

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Hewko v. B.C.***,
2006 BCSC 1638

Date: 20061103
Docket: L042181
Registry: Vancouver

Between:

**Darren Hewko, an infant, by his guardian ad litem,
Shirley Hewko, and the said Shirley Hewko in her personal capacity**

Plaintiffs

And

**Her Majesty the Queen
in Right of the Province of British Columbia
as represented by the Attorney General of British Columbia
and the Board of School Trustees of School District #34 (Abbotsford)**

Defendants

Before: The Honourable Madam Justice Koenigsberg

Reasons for Judgment

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INTRODUCTION

[1] This case involves a young boy with autism and how his school district responded to his disability and his resulting need for accommodation in order to access a public education. This case also examines the role of the Ministry of Education in ensuring such access for children with autism in British Columbia.

[2] Darren Hewko is a nine year old boy who was diagnosed at age three with autism and a measured intellectual deficit of moderate level. Darren has essentially no receptive language. His means of communication, and thus his means of learning, is through a reading and writing Lovaas based program. He generally does not respond to verbal instructions. Darren began pre-school in 2000 and had an effective ABA-IBI (Applied behaviour analysis-Intensive behavioural intervention) therapy home program by March 2002 (the reading and writing program).

[3] Pre-school for Darren was a moderate success and he transitioned into Kindergarten in the Abbotsford School District in September of 2002. Darren's home-based therapist attended Kindergarten with Darren for approximately the first month. He was under complete instructional control during the transition. By October his Kindergarten teacher, Ms. McLean, pronounced the transition a success. The Abbotsford School District provided a teaching assistant (TA) for Darren's half day in Kindergarten. His TA had almost no experience nor knowledge of autism and no experience nor knowledge of the teaching methods proven effective for Darren, that is, some form of ABA-IBI.

[4] By June of 2003, the end of Darren's Kindergarten year, Darren was removed from the school as he was hopelessly out of instructional control.

[5] In April of 2003, the School District was committed to Darren continuing to attend McMillan Elementary, his neighbourhood school, for Grade One, in the regular classroom with a TA. However, at the end of May, 2003, the school recommended to Darren's parents that he attend Mountain Elementary and be placed in a resource room. The resource room teacher was a highly qualified special education teacher who had considerable experience with children with autism but limited experience with specific ABA-IBI programs. The TAs available for the resource room, and potentially assignable to Darren, had experience with children with autism but again, no specific experience with ABA-IBI therapy. In the summer of 2003, both the resource room teacher and the TA most likely to be assigned to Darren were enrolled in a five day intensive course on autism, including exposure to ABA-IBI therapy.

[6] Despite two meetings between District officials, the resource room teacher, the TA and the Hewkos in September of 2003, the District was unable to persuade the Hewkos that placement in a resource room was in Darren's best interest. Likewise, the Hewkos were unable to persuade the District to allow Darren's home-based therapist or someone trained in his home-based therapy to function as his TA. Ultimately, after an unsuccessful appeal of the District's decision to the School Board pursuant to s. 11 of the **School Act**, R.S.B.C. 1996, c. 412 (the "**School Act**"), the Hewkos removed Darren from the public school system. The Hewkos have continued to provide Darren with a home-based ABA-IBI learning program at

considerable expense. The result of the failure of the parties to reach agreement on Darren's placement and program in the Abbotsford School District led the Hewkos to sue the Province and the Abbotsford School District. They seek relief for alleged discrimination pursuant to s. 15 and s. 7 of the **Charter of Rights and Freedoms** (the "**Charter**") against Darren on the basis of his disability (autism) and for negligence and/or a breach of the defendants' respective duties under the **School Act**.

[7] In short, the plaintiffs say the failure of the parties to agree is the District's fault because they failed to provide competent and/or adequate assistance for Darren to be able to access an education. The plaintiffs say this failure includes a failure to meaningfully consult with the parents to find a way to implement Darren's home-based ABA-IBI therapy so that he could access an education in the public school. The Province and School Board attribute the failure to agree on a placement and program to the parents' unrealistic and unreasonable requirements for Darren's public school program. The Province and School Board say that the parents sought to impose their personal choices on the school, and that these choices were not necessary for Darren to reasonably access an education. Further, the School Board and the Province say that the fact that Darren has not been in school for the last three years is solely the fault of the parents who refused a reasonable placement proposal by the District.

[8] After hearing over eight weeks of evidence and submissions and carefully considering the issues, I find that the defendant School Board is liable to the plaintiffs for breach of the Board's statutory duty to consult with the plaintiffs. I find

no basis for liability pursuant to the statutory duties of the Province. I find that the plaintiffs cannot succeed in establishing a breach by either the Province or the School Board of either s. 15 or s. 7 of the **Charter**.

[9] The application of ss. 7 and 15 of the **Charter** in relation to the access to education by children with autism has been recently decided in an Ontario case. An Ontario trial judge found that the Provincial Government of Ontario had discriminated against the plaintiffs on the basis of age and disability (autism) by failing to fund ABA-IBI therapy for children aged 6 years and over. (*Wynberg v. Ontario*, [2005] 252 D.L.R. (4th) 10). However, in *Wynberg v. Ontario*, July 7, 2006, [2006] O.J. No. 2732 (Q.L.), the Ontario Court of Appeal overturned the learned trial judge's finding.

[10] Even if the Ontario Court of Appeal had not overturned the trial judge's decision, the *Wynberg* case is significantly distinguishable on the facts from the case before this Court although the issue of what constitutes an appropriate education for children with autism is common to both cases. In addition, however, the Ontario Court of Appeal decision in *Wynberg* clarifies the law with regard to the application of s. 15 and s. 7 of the **Charter** in a case such as this one.

[11] This case involves an exploration of the duty to consult, pursuant to the **School Act**. It appears to be, on this issue, a case of first instance. This issue, as a justiciable one, will necessarily be fact driven. These reasons set out the facts of the case at length and in some detail. I do so, so that the parties to this case may have reference to the facts considered and found by the court in coming to the conclusion that ultimately, despite consultation between the parents of Darren Hewko and the

school personnel and District officials, the District failed to carry out its duty to consult by failing to meaningfully consult with the parents.

BACKGROUND

[12] This case does not arise in a legal, social or political vacuum. The historical struggle of parents of children with autism, or Autism Spectrum Disorder (ASD), to find and finance medical or educational resources to assist their children to reach their potential as functioning, productive citizens is relevant to some of the issues raised in this case. I set out in brief some of that legal and political history.

[13] A brief understanding of autism and ASD, as well as ABA-IBI therapy, is necessary to an appreciation of the issues in this case.

[14] In *Auton v. A.G.B.C.*, [2000] 78 B.C.L.R. (3d) 55 (S.C.), 2000 BCSC 1142, Allan J. made the following remarks about autism, which continue to be apt:

[2] Autism or autism spectrum disorder (ASD) is a neurobehavioural syndrome caused by a dysfunction in the central nervous system which leads to disordered development. According to the Diagnostic and Statistical Manual of Mental Disorders, 4th edition ("DSM-IV"), the onset of autistic symptoms begins within the first three years of life and includes three general categories of behavioural impairment:

- (a) qualitative impairments in social interaction,
- (b) qualitative impairments in communication, and
- (c) restricted repetitive and stereotyped patterns of behaviour, interest and activities.

[3] Autism may be viewed as the prototypical form of a spectrum or continuum of autistic disorders that vary in severity but share those core symptoms of behavioural impairment.

[10] While the etiology (or medical cause) of autism or ASD is unknown, there is substantial agreement about certain features of the

affliction. Autistic disorders are complex neurological conditions affecting between 10 and 15 of every 10,000 children. They are significantly more prevalent among boys than girls. Among children with untreated autism or autism spectrum disorders, about half of all pre-school age children (ages 2 to 6) are non-verbal. Most have limited attachment to caregivers, display little interest in pleasing them, evade eye contact and resist displays of physical affection. In a group of peers, a child with autism is likely to avoid contact and remain isolated from the group. Instead of playing imaginatively with toys, autistic children often engage in repetitive behaviour such as arranging objects into neat rows or flapping their hands in front of their eyes. When these behaviours are interrupted, or when they do not get their way, many autistic children have intense tantrums that may include aggression toward others or self-injurious behaviour such as banging their heads against hard objects.

[11] Without effective treatment, autism is a lifelong affliction that results in the placement of over 90% of untreated children in group homes or other residential facilities. Only one of 64 children will show any improvement without treatment.

[15] The preferred therapy for autism, at least for many cases of autism, especially between the ages of three and six, is some form of ABA-IBI. IBI is a particular application of ABA principles.

[16] IBI is a very specific protocol which uses a highly intensive, individualized, one-on-one structured therapy program and discrete trial training techniques. Comprehensive and on-going data collection forms an essential part of the IBI protocol. Such treatment administered competently and early in a child's life usually by the age of three, for one and a half to two years for at least 25-35 hours per week, in some cases, has resulted in enabling the child with autism to function normally in a public school setting.

The Auton Case

[17] In 1995, a group of parents of children with autism sued the Province of British Columbia, specifically the Attorney General and the Medical Services Commission, alleging that its failure to fund ABA violated s. 15(1) of the *Charter*. A very brief history of the case is contained in the headnote of the Supreme Court of Canada decision in that case, *Auton v. B.C. (A.G.)*, [2004] 3 S.C.R. 658-659:

In the years leading up to the trial, the government acknowledged the importance of early intervention, diagnosis and assessment for autistic children but stated that services for their needs had to be balanced with services to children with other special needs. The government funded a number of programs for autistic children but did not establish funding for ABA/IBI therapy for all autistic children between the ages of three and six because of, *inter alia*, financial constraints and the emergent and controversial nature of this therapy. At the time of the trial, ABA/IBI funding for autistic children was not universal and was only beginning to be recognized as desirable. The trial judge found that the failure to fund ABA/IBI therapy violated the petitioners' equality rights, directed the province to fund early ABA/IBI therapy for children with autism and awarded \$20,000 in damages to each of the adult petitioners. The Court of Appeal upheld the judgment and added funding for ABA/IBI treatment pursuant to medical opinion.

