other members and a secretary to the Education Appeal Tribunal. (2) The chair and the members of the Education Appeal Tribunal shall be appointed for the terms and in the manner specified by the Minister. Composition 158(1) An appeal referred to the Education Appeal Tribunal shall be heard by the chair and two or more members chosen by the chair. (2) If possible, the qualifications of the members of the Education Appeal Tribunal shall be appropriate to the matter under consideration by the Tribunal. (3) The chair may call on any experts or consultants considered advisable to report to the Education Appeal Tribunal. S.Y. 1989-90, c.25, s.158. Mediation 159 Before the consideration of an appeal by the Education Appeal Tribunal, the chair may appoint a mediator to attempt to settle the matter under appeal. S.Y. 1989-90, c.25, s.159. Powers of the Education Appeal Tribunal 161 The Education Appeal Tribunal, in deciding a matter being appealed, may make an order doing one or more of the following (a) confirming or varying the decision that is under appeal; (b) identifying a student as a student with special educational needs;

	(c) directing a School Board or the deputy minister to implement an Individualized Education Plan in a particular environment including, but not limited to, a regular class; (d) directing a School Board or the deputy minister to enroll a student in a school named by the Education Appeal Tribunal; (e) determining that an Individualized Education Plan be prepared for a student; (f) apportioning the cost of providing the services required for an Individualized Education Plan to a School Board, the department, or any other department of the Government of the Yukon; Matters to be considered 162 In the determination of an appeal, the Education Appeal Tribunal shall consider (a) the educational interests of the student who is the subject of the appeal; (b) the impact of a decision on the total population of students served; and (c) any other factor that appears to be relevant to the matter in dispute. S.Y. 1989-90, c.25, s.162. Final decision 163 The decision of the Education Appeal Tribunal shall be final and binds the parties to any such decision. S.Y. 1989-90, c.25, s.163. Enforcement of order 164(1) A copy of an order made by the Education Appeal Tribunal shall be filed with the clerk of the Supreme Court. (2) On the filing of a copy of an order with the clerk of the Supreme Court, the order has the same force and effect as if the order were an order of that Court. S.Y. 1989-90, c.25, s.164. Copy to the Minister 165 A copy of each decision of the Education Appeal Tribunal shall be sent to the Minister. S.Y. 1989-90, c.25, s.165.

Appendix C

Special Education Litigation – Cases 1998 – 2008

Province	Court	Citation	Legislation Cited	Issue(s)	Disability	Age/Gender
Canada	Supreme Court of Canada	Auton (Guardian ad litem of) v. British Columbia (Attorney General), 2004 SCC 78	*Canada Health Act*, R.S.C., 1985, c. C-6 *Charter of Rights and Freedoms*, ss. 1, 7,15, 24(1) *Constitution Act, 1867* *Interpretation Act*, R.S.B.C., 1996, c. 238 *Medical and Health Care Services Regulation*, B.C. Reg. 426/97 *Medicare Protection Act*, R.S.B.C. 1996, c. 286	Refusal to fund therapy Medically required treatment Discrimination	Autism	Ages not stated/ three males one female
	Supreme Court of Canada	Robyn Wynberg and Simon Wynberg on their own behalf and in their capacity as joint litigation guardians of Sebastian and Nathaniel Wynberg, et al. v. Her Majesty the Queen in Right of Ontario Michael Shane Deskin and Noah Samuel Deskin minors by their litigation guardian, Brenda Jill Deskin, Brenda Jill Deskin, Steven Joel Deskin, Sheldon Kosky, Frances	Not applicable	Application for leave to appeal from the judgment of the Court of Appeal for Ontario, Number C43425	Autism	Ages not stated/ four males