[18] The Supreme Court of Canada overturned the trial and appeal courts decision finding that the failure to fund ABA-IBI therapy for children with autism was not discriminatory. The reasons for the finding are also set out briefly in the headnote at page 659-660:

A person claiming a violation of s. 15(1) of the *Charter* must establish: (1) differential treatment under the law, (2) on the basis of an enumerated or analogous ground, (3) which constitutes discrimination. The specific role of s. 15(1) in achieving its equality objective is to ensure that when governments choose to enact benefits or burdens, they do so on a non-discriminatory basis. This confines s. 15(1) claims to benefits and burdens imposed by law.

In this case, the government's conduct did not infringe the petitioners' equality rights. The benefit claimed — funding for all medically required treatment — is not provided by law. The *Canada Health Act* and the relevant British Columbia legislation do not promise that any Canadian will receive funding for all medically required treatment. All that is conferred is core funding for services delivered by medical practitioners and, at a province's discretion, funding or partial funding for non-core services, which in the case of British Columbia are delivered by classes of "health care practitioners" named by the province. More specifically, the law did not provide for funding for ABA/IBI therapy for autistic children. At the time of the trial, the province had not designated providers of ABA/IBI therapy as "health care practitioners" whose services could be funded under the plan. Since the government had not designated ABA/IBI therapists as "health care practitioners", the administrative body charged with administration of the provincial legislation had no power to order funding for ABA/IBI therapy.

The legislative scheme is not itself discriminatory in providing funding for non-core services to some groups while denying funding for ABA/IBI therapy to autistic children. The scheme is, by its very terms, a partial health plan and its purpose is not to meet all medical needs. It follows that exclusion of particular non-core services cannot, without more, be viewed as an adverse distinction based on an enumerated ground. Rather, it is an anticipated feature of the legislative scheme. One cannot therefore infer from the fact of exclusion of ABA/IBI therapy for autistic children from non-core benefits that this amounts to discrimination. There is no discrimination by effect.

Nor has it been established on the facts of this case that the government excluded autistic children on the basis of disability. When the relevant criteria are applied, the appropriate comparator for the petitioners is a non-disabled person, or a person suffering a disability other than a mental disability, who seeks or receives funding for a non-core therapy that is important for his or her present and future health, is emergent and has only recently begun to be recognized as medically required. The claimant or claimant group was not denied a benefit made available to the comparator group. In the absence of evidence suggesting that the government's approach to ABA/IBI therapy was different than its approach to other comparable, novel therapies for non-disabled persons or persons with a different type of disability, a finding of discrimination cannot be sustained.

The government's conduct did not infringe the petitioners' rights under s. 7 of the *Charter*.

[19] The *Auton* case frames the very difficult decisions facing courts when deserving and admirable plaintiffs seek remedies for significant hardships they face. In her reasons for judgment in *Auton*, the Chief Justice begins the reasons by setting out the dilemma at pp. 662-663:

This case raises the issue of whether the Province of British Columbia's refusal to fund a particular treatment for preschool-aged autistic children violates the right to equality under the *Canadian Charter of Rights and Freedoms*. The petitioners are autistic children and their parents. They argue that the government's failure to fund applied behavioral therapy for autism unjustifiably discriminated against them. In the background lies the larger issue of when, if ever, a province's public health plan under the *Canada Health Act*, R.S.C. 1985, c. C-6 ("*CHA*"), is required to provide a particular health treatment outside the "core" services administered by doctors and hospitals.

One sympathizes with the petitioners, and with the decisions below ordering the public health system to pay for their therapy. However, the issue before us is not what the public health system should provide, which is a matter for Parliament and the legislature. The issue is rather whether the British Columbia Government's failure to fund these services under the health plan amounted to an unequal and discriminatory denial of benefits under that plan, contrary to s. 15 of the *Charter*. Despite their forceful argument, the petitioners fail to establish that the denial of benefits violated the *Charter*.

[20] It should be noted that information about the prevalence of autism is changing rapidly. However, in these proceedings, Dr. Foxx reported that the prevalence of autism in North America is estimated to be between one and two children in 1,000.

[21] In British Columbia, although the numbers are not precise there are approximately 700 children in the school system with a diagnosis of autism out of over 61,000 who are classified as Special Education Enrollment.

[22] Despite the ruling of the Supreme Court of Canada in **Auton**, the Province has continued to fund therapy for children with autism. Currently that funding includes \$20,000 per year for children up to the age of six. Children six years old and over receive \$6,000 per year. Schools receive \$16,000 per year per child with a diagnosis of autism and also very recently for a child with a diagnosis of ASD.

[23] In addition, the Province has established and funded programs to develop specialized expertise in the education of autistic children (albeit only in the last few years including ABA-IBI) and to make that expertise available on a consulting basis to local school districts.

[24] The primary program funded by the Province is called POPARD (Provincial Outreach Program for Autism and Related Disorders). As of 2005, there were ten special education teacher consultants and two professionals of related fields such as speech or language pathologists available, through POPARD to service the entire province. The organization can and does provide specific student consultations, classroom consultations or “capacity building”, that is, it provides workshops for training courses for teaching best practices approaches for children with autism.

FACTS

Darren Hewko’s Early Years

[25] Darren Hewko is now a nine and a half year-old boy who lives in Abbotsford with his mother, Shirley, father, Rod, and older brother, Bryce.

[26] Darren was born on February 5, 1997. Mrs. Hewko testified that Darren lost his speech when he was around 18 months old. He did not develop peer play skills and did not play with toys. Mrs. Hewko was not overly concerned at the time. However, when Darren was three years old, he still was not talking. Instead, he would scream for up to eight hours a day. He did not respond to his parents or make eye contact. He would raise his arm up and slap it hard against his thigh. He would jump for hours and also engage in handflapping.

[27] Darren's brother Bryce attended the neighbourhood school, McMillan Elementary. Mrs. Hewko would walk Bryce to school, accompanied by the screaming Darren, there and back.

[28] Ms. Kitsul, Bryce's Grade One teacher at McMillan Elementary, suggested to Mrs. Hewko that she see the school counsellor regarding Darren. Mrs. Hewko followed up on this suggestion. The counsellor recommended that Mrs. Hewko see the family's doctor, Dr. Wallace.

[29] Dr. Wallace referred Darren to the Fraser Valley Child Development Centre (the "FVCDC"), where Darren was seen by Dr. Traverse, a pediatrician. In the summer of 2000, Dr. Traverse diagnosed Darren with autism. Darren was then about three and a half years old. Dr. Traverse suggested a further assessment at Sunny Hill Health Centre for Children.

[30] Mrs. Hewko obtained a second opinion from Dr. de Levie, a pediatrician, who also diagnosed autism.

[31] After learning the initial diagnosis, Mrs. Hewko set about trying to learn as much as possible about this condition and its treatment. She had been given an information package by Dr. Traverse's receptionist that another parent had dropped off. Mrs. Hewko contacted this parent. Through her, Mrs. Hewko learned about an organization called FEAT-BC (Families for Early Autism Treatment). FEAT is a parent information and advocacy group dedicated to advocating on behalf of families with children with autism or ASD. Mrs. Hewko contacted FEAT-BC as well as the Autism Society of BC and received their parent packages.

[32] After researching articles, books and other sources on autism treatment, Mrs. Hewko decided that she wanted to embark on ABA (Applied Behaviour Analysis) therapy for Darren. In her words, "it was the only therapy that made sense".

[33] Mrs. Hewko had been given a list of ABA therapists in the Langley, Abbotsford, Mission and Chilliwack area. She called each one of them to see whether they would be able to join a new therapy team. Mrs. Hewko then contacted Autism Spectrum Consultants in California to see if they had a consultant who would be able to come to B.C. to set up an ABA program for Darren and commence training of the therapists.

[34] Darren began receiving autism treatment supervised by Autism Spectrum Consultants in early July, 2000. Initially he only received a few hours of therapy per day, but this gradually increased. The first months were difficult but after about six months of therapy, Darren, according to his mother, had achieved a "complete turnaround".

[35] In September 2000, Mrs. Hewko enrolled Darren in Creative Edge Preschool for one morning per week. He had an aide and did well in the environment among his peers. In November 2000, Darren began attending a further two half-days per week at ABC Preschool. He continued to do well in the 2000/2001 school year. Darren continued preschool in September 2001, again supported by an aide.

[36] Mrs. Hewko testified that it had only been necessary to come in to teach the preschool TA about the language that Darren understood, and how to motivate his behaviour and activities using certain phrases at the beginning. Darren's preschool aide was agreeable to taking behaviour data so that Darren's behaviours in the classroom could be tracked. Mrs. Hewko showed the aide how and when to do it and the aide proved capable of taking the data.

[37] Mrs. Hewko became concerned because after months of therapy focused on development of verbal and receptive language, Darren still did not seem to understand and he was not making much progress. Mrs. Hewko decided to change consultants. She had learned that Ms. Rachel Russell was returning to B.C., having worked in the United States. Ms. Russell took over as Darren's consultant in December, 2001.

[38] Ms. Russell noted that Darren had not progressed as expected and he continued to make only small improvements for the first few months under Ms. Russell's supervision. Ms. Russell then introduced Darren to the Reading & Writing Curriculum, a different way to access the therapy material, and Darren responded very well to this change.

[39] Socially, Darren did well at preschool. He was not aggressive and was able to follow many of the activities. He played along side other children. Further detail about Darren's preschool experience is set out in the records of the Fraser Valley Child Development Centre marked as Exhibit 7.

Darren's ABA Intervention Program

[40] Through his home-based ABA-IBI program, which has been ongoing since July 2000, Darren has learned a wide variety of practical skills as well as academics. He has acquired a means of communication.

[41] Over time, and particularly since the summer of 2003, when he stopped attending Kindergarten, Darren's aggressive, self-injurious, repetitive and self-stimulatory behaviours have been reduced or eliminated, thus allowing him to focus on learning new skills.

[42] Mrs. Hewko testified that through Darren's ABA program he has learned to tie his shoes, dress himself, and help clean around the house.

[43] Ms. Russell's expert report and numerous consult reports, all marked as Exhibits at trial, provide a very detailed record of Darren's achievements through his ABA program.

[44] I found Ms. Russell to be a straightforward, knowledgeable, and very credible witness, both as a qualified expert in the area of ABA-IBI therapy and training for its use, as well as a factual witness. She is a very committed proponent of a rigorous application of Lovaas therapy which does not admit of flexibility or deviation. Her

rigidity in seeing only one possible therapy for children with autism, applied over an indefinite number of years, placed her at odds, even with Dr. Foxx, who is a recognized expert and promoter of ABA-IBI. However, what Ms. Russell has achieved with Darren Hewko's therapy and her contribution in assisting him in attempting to access an education in a public school setting, I found to be overall positive and credible. In her interactions, both verbally and in writing, with School personnel, Ms. Russell was professional and her recommendations were appropriate.

[45] It has been demonstrated that adherence to Darren's specific ABA-IBI programs is necessary to develop and maintain the instructional control currently in place.

Required Training on Darren's Protocol

[46] Ms. Russell testified that it could take between 60 to 100 hours for a new instructor to obtain instructional control with Darren, and 100 hours is more the norm. Instructional Control refers to the ability to control Darren's behaviour so that one is able to teach him new things and maintain the things he has already learned.

[47] Ms. Russell described the 'tests' that a potential therapist must meet before even earning a training spot on a team. The "tests" involve attitude, aptitude and a willingness to submit to intensive training. The applicant is given very intensive theory training where they have to master a volume of preliminary concepts to do with behaviour analysis, data collection, functional analysis and autism in general. If they have demonstrated mastery of those items, only then will they be considered

worthwhile to continue to train. They then begin highly supervised sessions with a senior instructor who continues to drill the instructor intensively.

[48] The instructor has to demonstrate across many hours that they are mastering the definitions in the concepts and in the applied setting with correct data collection. Only at that point is the person allowed to gradually begin independent sessions with the child. Ms. Russell testified that the impression that if you work with one child you can use the same techniques with another, is usually incorrect. This view was supported by Dr. Siegel and Dr. Foxx. Dr. Siegel is a highly qualified child psychologist with over 30 years experience working with children with autism. She testified on behalf of the School Board. Dr. Foxx is also a highly qualified child psychologist and specifically an expert in ABA-IBI who testified on behalf of the plaintiff.

[49] Someone who merely has the theoretical component (whether taken over two days or two weeks) is not considered fully trained and qualified by Ms. Russell to actually work with a child on a home-based team. There was support for Ms. Russell's view in evidence given by experts called by all sides.

[50] Dr. Siegel testified about the decline in the quality of ABA when people started entering the area without adequate training and qualifications.

[51] Dr. Foxx provided extensive background regarding the need for, and the type of, training and qualifications needed to provide appropriate ABA service to a child with autism.

[52] Darren has not attended school since early June, 2003. Since that time, he has been receiving home-based intensive ABA intervention under the supervision of Ms. Russell.

Reading & Writing Curriculum

[53] Ms. Russell testified that the original Lovaas curriculum had a strong emphasis on the child being able to, at some point, establish vocal language. However, there were a small group of children who had progressed quickly then appeared to hit a wall. Even though they were compliant and under instructional control, they simply could not move on to the next level. As a result, some of the researchers at UCLA (University of California, Los Angeles) decided to see if they could parallel the original Lovaas curriculum but instead of having the children vocally respond, they would have them respond using printed words and seeing printed words.

[54] Ms. Russell emphasized that the Reading and Writing curriculum is not a different curriculum from the Lovaas curriculum; the only difference is that the latter is extensive and the former only includes the middle four or five programs that start receptive and expressive language production. The actual curriculum that the child follows using the augmentative communication system, in this case the Reading and Writing curriculum, is the same and the child then goes right back onto the Lovaas curriculum. Darren is no longer following programs that are published in the Reading and Writing manual because he mastered them all. He is now back on the typical Lovaas curriculum but he responds and receives language in a way that is

similar to a child on a PECS (Picture Exchange Communication System) curriculum or on a signing curriculum.

Need for a Modified Curriculum at School

[55] Ms. Russell testified that she assumed that Darren would immediately be on a modified curriculum once he started in Kindergarten, meaning that he would have an alternate curriculum while the other children would be working from the typical curriculum.

[56] Ms. Russell provided a detailed list of proposed IEP (Individual Education Plan) goals for Darren at the initial Kindergarten IEP meeting on October 22, 2002. These were not adopted by the school by and large. Ms. Russell repeatedly expressed her concern about Darren being expected to follow the regular Kindergarten curriculum through verbal instruction. Because he did not understand these instructions, he became bored and frustrated.

[57] The Ministry of Education defines “Modified Curriculum” as follows:

Definition – “Modified Curriculum”: Refers to outcomes that are different than the expected learning outcomes of a curriculum. When students with special needs are unable to meet the expected learning outcomes of a curriculum, and it is necessary to modify the students' education programs, Individual Education Plans (IEPs) outlining the goals and objectives for each student will be established. These goals and objectives should reflect how the curriculum has been modified for each student.

The Need for Consistency

[58] There was widespread agreement among the experts and several lay witnesses that consistency across environments and across people is critically important for a child with autism.

[59] Ms. Susan Kennedy testified on behalf of the Province. She holds the position of Director of Diversity, Equity and Early Learning Branch within the Special Education Branch of the Ministry of Education. Ms. Kennedy testified that the Ministry understood there were problems identified by professionals working with children with autism and parents relating to the following:

1. "Lack of commitment to integrated and coordinated approach between school and home environments"; and,
2. "Lack of consistency between behavioural intervention programs being implemented in the school and at home."

[60] According to Ms. Kennedy, these issues had come to the attention of the Ministry in the form of "more than some complaints" before April of 2005.

[61] Ms. Russell testified about what could happen to Darren if consistency between home and school was lacking:

So if at school there's a behaviour plan where sometimes it is being implemented, sometimes it's not, even when it is it's completely different from hour to hour, never mind day-to-day, Darren will not --- in my opinion Darren will not understand the system. He will not understand the contingencies that are in place of, if you do this, this will happen. If you do this, you'll gain access to this, this will happen. It takes many, many, many trials of incredible consistency in order for Darren to then understand or demonstrate an understanding of those contingencies.

So without that, I think it will negatively affect his behaviour in the home environment where it is very consistent. If Darren learns at

school, I have no idea how to get answers right now or, you know, earn access to desired items or get access to free time that I enjoy, then at home he may start to --- again start to show confusion about the rules at home.

If you have complete consistency across days, instructors and all the child's environment, the likelihood is much higher that the child will make the jump to understanding when rewards are available and when consequences are likely to occur with 100 percent predictability.

[62] The need for consistency between the home and school program was also commented on by Dr. Joschko, a registered psychologist with a specialty in clinical neuropsychology. Dr. Joschko did an assessment of Darren on December 13 and 14, 2005, a few months before the trial, at the request of the defendant School Board.

The 2002/2003 School Year

[63] McMillan Elementary is the Hewkos' neighbourhood school. It is a Kindergarten through Grade Three primary school, with about 250 students.

[64] Robert Carmichael was the principal of McMillan Elementary in 2002-2003. Mr. Carmichael first met Darren when his mother brought Bryce to school and Darren came along.

[65] A transitional meeting took place on April 19, 2002 to plan for Darren's Kindergarten school entry. At the meeting, people who had worked with Darren in the preschool setting (preschool staff and consultants) from the Child Development Centre and at home, (Ms. Russell) as well as Darren's parents, shared information about Darren, including information about his learning style and behaviour:

- a. very compliant; if not prompted will just blank out;

- b. success in following adult direction;
- c. redirection an effective behaviour technique; don't give in to protest – ignore disruptive behaviour;
- d. visual learner;
- e. good problem-solving skills;
- f. could do puzzles up to 50 pieces;
- g. matching colours with words;
- h. non-aggressive with children; has pinched adults;
- l. might see jumping, banging hard on leg.

[66] Ms. Russell also shared information about Darren's home-based intensive ABA program, that he was using a Reading & Writing curriculum and that he had been successful with this intervention. Ms. Russell also stressed the importance of having Darren supported by someone from his home team as his TA at school. She testified that she remembered being told that this was not something that was done in the Abbotsford School District, that they hire their own staff and that home programs and school programs were completely different.

[67] At some point between the transitional meeting and the start of the school year it was agreed that one of Darren's home-based therapists, Cressen Beckedorf, who passed away prior to this trial, would accompany him to school for as long as it took to get him comfortable in the new setting.

[68] Following the transition meeting, Darren was classified in the Ministry of Education special needs category of autism (118G) and assigned a full-time TA.

[69] The District posted the position for Darren's TA during the summer of 2002. Experience with autism was recommended but not required.

[70] Susan Major applied for, and was assigned to, the position as Darren's TA. She was the only applicant for the position.

[71] Ms. Major was going to work with Darren in the afternoons and with another student in the mornings. Ms. Major was required to take three days of training with the Health Unit prior to the beginning of school in order to work with the morning student. As far as Mr. Carmichael was aware, Ms. Major did not seek or obtain any education with respect to autism or the needs of an autistic child from the time she got the job as Darren's TA until she started working with him, nor was she required to do so.