		Kosky and Betty Deskin v. Her Majesty the Queen in Right of Ontario				
Alberta	Court of Queen's Bench	V.G. v. Wetaskiwin (Regional Division No. 11), 1998 ABQB 600	*Charter of Rights and Freedoms* 24(1) *School Act*, S.A. 1998, c. S-3.1, s. 29	Placement	Autism	14 yrs./ male
	Court of Queen's Bench	D.J.N. v. Alberta (Child Welfare Appeal Panel), 1999 ABQB 599	*Charter of Rights and Freedoms*, s. 15(1) *Child Welfare Act*, S.A. 1984, C-8.1 *School Act*, S.A. 1988, c. S-3.1, s. 30(9)	Funding	Autism	Age not stated/ male
	Court of Queen's Bench	L.S. v. Alberta (Child Welfare Panel), 2002 ABQB 1102	*Child Welfare Act*, R.S.A 2000, c. C-12, ss. 106, 115. 117(1), 120 *School Act*, R.S.A. 2000, c. S-3, s.47	Funding	Autism	7 yrs./ female
	Court of Queen's Bench	St. Albert and Area Student Health Initiative Partnership v. Polczer, 2007 ABQB 692	*Human Rights, Citizenship, and Multiculturalism Act*, R.S.A., 2000, c. H-14 *School Act*, R.S.A., 2000, c. S-3	Denial of services	Autism Spectrum Disorder	Age not stated/ male
British Columbia	Court of Appeal	Auton (Guardian ad litem of) v. British Columbia (Attorney General), 2002 BCCA 538	*Canadian Charter of Rights and Freedoms*, 1982, ss. 1,7,15,15(1), 24, 24(1) *Class Proceedings Act*, R.S.B.C. 1996, c. 50 *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 13 *Medicare Protection Act*, R.S.B.C. 1996, c. 286 *School Act*, R.S.B.C. 1996, c. 412	Funding	Autism	Ages not stated/ three males one female

	Court of Appeal	Barclay (Guardian ad litem of) v. British Columbia, 2005 BCCA 382	None cited	Court Costs Funding	Autism	Age not stated male
	Court of Appeal	Barclay (Guardian ad litem of) v. British Columbia, 2006 BCCA 434	*Canadian Charter of Rights and Freedoms*	Funding	Autism	Age not stated/ male
	Court of Appeal	Fahlman, by his Guardian ad litem Fiona Gow v. Community Living British Columbia et al., 2007 BCCA 15	None cited	Denial of disability benefits	Fetal alcohol syndrome Attention deficit disorder Pervasive development al disorder	20 yrs./ male
British Columbia	Supreme Court of British Columbia	HMTQ v. Moore et al., 2001 BCSC 336	*Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 *Human Rights Code*, R.S.B.C. 1996, c. 210 *School Act*, S.B.C. 1989, c. 61	Placement Funding Appropriate special education program Method of instruction	Learning disability - severe	Age not stated/ male
	Supreme Court of British Columbia	Auton (Guardian of) v. British Columbia (Minister of Health), 1999 BCSC 261	*Canadian Charter of Rights and Freedoms* *Class Proceedings Act*, R.S.B.C. 1996, c. 50 *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 *Medicare Protection Act*, R.S.B.C. 1996, c. 286	Funding Certification as class proceeding	Autism	Age not stated/ male
	Supreme Court of British Columbia	Auton et al. v. AGBC, 2000 BCSC 1142	*Canada Health Act*, R.S.C., 1985, c. C-6 *Canadian Charter of Rights and*	Funding	Autism	Ages not stated/ 3 males 1 female

			Freedoms *Class Proceedings Act*, R.S.B.C. 1996, c. 50 *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 *Medicare Protection Act*, R.S.B.C. 1996, c. 286 *Ministry of Health Act*, R.S.B.C. 1996, c. 301 *School Act*, R.S.B.C. 1996, c. 412			
	Supreme Court of British Columbia	Auton et al. v. AGBC, 2001 BCSC 220	*Canadian Charter of Rights and Freedoms*	Funding	Autism	Ages not stated/ 3 males 1 female
	Supreme Court of British Columbia	Auton et al. v. AGBC, 2002 BCSC 538	*Canadian Charter of Rights and Freedoms*, s. 1,7,15, 15(1)	Funding	Autism	Ages not stated/ 3 males 1 female
	Supreme Court of British Columbia	Anderson et al. v. Attorney General of British Columbia, 2003 BCSC 1299	*Canadian Charter of Rights and Freedoms*, s. 1, 15(1)	Funding	Autism	Ages not stated/ 16 males 3 female 3 gender not specified
	Supreme Court of British Columbia	Barclay (Guardian ad litem of) v. British Columbia (Attorney General), 2005 BCSC 640	*Supreme Court Act*, R.S.C., 1985, c. S-26	Court costs Funding	Autism	11 yrs./ male
	Supreme Court of British Columbia	Hewko v. B.C., 2006 BCSC 1638	*Canada Health Act*, R.S.C., 1985, c. C-6 *Canadian Charter of Rights and Freedoms* *Education Act*, R.S.O., 1990, c. E.2	Access to public education Appropriate special education program and supports	Autism	9 yrs./ male