[72] Mr. Carmichael noted that the other student was involved with the Ministry of Health and the Ministry of Education and that appropriate nursing support was provided and funded for this student.

[73] Ms. McLean was Darren's Kindergarten teacher. By the time of trial she had married and changed her name to Ms. Antifaeff. The 2002/2003 school year was her first year at McMillan. She qualified as a teacher a year earlier and had worked at a different school but had not worked with any students with autism before. Ms. McLean was covering a maternity leave at McMillan. Ms. McLean took a five-day general POPARD course on autism and other spectrum-related disorders in the summer of 2002. Ms. McLean had not taken any course work in ABA or IBI or Lovaas therapy prior to September 2002. She did not know what these were, nor did she know what Discrete Trial Training was.

[74] Darren started Kindergarten in September 2002. To facilitate the transition, as previously agreed, Ms. Beckedorf accompanied Darren to school at the start of the year. She stayed approximately one month. Mrs. Hewko hoped that Ms. Beckedorf would review techniques with Ms. Major.

[75] In early September 2002, Mrs. Hewko asked Ms. Major if she would like to join Darren's home team because Mrs. Hewko felt it would make it easier for her to obtain instructional control. Ms. Major declined the offer.

[76] Ms. McLean felt that Darren was able to transition successfully into her classroom by the end of September, 2002.

[77] Mrs. Hewko testified that within a couple of weeks after Ms. Beckedorf was no longer in the classroom, it was becoming evident to her that Ms. Major was having a very hard time learning how to take data necessary to provide consistency between the home and school programs. Mrs. Hewko remembers that Darren began taking a very fast downhill spiral in his behaviours. He did not want to go to school anymore. Mrs. Hewko started getting more frequent reports back from Ms. Major that Darren was pinching her and hitting her.

[78] Ms. Major told Mrs. Hewko that Darren was pinching her hard in the first week of October, 2002. Mrs. Hewko told Ms. Major that the home workers used extinctions for that behaviour and demonstrated to Ms. Major how extinction worked. Extinction is a fundamental ABA concept and technique. Ms. Major seemed unable to use this technique effectively.

[79] Ms. McLean prepared an interim report card for Darren dated October 17, 2002 and testified that by that time, Darren had begun pinching Ms. Major. The pinching discussed at this time was relatively gentle.

[80] Ms. Major did not testify.

[81] The first IEP meeting was held on October 22, 2002. Ms. McLean noted that at that time, Darren was doing fairly well in terms of not exhibiting many negative behaviours, other than pinching Ms. Major.

[82] Ms. Russell testified that at the October IEP meeting she stressed the importance of having Darren aided at school by a trained home team member. Ms. McLean, who also attended the first IEP meeting, did not recall that issue being raised at that time. This issue along with several others, represents a continuous communication failure between the home-based team and the school-based team. McMillan utilized a school-based team for Darren. That team included Jean Louis, case manager, Robert Carmichael, principal, Ms. McLean, Kindergarten teacher and Val Smith, another teacher. The home-based team included the Hewkos, Ms. Rachel Russell and Ms. Cressen Beckedorf (senior therapist).

[83] It is likely that, directly or indirectly, home training for Darren's TA or a home trained TA was raised at most meetings between the home-based team and school-based team. However, in the early months, September to November, 2002, the central importance of this training was not appreciated by either side. At Mrs. Hewko's request, Ms. Russell also provided the school with a set of proposed IEP goals for Darren. As far as Ms. Russell could tell, none of those proposed goals

were actually incorporated into Darren's IEP. Again, Ms. McLean's testimony differed on this point and I accept that some of Ms. Russell's goals were incorporated into the IEP.

[84] Ms. Russell's IEP goals recommendations were very lengthy and detailed. She was asked to highlight ones which could easily be accomplished in the school setting. I find that no hard feelings, nor desire to be uncooperative on the part of either party had developed by this point. However, the school personnel at this point had no understanding of the importance of utilizing a consistent ABA-IBI methodology in carrying out any of the goals of the IEP. That methodology, emphasizes specific materials, intensive one on one eye contact between teacher and pupil (in this case Darren and Ms. Major), and the taking of detailed formulaic data of what is occurring by describing the activity and Darren's success or failure in carrying out the activity, including tallying his behaviours. This was considered by the school personnel (to the extent that any but Ms. McLean were familiar with it) to be far too ambitious for application at school. Indeed, I find that given Ms. Major's lack of training and aptitude for carrying out any requirements of an ABA-IBI program, the program as proposed by Ms. Russell was far too ambitious for the classroom. I also find, for the same reason, that most of Darren's IEP goals were too ambitious for the classroom.

[85] Mr. Carmichael agreed that Mr. and Mrs. Hewko and Ms. Russell were members of Darren's IEP team throughout the 2002/2003 school year.

[86] By the time of Darren's first formal report card, November 22, 2002, Ms. McLean was of the view that the work that Darren did at home was "integral to the success" in the classroom. Mr. Carmichael agreed with that assessment. Thus, by late November, it had become apparent to Ms. McLean and Mr. Carmichael that the instructional control demonstrated by Ms. Beckedorf in September was likely only achievable utilizing the home-based methodology.

[87] However, Ms. McLean also noted by the end of November that Darren's targeted behaviours (pinching, slapping, stomping) had escalated and that he was pinching Ms. Major with greater frequency and greater intensity.

[88] Mr. Carmichael remembered that Ms. McLean had told him that she did not feel she could work with Ms. Major. At some point during their conversations, Mr. Carmichael admitted picking up on the implication that Ms. Major was not capable of assisting Darren. Ms. McLean's opinion was that Ms. Major had difficulty providing consistency and structure to Darren and that she was not always as quick, physically, as one needed to be with Darren. It was becoming apparent to Ms. McLean that the two essential elements of instructional control of Darren were consistency and structure.

[89] Between November and December, 2002, Darren's negative behaviours continued to increase. Darren started to use some tantrum behaviours, such as kicking. Mrs. Hewko expressed her concerns regarding Ms. Major's ability to effectively assist Darren to Ms. McLean, who agreed with Mrs. Hewko and suggested that she follow up with Mr. Carmichael.

[90] On December 11, 2002, the school-based team met to discuss the escalating situation with Darren and Ms. Major. They decided to contact Ms. Russell and ask her to come and observe Darren in the classroom and see if there were some strategies she could recommend.

[91] On December 12, 2002, Ms. Russell was advised by Mrs. Hewko that Darren's medical condition (digestive and allergies issues) for which he was being treated by a naturopath was contributing to his escalating behaviours. Furthermore, his brother Bryce's birthday and the excitement of Christmas preparations were all reasons why Darren was over stimulated and why his behaviours were more difficult to control.

[92] Ms. Russell had previously expressed the opinion, in late November, that the Kindergarten curriculum was likely too advanced for Darren and that he required a "pull out" program by a person trained in his home-based program. A "pull out" program involves placing a child away from the other children during activities he cannot participate in and utilizing the child's "learning one on one" methodology with his TA.

[93] Ms. Russell attended McMillan on December 16, 2002 and observed Darren. She saw a number of problems. Darren was being asked to sit and listen to a verbal lesson he did not understand. He very quickly deteriorated and began to flop, kick his legs in the air, run away, climb shelves, scream. Ms. Major was having a very difficult time getting him under control. When Ms. Russell saw Darren engage in these behaviours that she had never seen him engage in with such a high frequency

or for such a duration, and saw Ms. Major's distraught reaction and the teacher visibly upset, she did not feel it was in anybody's best interest that the situation be allowed to continue even for one more day. She recommended that Darren stay home from that point on until the end of the Christmas break so that the home team could work consistently with him with increased hours to regain instructional control and Mrs. Hewko agreed. It was clear to Ms. Russell that the TA and the teacher did not know what to do with Darren.

[94] Although Mr. Carmichael was at the school on December 16, 2002, he did not talk to Ms. Russell about her observations, nor did he talk to Ms. McLean about Ms. Russell's observations.

[95] Ms. McLean was invited to and attended the December 16, 2002 home team meeting at the Hewkos'. She attended on all occasions when invited to the Hewkos. It was at this meeting that Ms. Russell recommended Darren not attend school until after Christmas break as it was thought the excitement of Christmas and his brother's birthday might be overwhelming him in addition to the other problems. It was also agreed at this meeting that when Darren returned to school, a "pull-out" program would be started. Darren would be taken to the back of the class by Ms. Major to work on individual activities when the class materials were too difficult. It was agreed Ms. Beckedorf would return to class with Darren on January 7, 2003 to model the "pull-out" program for Ms. Major and Ms. McLean. Ms. Beckedorf did attend for one to two weeks with Darren. Ms. McLean recalls she modeled programs such as matching alphabet letters and having Darren try to vocalize them.

[96] Following the December 16 meeting at the Hewkos', Mrs. Hewko wrote a letter to Mr. Carmichael, letting him know that, in her view, the current classroom situation was not meeting Darren's needs.

[97] Mr. Carmichael took from the letter that Mrs. Hewko was critical of Ms. Major's abilities.

[98] At her request, Mr. Carmichael met with Mrs. Hewko on December 19, 2002. Mrs. Hewko repeated her concerns regarding Darren's classroom situation. It is likely that at this meeting Mrs. Hewko shared information from FEAT-BC with Mr. Carmichael.

[99] Mrs. Hewko told Mr. Carmichael that there were other districts that had brought in TAs with ABA training and permitted members of the home-based team to work as the child's TA. She asked Mr. Carmichael whether there were any TAs in the District who had ABA training and if so, could a TA with ABA training be assigned to Darren before the end of the year so that this person could also work on the home team.

[100] Mr. Carmichael made a note to research this question and get more information. Mr. Carmichael did not research the question nor get back to Ms. Hewko about it.

[101] At this meeting, Mr. Carmichael testified that Mrs. Hewko told him there were 11 programs Darren had worked on at home and she thought three could be adapted to the classroom. They agreed that Ms. Beckedorf would return with Darren

for the first part of January and Ms. Beckedorf would model the programs. Mrs. Hewko was willing to try this with Ms. Major.

[102] Following the meeting, Mr. Carmichael called Mr. Godden, the District's Assistant Superintendent in charge of special needs students, and left a message as Mr. Carmichael needed to run some things by him regarding the possibility of the District hiring a "Lovaas employee" as a TA. He meant someone with ABA training.

[103] Mr. Carmichael could not remember if Mr. Godden returned his call but did not think they had a direct conversation about the inquiry.

[104] The school-based team agreed it would be appropriate for Ms. Beckedorf to return to McMillan at the start of the new year to model a pullout program.

[105] School started again on January 6, 2003. Ms. Beckedorf came to the school with Darren for the first week to try to model programs for Ms. Major. Ms. McLean felt that Ms. Beckedorf had significant success in addressing Darren's behavioural issues during that time. Ms. Beckedorf was not paid by the District or the school for this work. While Mr. Carmichael described Ms. Beckedorf's activities as "observations", he hoped that Ms. Major would be able to pick up some of it. Mr. Carmichael admitted that he had hoped that it would be "training". This issue of "observation" versus "training" was a theme running through the struggle to gain instructional control of Darren at school. The school personnel, instructed by the District personnel (Mr. Godden and Ms. Clarke) resisted the idea that any school employee should be "trained" by home-based therapists or consultants. The need for Darren's TA to have effective training in Darren's ABA-IBI program or at least

have ABA-IBI training so that instructional control might be gained was becoming increasingly obvious. An attempt was being made to try to meet this need by allowing “observation” by Darren’s TA of home-based therapy and by allowing “observation” at school when under the instructional control of his home-based therapist.

[106] Mrs. Hewko testified that Ms. Beckedorf attended school with Darren for the first week of school in January 2003, but that she believed Ms. Beckedorf stopped going after Mr. Carmichael asked her to stop coming.

[107] Ms. Beckedorf passed away prior to the trial of this action and thus could not give evidence.

[108] Mr. Carmichael denied ever preventing Ms. Beckedorf from attending McMillan Elementary.

[109] However, Ms. McLean remembered that Ms. Beckedorf had a discussion with Mr. Carmichael that resulted in her ceasing to attend. Ms. McLean was not asked whether she thought this was a positive or negative development.

[110] I find that, at the very least, Ms. Beckedorf was not encouraged to continue attending in January. Nor was she encouraged to “train” Ms. Major at this point.

[111] Mrs. Hewko offered to train the school-based aide in IBI techniques at her own expense but Mr. Carmichael told her that training was the District’s responsibility and that the District would look after it.

[112] Mrs. Hewko met with Ms. Clarke of the District Superintendent's office and requested that she be allowed to have Ms. Beckedorf attend as Darren's TA at McMillan. Ms. Clarke said no, because Ms. Beckedorf was not a district employee. Mrs. Hewko then asked if she could approach employees and ask them if they would be interested in working on Darren's home-based therapy team. Ms. Clarke responded that Mrs. Hewko could not approach district employees, but if an employee approached her with such a suggestion, Mrs. Hewko was allowed to pursue it.

[113] At the suggestion of Mr. Godden and Ms. Clarke in early 2003, the school-based team decided to "get the District Autism Team involved immediately" and on an "expedited basis". The District realized instructional control was being lost. The referral was made on January 15, 2003. No one had told Ms. McLean that there was a District Autism Team, even though Mr. Carmichael had been aware of the team's existence for several months prior.

[114] The District Autism team is made up of a group of consultants who are funded by POPARD to provide "consults" to individual students at the request of the school where the student is enrolled and with the parent's consent. In this case the "Team" was made up of two persons –Ms. Savinkoff who is a speech language pathologist and Lamie Champigny who is also a speech pathologist whose regular case load included McMillan Elementary.

[115] Mr. Carmichael described the situation in his examination in chief:

That from all our points of view, things were not going as well. From my point of view, what it means is that things were not going as well for Darren in his learning as I would have hoped, and as the mom and dad would have hoped.

[116] Between December 2002 and January 2003 there was a growing concern among all of the school-based team that none of them were very well qualified to deal with Darren, including Ms. Major.

[117] According to Ms. McLean, by this time Darren was not responsive to her or to Ms. Major. His behaviour included kicking and flailing. Ms. McLean concluded that Ms. Major was not suited to work as Darren's TA.

[118] The District Autism Team received the "fast-track" referral but understood that the school "may be having Lovaas take a lower profile".

[119] This evidence supports the plaintiffs' position that part of the problem in effectively providing access to an education for Darren was the District's perception that they should resist pressure for "Lovaas therapy" because they were being set up for potential litigation. Evidence of this perception and concomitant resistance cropped up repeatedly in the evidence in this case. I find that in fact, the plaintiffs' position is well founded.

[120] I find that by this time, January-February of 2003, the school personnel were aware that Ms. Major could not obtain instructional control of Darren. Ms. Beckedorf's work in the classroom had also demonstrated that instructional control was possible, if the home program and consistent ABA-IBI techniques were used.

[121] Mr. Carmichael said it was likely he told Mrs. Hewko and Ms. Russell that the home program was the home program, and that the school program was the school program. He explained that the District philosophy was that those were two separate contexts and that they would be separate programs.

[122] Mr. and Mrs. Hewko requested a meeting with Mr. Carmichael which took place on January 17, 2003. They were concerned about maximizing classroom time for Darren.

[123] Before the meeting, Mr. Carmichael wrote via email, to Ms. Clarke, Mr. Godden, Ms. Patterson (school district psychologist), Ms. Champigny and Ms. Richardson (district helping teacher; head of the District Autism Team), setting out the strategy for the meeting: “to act as good listeners for whatever the parents had to say, but not to attempt to answer questions and not get into a debate with the parents. The plan was to listen, report questions, suggestions and demands, and tell the parents that they would seek clarification from the District.”

[124] Mr. Godden received the e-mail but did not think it necessary to intervene – he was going to let Mr. Carmichael try to resolve the situation.

[125] Mr. Carmichael explained that he was in the position where he knew what the District philosophy was on the difference between the home program and the school program and the training of District employees by someone outside of the District. His thinking was: “And so if that’s the party plan, that’s what the party plan was”.

[126] Mr. Carmichael did not at this juncture try to determine if other districts found a way to utilize home-based therapists in the school.

[127] Mr. Carmichael agreed there had been many meetings at the school about Darren that the Hewkos did not know about and that they were deliberately excluded from because the nature of the meetings was such that it was a school-based meeting or just other planning around Darren.

[128] Following the January 17, 2003 meeting with Mr. Carmichael, Mrs. Hewko felt that the school was not listening to her. As a result, she asked Ms. Russell to write a letter to the school. Mrs. Hewko felt that Ms. Russell was a professional who knew a lot more about Darren's condition than Mrs. Hewko could explain to the school.

[129] Ms. Russell wrote a letter to Ms. Richardson and the Members of the District Autism Team on January 25, 2003. In it, she expressed her concerns that Darren may not be understanding the majority of what was being said verbally during group instruction and that therefore he was very confused, getting bored due to lack of stimulation, starting to stim out of boredom, and then receiving negative feedback for the resulting self-stimulatory behaviour. Ms. Russell also noted that the pinching, screaming and hitting appeared to be escape motivated. She expressed her concern that having an aide who was not a member of the home team may be contributing to Darren's frustration. She noted that Darren required one to one support in the classroom, receiving instruction that used his primary communication system with a trained aide who was also a member of the home team.

[130] Ms. Russell did not recall receiving any response to her letter of January 25, 2003.

[131] Mr. Carmichael got a copy of Ms. Russell's letter but did not respond to it. He inquired if anyone else from the school teams had responded but received no affirmative replies.

[132] Mr. Carmichael thought the letter was "very significant" and wanted to ensure that everyone was "very much on the same page with respect to responding to her opinions and recommendations". Mr. Carmichael did not want to be saying something different than other people were saying. He felt he didn't have the authority to implement the recommendations of Ms. Russell's letter which he thought would have far-reaching implications for the Abbotsford School District.

[133] When challenged about the lack of response to the letter, Mr. Carmichael said he did not see how Darren's IEP and Ms. Russell's letter were related. There was going to be "no part of the IEP meeting that was devoted to Ms. Russell's letter – that was not the point of the IEP meeting".

[134] Ms. Richardson testified that she had not responded to the letter, although it had been addressed to her, because she had been directed by Ms. Clarke not to respond in writing.

[135] As previously arranged, Ms. Russell attended McMillan on February 17, 2003 to observe Darren in the classroom. As she went to the front desk to sign in, Mr. Carmichael approached her.

[136] Ms. Russell described her encounter with Mr. Carmichael in a letter dated October 27, 2003, before the commencement of these proceedings. Ms. Russell wrote (Exhibit 75):

At my third and last school observation, as I was at the front desk to obtain my pass, Mr. Carmichael, the school principal, approached me and insisted that I accompany him to his office immediately before observing Darren in the classroom, as scheduled. Shirley and Rod Hewko were not informed of this private meeting, nor were they present. During the meeting, Mr. Carmichael informed me that the school did not want my input regarding Darren Hewko as the school was fully able to program for Darren without my assistance. Mr. Carmichael was aware that I was scheduled for an observation visit, and after 30 minutes of discussion, I requested permission to complete the scheduled observation for the time remaining. I was permitted to proceed to the classroom as long as I agreed to return to Mr. Carmichael's office for further discussion on the topic at the end of the school day. After the observation, I returned to his office with the classroom teacher to further discuss my role in the school.

[137] Mr. Carmichael repeatedly stated in his testimony at trial that the purpose of his meetings with Ms. Russell on February 17, 2003 was to get feedback from her classroom observation.