	Supreme Court of British Columbia	British Columbia (Ministry of Education) v. Moore, 2008 BCSC 264	*Canadian Charter of Rights and Freedoms*, s. 15(1) *Constitution Act*, 1982 *Education Act*, R.S.O., 1990, c. E.2 – 8(3)	Disability discrimination Remedies	Learning disability/ severe	Age not stated/ male
New Brunswick	Court of Queen's Bench of New Brunswick	Acheson v. New Brunswick (Minister of Education), 2000 N.B.R. (2d) 223	*Canadian Charter of Rights and Freedoms*, s. 15 *Education Act*, s. 12	Reduction in teacher assistants	Exceptional pupils – disabilities not specified	Ages not stated/ Two males and 18 other students gender not specified
	Court of Queen's Bench of New Brunswick	New Brunswick Human Rights Commission v. New Brunswick (Dept. of Education), 2005 NBQB 90	*Education Act*, S.N.B., c. E-1.12 *Human Rights Act*, R.S.N.B., 1973, c. H-11	Disability discrimination Funding Placement	Attention deficit/ hyperactivity disorder	17 yrs./ male
Nova Scotia	Nova Scotia Court of Appeal	Bourque v. Nova Scotia (Minister of Education), 2001 NSCA 143	*Education Act*	Minister's discretion	Down syndrome	11 yrs./ male
	Nova Scotia Court of Appeal	Dassonville-Trudel (Guardian ad litem of) v. Halifax Regional School Board, 2004 NSCA 82	*Canadian Charter of Rights and Freedoms*, ss. 7, 12,15 *Children and Family Services Act*, R.S.N.S., 1989, c. 5 *Children and Family Services Act Guidelines*, 1989	Funding	Autism/ severe	9 yrs. female
Nova Scotia	Supreme Court of Nova Scotia	Halifax Regional School Board v. Nova Scotia (Attorney General) and Daigle, 1998	*Education Act*, S.N.S. 1995-96, c. 1	Funding Authority of Appeal Board	Learning challenges	14 yrs./ male
	Supreme Court of Nova Scotia	J.B. v. Nova Scotia (Minister of Education), 2001 197 N.S.R (2d) 23	*Education Act*, S.N.S. 1996-97, c. 1	Minister's discretion	Down syndrome	11 yrs./ male
	Supreme Court of Nova Scotia	Dassonville-Trudel (Guardian ad litem of) v. Halifax Regional School	*Canadian Charter of Rights and Freedoms*, 1982 *Education Act*, S.N.S. 1995-96,	Compliance with provincial appeal decision	Autism	6 yrs./ female

		Board, 2002 NSSC 85	c. 1 ss. 10E, 68 *Ontario Rules of Civil Procedure*, Rule 56			
	Supreme Court of Nova Scotia	Dassonville-Trudel (Guardian ad litem of) v. Halifax Regional School Board, 2002 NSSC 110	*Canadian Charter of Rights and Freedoms*, 1982 *Children and Family Services Act*, R.S.N.S., 1989, c. 5 *Nova Scotia Civil Procedure Rules*, Rule 9.02, 9.04	Funding	Autism	6 yrs./ female
	Supreme Court of Nova Scotia	Dauphinee (Litigation Guardians of) v. Conseil Scolaire Acadien Provincial, 2007 NSSC 238	*Canadian Charter of Rights and Freedoms*, 1982 s. 23, s. 23(3) *Education Act*, S.N.S. 1995-96, c. 1	Funding French special education services	Attention deficit hyperactivity disorder Oppositional defiant disorder	Age not stated/ male
Nunavut	Nunavut Court of Justice	S. (J.) (Litigation Guardian of v. Nunavut, 2006 NUCJ 1	*Canadian Charter of Rights and Freedoms*, s. 15 *Judicature Act*, S.N.W.T., 1998, c. 34 – 1(1) *Nunavut Act*, S.C., 1993, c. 28	Funding Access to services	Blind Multiple disabilities	8 yrs./ male
Ontario	Court of Appeal for Ontario	Bonnah (Litigation Guardian of) v. Ottawa-Carleton District School Board, 2003 170 O.A.C. 248	*Education Act*, R.S.O 1990, c. E.2 *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 *Safe Schools Act*, 2000, S.O. 2000, c. 12 *The Education Amendment Act*, 1980, S.O. 1980, c. 61 O. Reg. 181/98 (Education Act) O. Reg. 474/00 (Education Act)	Placement Transfer of student for safety reasons	Multiple disabilities	11 yrs./ male
	Court of Appeal for Ontario	Wynberg v. Ontario, 2006 O.A.C. 2732	*Canadian Charter of Rights and Freedoms*, 1982	Funding Age	Autism	Thirty-five children with