[138] Mr. Carmichael had a separate file in his office regarding Darren Hewko where he kept notes from meetings, including his meeting with Mrs. Hewko on December 19, 2002. However, he did not keep any notes from his meetings with Ms. Russell. Whether Mr. Carmichael's purpose was to get feedback from Ms. Russell or not, he clearly did not feel comfortable with any of the feedback he received because Ms. Russell repeatedly emphasized the need for training in the home-based program and consistency between that program the school program. This conflicted with what Mr. Carmichael understood to be the policy of the District.

[139] Mr. Carmichael knew very little about autism and even less about ABA. His evidence on how to handle the difficult situation with which he was confronted can be summarized in the following way: He was getting directives from his superiors, and he was going to make sure they were followed.

[140] The following day, Mr. and Mrs. Hewko went to the school to express their concern about Mr. Carmichael's unannounced meeting with Ms. Russell. They were angry and upset and explained that Ms. Russell was being paid by the Hewkos to conduct a school observation and then attend at the Hewko home for a consultation meeting. The entire home-based team had been assembled at the Hewko home, all the time being paid by the Hewkos, waiting for Ms. Russell to return and report on her classroom observations.

[141] Mr. Carmichael recalled that at this meeting Mr. and Mrs. Hewko expressed their concern that Ms. Major, while presumably well-intentioned and a good person, was very unqualified in terms of training to be able to work with Darren. He also recalled being told that the TA situation was causing serious problems with Darren's progress in the home program. Rather than continuing with the learning they had been so pleased with, Darren was seriously regressing and losing ground.

[142] Mr. Carmichael further recalled that the Hewkos had requested that all at-school interventions by Ms. Major with Darren stop immediately, at least those interventions that had been created at school to try to simulate home programs. The Hewkos felt that because Ms. Major could not utilize the ABA-IBI methodology, her approach was undermining Darren's progress at home because of a lack of

consistency. Mr. Carmichael and other school personnel failed to understand the stated reason for why the Hewkos demanded discontinuance of most home programs in the school. Instead, they chose to conclude that the Hewkos could not make up their minds about what they wanted the school to do.

[143] Mr. Carmichael agreed that it was clear to the whole school-based team, including Ms. Major, that she did not have the necessary training to effectively run programs with Darren that mirrored home programs. Mr. Godden also understood that there were problems with Ms. Major's ability to interact appropriately with Darren and to work well with Ms. McLean. However, another month went by before Ms. Major was reassigned.

[144] The school in concert with the District continued to utilize District resources to try to deal with the problem of Ms. Major's inability to have instructional control of Darren without consulting in any meaningful way with Darren's home program.

[145] The District Autism Team (Ms. Champigny and Ms. Savinkoff) visited McMillan on February 19, 2003, and met with the school-based team later in the afternoon. The referral to the District Autism Team had been made in the middle of January, yet it took more than a month for this site visit to occur.

[146] Ms. Savinkoff testified to the training and experience she had in autism prior to September, 2002. She had taken numerous courses and worked with autistic children prior to February, 2003. In the 2003/2004 school year, she was seconded to POPARD as a consultant. Ms. Savinkoff received training in autism during her Masters Degree in Speech and Language Pathology completed in 1989. She

worked as a teacher for four years. She took a number of autism courses through continuing education from the early 1990s when the number of autism diagnoses skyrocketed. Her courses included POPARD courses and others. She also attended the SCERTS (Social Communication Emotional Regulation and Transactional Support) course on April 25, 2003.

[147] During the classroom visit, Ms. Savinkoff observed inconsistent and incorrect use of visual supports. She also noted that the 'crisis intervention deflection technique' was not being applied. She observed that the kicking behaviour was not being managed well. Ms. Savinkoff agreed that data collection was important and that this would normally be the job of the TA. While Ms. Savinkoff did not see the ABC charts being used while she observed in the classroom, she assumed that data for Darren was being sent home to be analyzed by the home program consultant. She did not verify whether this was the case. In fact, it was not the case. Ms. Savinkoff observed that there were two opposing reward systems in place.

[148] The District Autism Team made several recommendations. In terms of their recommendations, Ms. McLean implemented the basket work, flip cards, schedules, routine strips, took a crisis intervention course, and prepared and utilized ABC charts.

[149] By February 21, 2003, Mr. Carmichael noted that there was a general agreement that lack of training for Ms. Major was a huge problem. The school-based team proposed that Mrs. Hewko keep Darren home for a week and that Ms.

Beckedorf come to the school to do 12 ½ hours of intensive training with Ms. Major in the afternoons while Darren was at home.

[150] According to Mr. Carmichael, Ms. Major was amenable to the plan when it was first discussed. The school-based team, through Mr. Carmichael, prepared a proposal for the approval of Ms. Clarke. Mr. Carmichael knew that what they were asking for was something different from what the School District would normally permit but in his considered judgment, he and his colleagues on the team felt it had to be done.

[151] However, at this point Ms. Major said that she did not feel she had what was required to meet Darren's needs and asked to be reassigned. The plan was abandoned and Ms. Major was reassigned.

[152] Mr. Carmichael never did a formal evaluation or performance review of Ms. Major. He initially testified that this was because she was already a district employee and did not need a review. However, when he had previously been asked about it in discovery, his answer had been that he did not do a review because he did not receive the forms to fill out. He admitted that he could have asked for a form, but that he had not done so because he did not feel any need to. Mr. Carmichael did not have a personnel file on Ms. Major.

[153] Mr. Godden contradicted Mr. Carmichael on the need for a performance review. He stated at his Examination for Discovery, and confirmed at trial, that the TA contract specifies that a performance review be completed by the principal within 60 days of a new assignment.

[154] The Hewkos continued to express concern about the lack of effective support for Darren in the classroom. Mr. Carmichael suggested they call the District Assistant Superintendent, Mr. Godden. On February 21, 2003, Mr. Godden wrote to Mr. Carmichael expressing surprise that Mr. Carmichael had told the Hewkos to call him, since he dealt with specific parental appeals, Mr. Godden felt he should not be involved at this stage and agreed that Mr. Carmichael had not realized this. However, Mr. Godden agreed he was already involved, to a degree.

[155] On February 24, 2003, Mr. Carmichael sent an e-mail to Ms. Savinkoff, Ms. Richardson, Ms. Champigny, Ms. Patterson, Ms. McLean, Ms. Lewis and Ms. Clarke asking for their suggestions for criteria to go into the posting for the new TA for Darren.

[156] Mr. Carmichael did not ask Mr. and Mrs. Hewko, or Ms. Russell, for their suggestions for TA criteria, even though they were members of Darren's IEP team.

[157] Ms. Richardson had several conversations about Darren with Mr. Carmichael, Ms. McLean and Ms. Major, but the Hewkos were not involved in those discussions. When asked whether it would not have been helpful to have them involved, Mr. Carmichael answered that he had not thought about that.

[158] Arrangements were made for Darren to receive deep massage from an occupational therapist, who also showed the technique to Mrs. Hewko, Ms. Beckedorf and Ms. Major. Neither Mrs. Hewko nor anyone from the home team had requested massage for Darren or training in the massage techniques. It had been recommended by the school. The suggestion was that this would assist Darren in

accessing an education at McMillan. Mrs. Hewko continued the massage at home for a few weeks but stopped after she realized that Ms. Major was not doing the massage in the classroom. There was no evidence provided nor even a suggestion made that such a technique has any validity in assisting a child with autism to achieve an education.

[159] Ms. Savinkoff understood that the District was given eight days training or advice per year from POPARD without charge and that it was up to the District to decide how those days were going to be spent. In 2002/2003 the District chose to receive eight days in advanced team training rather than in student consultations. Ms. Savinkoff was not aware that the District could buy additional days from POPARD.

[160] Arrangements were made for Ms. McLean and Ms. Major to visit some other schools to observe how other schools were including children with autism in the classroom. No one told Mrs. Hewko about those visits. According to Mr. Carmichael, nobody thought of telling Darren's parents.

[161] As a member of the District Autism Team, Ms. Savinkoff and Ms. Champigny produced a report based on their classroom observation and their meetings with school personnel. Despite the agreement of the District Autism Team members and Ms. Richardson that consistency with a home-based program is essential –the team did not interview either the Hewkos or Ms. Russell.

[162] Mrs. Hewko received a copy of the report. When asked about her reaction to it, she said there was nothing in it that reflected anything that she had been trying to communicate with the school all year.

[163] An IEP meeting was held on February 25, 2003. This was the first time Mrs. Hewko found out that Ms. Major was being reassigned at her own suggestion.

[164] The school-based team was aware that Ms. Russell would not be able to attend the IEP meeting scheduled for February 25, 2003 but made no attempt to re-schedule the meeting so that she would be able to attend, even though they also knew that the scheduling was an issue for the Hewkos. There is no doubt, however, that scheduling an IEP to include most of the members is difficult.

[165] Ms. Champigny attended the February 25, 2003 IEP meeting. Mrs. Hewko did not recall if the District Autism Team report was discussed at this meeting.

[166] Mr. Carmichael said that one of the purposes of the February 25, 2003 IEP meeting was to discuss the District Autism Team report but he cannot recall the specifics of the discussion.

[167] Ms. Richardson recalled a discussion regarding collaboration between the home and school such that both would use the same language. Mrs. Hewko agreed to some photos being used with words. Ms. McLean made photo cards with words for Darren's use.

[168] I find that there was little, if any, discussion of the District Autism Team report and none of Ms. Russell's January 25 letter report to the Team at the February 25, 2003 IEP meeting.

[169] Around February, 2003, it was noted that Darren was able to participate in the following Kindergarten activities successfully: colouring, cutting, gluing, copying words and pictures, copying letters and numbers, making crafts, clapping and copying some actions to songs, and experimenting in Kid Pix on the computer. There was no suggestion at trial that these are not appropriate activities for any child in Kindergarten.