			Child *and Family Services Act*, R.S.O., 1990, c. C.11 *Constitution Act*, 1982 *Education Act*, R.S.O., 1990, c. E.2 O. Reg. 181/98 (Education Act) O. Reg. 464/97 (Education Act) O. Reg. 306/90 (Education Act)	discrimination		autism age six and over
	Court of Appeal for Ontario	Sagharian v. Ontario (Education), 2008 ONCA 411	*Canadian Charter of Rights and Freedoms*, 1982, s. 2, s. 15(1)	Educational services Age discrimination Duty to accommodate	Autism	Age six and over/ six males
Ontario	Superior Court of Justice	Jimmo v. Ontario (Minister of Education), 2002 ON S.C.	*Education Act*, R.S.O., 1990, c. E.2 O. Reg. 181/98 (Education Act) *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1	Budget reductions	All exceptional pupils in the Board	Not applicable
	Superior Court of Justice	Lowery v. Ontario, 2003 ON S.C.	*Canadian Charter of Rights and Freedoms*, 1982, ss. 7, 15	Funding Age discrimination	Autism	6 yrs./ male
	Superior Court of Justice	Burrows (litigation guardian of) v. Ontario, 2003 ON S.C.	*Canadian Charter of Rights and Freedoms*, 1982, ss. 7, 15	Funding Age discrimination	Autism	Age six and over/ four males
	Superior Court of Justice	R. v. Wynberg, 2004 ON. S.C.	*Canadian Charter of Rights and Freedoms*, 1982, ss. 7, 15, 1 *Education Act*, R.S.O., 1990, c. E.2	Funding Age discrimination	Autism	Age six and over/ 16 children: 14 males and 2 females
	Superior Court	Nieberg (Litigation	*Canadian Charter of Rights and*	Appropriate	Various	Seventeen

	of Justice	Guardian) v. Simcoe County District School Board, 2004 ON S.C.	*Freedoms*, 1982, ss. 7, 15 *Education Act*, R.S.O., 1990, c. E.2	special education program Safe school environment		exceptional pupils all elementary school age
	Superior Court of Justice	M.E. v. Ontario, 2004 ON S.C.	*Canada Health Act*, R.S.C., 1985, c. C-6 *Canadian Charter of Rights and Freedoms*, ss. 7. 15 *Child and Family Services Act*, R.S.O., 1990, c. C-11 *Constitution Act*, 1982 *Courts of Justice Act*, R.S.O., 1990, c. C-43 *Developmental Services Act*, R.S.O., 1990, c. D-11 *Disability Support Program Act*, R.S.O., 1997 *Education Act*, R.S.O., 1990, c. E-2 *Health Insurance Act*, R.S.O., 1990, c. H-6 *Ontario Rules of Civil Procedure*, R.R.O., 1990, Reg. 194	Funding Age discrimination	Autism	10 yrs./ male
	Superior Court of Justice	Germain (Litigation Guardian) v. Ontario, 2004 ON S.C.	None cited	Discrimination Irreparable harm	Mild intellectual disability Profound deafness	17 yrs./ female 17 yrs./ male
	Superior Court of Justice	Eisler (Litigation Guardian of) v. Ontario, 2004 ON S.C.	*Canada Health Act*, R.S.C., 1985, c. C-6 *Canadian Charter of Rights and*	Funding Age discrimination	Autism	6 yrs./ male