[170] However, it was also observed that he was displaying behaviours which had not been observed prior to December, such as laying down and climbing. Other behaviours such as pinching, kicking, stomping, hitting and calling out also increased.

[171] At the end of February, a new TA was sought for Darren. In his evidence in chief, Mr. Carmichael said that there were three candidates for the position of Darren's TA, one of whom was Ms. Deanne Mayes, an employee of the District. However, in cross-examination, Mr. Carmichael said that there was no interview process, as such. Instead, he had been told by Human Resources who the person was who would be assigned to Darren. Ms. Mayes was sent to McMillan to speak with Mr. Carmichael but at that time she had already been hired for the position.

[172] Mr. Godden thought there had been a posting for Darren's TA following Ms. Major's request for reassignment. He did not know how many people had applied

for the position but thought there had been three people, all of whom were temporary or casual employees. Mr. Godden agreed that if Ms. Beckedorf had applied for the position, she would not have been successful, since all of the applicants would have been given the job if they wanted it before Ms. Beckedorf, based on their seniority as opposed to their training or qualifications.

[173] I find that between late January and March 2003, there was an evolving resistance on the part of the school and School Board to listen to the Hewkos and accommodate Darren Hewko's home program despite the repeated failure of the School Board's resources to enable Darren to access an education.

[174] The evidence or lack of it makes clear that there was no posting for the TA position, or if there was, there were no interviews in relation to a posting. Ms. Mayes was hired through Human Resources when she advised she would be available because a student she was working with was moving out of the District. Ms. Mayes was contacted by Human Resources and asked if she would like to work with a male student with autism in an integrated classroom. Ms. Mayes had worked with at least one child with autism but she had no training at all in ABA.

[175] Ms. Mayes had a social work diploma from Northern Lights College, had worked with autistic persons before and had taken non-violent crisis intervention training. She had been waitlisted for the spring POPARD course but it was full and she did not get in to the course.

[176] Ms. Mayes met Mrs. Hewko and Darren over spring break at a skating rink. Mrs. Hewko was impressed with Ms. Mayes' personality and enthusiasm and was

initially happy with her as Darren's TA. She expressed no concerns about Ms. Mayes' qualifications.

[177] During spring break, Ms. McLean, Ms. Mayes and Ms. Champigny met and Ms. Champigny showed them some strategies for use in the classroom although Ms. McLean could not recall what specifically they were when testifying at trial.

[178] Ms. Richardson also met with Ms. McLean and Ms. Mayes on March 25, 2003 to review strategies used with Darren with Ms. Mayes.

[179] Ms. Mayes testified Ms. Richardson taught her strategies such as count down strips, visual schedules and redirection strategies. Ms. Mayes practiced Discreet Trial Training with Ms. Richardson and attended site observations arranged by Ms. Richardson.

[180] Ms. Mayes started working as Darren's TA on March 24, 2003, following Spring Break. Within the first week, she was injured by Darren, as was Ms. McLean.

[181] Mr. Carmichael affirmed that by March 28, 2003, there had been no consideration of any special class placement for Darren.

[182] Ms. Mayes was hired to replace Susan Major prior to March 6, 2003. She was working in the classroom by March 6, 2003, but did not start full-time until after spring break.

[183] Mr. Carmichael knew Ms. Mayes as she had previously worked as a TA at McMillan Elementary School. He was aware of her educational background and that she had general experience with autistic persons.

[184] Mrs. Hewko communicated well with Ms. Mayes during the school year. At first Darren's demeanour and behaviour improved after she started working with him and she believed she worked well with Darren on skills and socialization. Ms. Mayes expressed willingness to learn Darren's home program.

[185] At the April 28, 2003 IEP meeting, Mrs. Hewko expressed her satisfaction with Ms. Mayes as Darren's TA. Ms. Mayes first attended the Hewko residence to observe the Hewkos home program following the April 28 meeting.

[186] On March 31, Ms. McLean sent an email to Ms. Clarke stating:

...I am especially appreciative of my new Ms. Mayes – she is amazing. We make a good team. Despite our teamwork, however, the situation has began to deteriorate in Kindergarten class. Beginning on Wednesday or Thursday of last week, Darren began to revert to his old behaviours. He began laying down, kicking, pinching, etc. Although Ms. Mayes and I have been weaving and dodging about 60-75% of his attempted pinch/scratches, we are both black and blue and have shed some blood. I am afraid that I am having a difficult time tolerating this situation. First of all, I feel that my other students' learning is suffering due to the frequent disruptions (I have noticed a difference in the class attitude and work ethic during Darren's disruptive episodes) and I am finding it exceedingly difficult to tolerate the pinching. I told Kerry of my frustrations today, and she suggested we try another strategy. I agree to try this one, but I am losing my optimistic hopefulness in this case. I talked to Darren's mom about the situation (and Kerry's recommendation). I let her know that Darren is pinching us and that the District is supporting us through giving us strategies and that we would come up with an emergency plan and then meet to discuss it. Mom agreed that Darren shouldn't be pinching.

[187] On April 1, 2003 or thereabouts, Ms. Richardson introduced a bean bag to be used as a “calming device” for Darren. She did not talk to Mrs. Hewko about her intentions in this regard and Mrs. Hewko only found out about it when she saw it at the school on April 8, 2003. She immediately requested that the bean bag be removed and that all involvement of the District Autism Team with Darren cease. She interpreted the beanbag as Darren receiving a reward for bad behaviour, a further inconsistency with Darren’s home program.

[188] Mrs. Hewko testified that her main concern at this time was that the school had started implementing interventions for Darren without consulting her or telling her what they were planning to do, or even asking for her input on what they wanted to do. It was the beanbag that alerted her to the fact that the school had started interventions without her knowledge.

[189] In her letter to the school requesting that the involvement of the District Autism Team cease, Mrs. Hewko wrote:

When we gave consent, we expected to be informed of all that involves our son. We have not been involved in any aspect of his schooling since the autism team stepped in. We have not been included in any decisions or suggestions or recommendations for interventions. We do not approve of the decisions made for his interventions. The autism team has not communicated with us in any way. From what we have seen implemented in the classroom on the advice of the autism team contradicts everything we are teaching our son.

[190] Again, the communication between home and school floundered in that consistency in handling Darren’s “behaviours” as well as learning was not maintained.

[191] There had been a change in the home team in March, 2003. Ms. Tournemille was hired at the end of March, 2003, and a Ms. Isaac was hired at the end of April, 2003 or beginning of May, 2003.

[192] Mrs. Hewko stated that when there were new home members, initially Darren would often have increases in negative behaviours. There was also evidence that a new behaviour program was being implemented at that time. In Ms. Russell's consultation report of April 28, 2003, she noted that Darren had not progressed in his current program since December due to lack of therapy hours and lack of instructor consistency and organization. She stated he was moving along in all of his programs when he was receiving 30 hours of direct instruction a week but had not progressed since he had been receiving 9 hours a week starting in December, 2002. She noted that he was rapidly losing his mastered skills. She noted overall instructor consistency and organization needed to be drastically improved to cut down on administrative time and maximize direct instructor time. She noted that in September he had received an average of 29 hours a week of home therapy which had dropped to 9 hours in November and December. The reason for the decrease in home hours was the expectation on the part of the Hewkos that the school would implement an effective program for Darren.

[193] Teresa Tournemille testified that, on occasion, Ms. Russell requested that Mrs. Hewko be at or near the treatment room to ensure instruction safety. Ms. Tournemille testified:

It was more than an issue of the instructors themselves not feeling confident or able to consistently consequate effectively given the

systems we had in place at the time. The time period I am referring to was when we had a huge transition going on with the team and we had several of the team members who had come on, including myself, who had never worked with Darren and didn't understand his history or who he was, his behaviours, necessarily. We were all learning all that and we were faced with some pretty challenging behaviours at the time.

[194] Ms. McLean said she was concerned that Darren might kick someone while he was having a tantrum or that his shoe might fly off and hit someone. Darren was also throwing objects and would scream loudly.

[195] On April 9, 2003, the school-based team met to formulate an emergency plan for use in the event that Darren's hitting and pinching continued.

[196] On April 28, 2003 there was an IEP and Transition meeting held at the school regarding Darren. Ms. Kitsul, a Grade One McMillan teacher, attended and Mrs. Hewko was told that she would be Darren's teacher.

[197] Mrs. Hewko was happy about the prospect of having Ms. Kitsul as Darren's teacher since she was very familiar with Darren and had been the person who had recognized signs of autism in Darren when he was a baby.

[198] At this time, the Hewkos thought that things would improve if Ms. Mayes followed through on her intention to learn Darren's home-based program and then continued as his TA for Grade One.

[199] Mrs. Hewko did not recall any suggestion at the April 28 meeting that Darren might not go to McMillan for his Grade One year.

[200] Mr. Carmichael said in his examination in chief it was his recollection that Ms. Clarke made some reference to a resource room as a possibility but he could not recall anything specific. In cross-examination, Mr. Carmichael agreed that it had not been a significant part of the meeting because “we were focused on discussion around plans for transitioning Darren for Grade One at McMillan” and Ms. Kitsul was being introduced as Darren’s Grade One teacher.

[201] From Mr. Carmichael’s point of view, there was nothing inappropriate in having staff receive training from Ms. Russell or Ms. Beckedorf but the “invariable position” of Mr. Carmichael’s superiors (Mr. Godden and Ms. Clarke) was that it was inappropriate for district staff to receive training from an outside agency with which the school had no connection. When this was communicated to Mr. Carmichael, he did not challenge Ms. Clarke on the point.

[202] Ms. Clarke was not called to testify.

[203] Mr. Carmichael agreed that he had every opportunity to find out Ms. Russell’s and Ms. Beckedorf’s credentials and that he made no effort to verify or disprove their credentials. He knew that the District did not do anything to check their credentials. Mr. Godden confirmed that he did not ask about their qualifications.