			Freedoms, ss. 7. 15 *Child and Family Services Act*, R.S.O., 1990, c. C-11 *Constitution Act*, 1982 *Courts of Justice Act*, R.S.O., 1990, c. C-43 *Developmental Services Act*, R.S.O., 1990, c. D-11 *Disability Support Program Act*, R.S.O., 1997 *Education Act*, R.S.O., 1990, c. E-2 *Health Insurance Act*, R.S.O., 1990, c. H-6 *Ontario Rules of Civil Procedure*, R.R.O., 1990, Reg. 194			
	Superior Court of Justice	Walker Youth Homes Inc. v. Ottawa-Carleton District School Board, 2004 ON S.C.	*Education Act*, R.S.O., 1990, c. E-2 *Judicial Review Procedure Act*, R.S.O., 1990, c. J.1	Resident student Safety	Mild developmental disability	15 yrs./ male
	Superior Court of Justice	R. v. Naccarato, 2004 ON S.C.	*Canadian Charter of Rights and Freedoms*, 1982, s.15	Funding Age discrimination	Autism	7 yrs./ male
	Superior Court of Justice	Kohn v. Ontario (Attorney General), 2004 ON S.C.	None cited	Funding Age discrimination	Autism	6 yrs./ male
	Superior Court of Justice	Bettencourt v. Ontario, 2005 ON S.C.	*Canadian Charter of Rights and Freedoms*, 1982, s. 15(1)	Funding Age discrimination	Autism	6 yrs./males (twins)
	Superior Court of Justice	Wynberg v. Ontario, 2005 ON S.C.	*Canadian Charter of Rights and Freedoms*, 1982 *Child and Family Services Act*,	Funding Age discrimination	Autism	Age six or older/ 35 children from 30 families

			R.S.O., 1990, c. C-11 *Constitution Act*, 1982 *Education Act*, R.S.O., 1990, c. E-2 *Criminal Code*, R.S.C., 1985, c. C46			
	Superior Court of Justice	Sagharian v. Ontario (Education), 2007 ON S.C.	*Child and Family Services Act*, R.S.O., 1990, c. C-11 *Class Proceedings Act 1992*, 1992, S.O., c. 6 *Education Act*, R.S.O., 1990, c. E-2 *Family Law Act*, R.S.O., 1990, c. F.3	Funding Educational services	Autism	Age six or older/ six males
Ontario	Divisional Court	Fleischmann v. Toronto District School Board, 2004 ON S.C.D.C.	*Education Act*, R.S.O., 1990, c. E-2	Transition plan Special education staffing	Autism	8 yrs./ female
	Divisional Court	Clough v. Simcoe County District School Board, 2005 ON S.C.D.C.	None cited	Placement Review of Special Education Tribunal decision	Autism	12 yrs./ male
	Divisional Court	Ismail v. Toronto District School Board, 2006 ON S.C.D.C.	*Canadian Charter of Rights and Freedoms*, s. 15 *Education Act*, R.S.O., 1990, c. E.2 Regulation 181/98 R.R.O., 1990	Placement Review of Special Education Tribunal decision	Down syndrome	14 yrs./ male
	Divisional Court	Jackson v. Toronto Catholic School Board, 2006 ON S.C.D.C.	*Canadian Charter of Rights and Freedoms*, s. 7 *Education Act*, R.S.O., 1990, c. E.2	Suspension Safety	Language impairment	11 yrs./ male

			Statutory Powers Procedure Act, R.S.O., 1990, c. S.22			
Saskatchewan	Court of Appeal for Saskatchewan	Kendal v. St. Paul's Roman Catholic Separate School Division No. 20, 2004 SKCA 86	*Education Act*, R.S.S., 1978, c. E-0.1	Negligence Staff safety	Asperger's syndrome	Age not stated/ male
Saskatchewan	Court of Queen's Bench for Saskatchewan	Concerned Parents for Students with Learning Disabilities Inc. v. Saskatchewan (Minister of Education), 1998 SK Q.B. 733	*Canadian Charter of Rights and Freedoms* *Education Act*, 1995, S.S., 1995, c. E-0.2 – 13	Quality of public education Appropriate special education program	Learning disabilities	Ages not stated/ Gender not specified six children
	Court of Queen's Bench for Saskatchewan	Kendal v. St. Paul's Roman Catholic Separate School Division No. 20, 2003 SKQB 214	*Education Act*, R.S.S., 1978, c. E-0.1 *Education Regulations*, 1986	Negligence Staff safety	Asperger's syndrome	10 yrs./ male