[204] In fact, however, the school and the District had Ms. Russell’s credentials and had IEP meetings with her, and had allowed Ms. Beckedorf into the school to work with Darren at least twice for over a week and a few other times. Each time, Ms. Beckedorf demonstrated her methodology and the instructional control she had to Ms. McLean and Mr. Carmichael.

[205] Darren's negative behaviours continued to escalate. On April 29, a substitute TA was present for Ms. Mayes. Darren began to exhibit negative behaviours. He started kicking on the floor and the TA cradled him. Ms. McLean was concerned Darren would slam his head back and break her jaw and told her not to do that. Darren then came over to her and grabbed her apron and was more upset than she had ever seen him. One of the students went to get Mr. Carmichael to assist. Mrs. Hewko was called and took Darren home. Ms. McLean had discussions with Mrs. Hewko following this and it was agreed that if Ms. Mayes were away, Darren would stay home. Mr. Carmichael spoke to Mrs. Hewko on April 30, 2006 and she said the same to him.

[206] Ms. McLean first discussed a resource room being a possibility for Darren's Grade One year with Mr. Carmichael in May, 2004.

[207] Mr. Carmichael said that school staff started to look into the possibility of Darren attending a resource room because of Darren's escalating behaviours and because both the TA and the teacher were being injured. Again, there was no communication with the Hewkos regarding the evolving plan by the school.

[208] Following an e-mail exchange between Ms. Mayes and Mr. Carmichael, Ms. McLean felt Ms. Mayes was being reprimanded for going to the Hewko house to be "trained". Ms. McLean was upset by this and wrote a long e-mail in defence of the situation on May 17, 2003. She stressed that there had only been observation, not training. She continued:

I am kind of going into protection mode after the reprimand Deanne [Mayes] has received and the message you included here. I believe I said at the outset that if things went south, we would be the ones to wear it.

[209] Darren's aggressive behaviours continued in May. On May 21, 2003, Ms. McLean was bruised when Darren grabbed her shirt and chest and pinched and hit her.

[210] Mr. Carmichael and Ms. McLean visited the Mountain resource room on May 14, 2003.

[211] Mr. Carmichael did not ask, and was not told, of the degree of training of the TAs in the Mountain resource room. From the Resource Room visit, Mr. Carmichael understood that each child in the resource room had an individual plan and was integrated into the regular classroom. Based on observations and discussions, he believed the TA's were more specialized and highly trained than those at McMillan. In this assessment, he was likely correct. He understood Ms. Schwass was a highly trained special education teacher, worked successfully with autistic children and that she had training in educating children with autism. He thought the Mountain Elementary School placement was best for Darren because of the small class size, highly specialized staff, excellent class setting and emphasis on integration.

[212] However, Mr. Carmichael had so little knowledge of autism and ABA therapy that his ability to evaluate what he was told was very limited. In addition, for the same reason, his ability to evaluate what was in Darren Hewko's best interest was limited.

[213] Mr. and Mrs. Hewko first learned about the school-based team's recommendation that Darren attend a resource room on May 26, 2003, at a meeting held at McMillan school. They had no prior notice about the purpose of the meeting; only that there was a meeting. Mrs. Hewko was completely caught off guard and could not believe they were at that point.

[214] At the meeting, Mr. and Mrs. Hewko were presented with the school-based team's recommendation that Darren should go to Mountain Elementary and attend a resource room at that school. Ms. Lori Patterson, school psychologist, told the Hewkos that:

- a. There would be about 10 students in the resource room;
- b. There would be a high ratio of adults to children;
- c. There was a very skilled, knowledgeable special education teacher who had worked with autistic children before; and,
- d. Meaningful integration into a regular classroom was a feature of the resource room program.

[215] Mrs. Hewko expressed concern at the meeting that Darren might pick up negative behaviours in the resource room.

[216] However, as the Hewkos did not want to rule out anything without looking at it, they agreed to take a look at the Mountain resource room. They went there with Ms. Patterson on June 5, 2003.

[217] Mrs. Hewko found the resource room tidy and organized and thought that Ms. Schwass seemed nice and knowledgeable about autism.

[218] While there, the Hewkos observed a child lying on the floor having what they were told was a week-long seizure, at least two children in wheelchairs and another child with a feeding tube. Mrs. Hewko could not understand how they were going to socialize with Darren. When challenged on this point, Mrs. Hewko explained that Darren's biggest deficit in his life is communication and socialization. He needed to be with children who excelled in those areas.

[219] At the June 5, 2003 viewing of the Mountain Resource Room with Ms. Patterson, Ms. Schwass assured Mrs. Hewko that the children in the class were watched closely and that she had experience working with autistic children. She believes she advised the Hewkos that she was confident she could work with Darren.

[220] On June 5, 2003, Ms. Schwass told the Hewkos she tried to have kids in integration classrooms as much as possible starting with social activities and working up from that. Basically they worked on skill and developmental levels and filled in gaps in the resource room.

[221] Mrs. Hewko agreed that Ms. Schwass probably said she would allow home members into the class as long as they observed the protocol. She agreed Ms. Schwass came to her house at least twice before September 2003.

[222] Ms. Patterson recalls that at the June 5 resource room observation, there was discussion about co-ordination of students schedules and Ms. Schwass showed them the schedule for students going from resource room to classrooms for integration. Ms. Schwass advised that TAs were present at recess and lunch.

[223] Darren visited the Mountain resource room on three occasions in June of 2003.

[224] Ms. Patterson e-mailed Mr. Carmichael and Ms. McLean on June 5, 2003, indicating to them that the Hewkos had accepted the Mountain resource room placement. Mr. Carmichael did not receive any information from the parents, nor did he contact them to verify or follow up on the information he had received from Ms. Patterson. Ms. Patterson agreed on cross-examination that Mrs. Hewko actually had never agreed that Darren would go to Mountain.

[225] Mrs. Hewko gave evidence that while she was still considering the Mountain placement at that time, she never committed to it or accepted the placement. She was very consistent in those responses and also pointed out that while the room may have been nice, there was never any “program” identified for Darren.

[226] By early June, Mr. Carmichael thought things were not going well in the classroom for Darren and the situation was stressful for him, the TA and the teacher. He therefore requested that Mrs. Hewko keep Darren at home for the remainder of the school year. Mrs. Hewko agreed, thus enabling the school to avoid using the suspension procedure.

[227] Darren missed 29 days of his Kindergarten school year.

[228] Darren did not meet any of the goals set out in his IEP for the 2002/2003 school year.

[229] Mrs. Hewko was given the impression that Ms. Mayes intended to apply for the position as Darren's TA in the Grade One year. She was optimistic about Ms. Mayes and offered to train Ms. Mayes over the summer. Ms. Mayes declined a paid position, telling Mrs. Hewko she would rather be an unpaid volunteer.

[230] Ms. Mayes attended the Hewko home on a few occasions but did not inform Mrs. Hewko of her schedule or when she was arriving or leaving. She then stopped coming towards the end of July 2003, without communicating with Mrs. Hewko. Mrs. Hewko tried to get in touch with Ms. Mayes, without success. Finally, on August 11, 2003, Mrs. Hewko wrote a letter to Ms. Mayes, which she delivered to the school board office. Mrs. Hewko noted that Ms. Mayes had not attended five out of eight scheduled sessions and that of the three that she did attend, she either left early or arrived late.

[231] Despite having told Mrs. Hewko that she would love to work with Darren and be his TA the following year (in effect implying that she would apply for the position), Ms. Mayes never applied for the position as Darren's TA and never told Mrs. Hewko that she had not.

[232] When asked at trial why not, Ms. Mayes said it was because she had not actually completely changed her mind until much later. Ms. Mayes admitted that she had told Ms. Schwass as early as June that she may not apply for the position. However, she maintained that she had not been sure about what she would do as it depended on whether she would have enough staff to cover the person she was

looking after in her own home. Ms. Mayes readily admitted that she makes considerably more money taking care of people at her home than she does as a TA.

[233] On the basis of all the evidence given by those directly involved, Ms. Schwaas, Ms. Patterson, the McMillan school psychologist, Ms. McLean, Mrs. Hewko, and Ms. Mayes, I find that Ms. Mayes did not apply for the posting for several reasons. First, her life was complicated by many obligations at home and to other agencies, her physical health was not robust at the time and most importantly, she became disenchanted with the home-based program. My assessment of Ms. Mayes as a witness was that she was honest and intelligent. She came across as a very well intentioned individual whose career choices are devoted to helping disabled people including children. Her background at the time she was hired to be Darren's TA in Kindergarten did not include any knowledge or experience with ABA therapy. She was intellectually willing to become trained in ABA-IBI. However, her training and predilection at that time centred around a program called "Gentle Touch" which appeared to be in conflict with certain ABA principles such as "consequences". It is impossible to know whether she would have persevered and become comfortable with Darren's home-based program if her physical health had been better in the summer of 2003 and/or if her other obligations had been less onerous.

[234] Mrs. Hewko never registered Darren for Mountain Elementary. Instead, she specifically declined the Mountain placement, on two different occasions, signing and delivering the forms declining the placement the first week of August and September 2, 2003.

[235] Mrs. Hewko wrote to Mr. Godden on September 4, 2003 requesting a meeting the following Monday, September 8th. She wrote again on September 8, 2003, referring to having fulfilled all of Mr. Godden's requests and again requesting a meeting.

[236] Mrs. Hewko wrote to Mr. Godden on September 9, 2003, thanking him for calling to set up a meeting. She specifically requested a written outline of what the District was prepared to offer, in advance of a meeting. Mrs. Hewko said she did not get a written outline. Mr. Godden confirmed that he did not respond as requested but could not say why he had not done so. He agreed that he was well aware of what the Hewkos were asking for, namely an appropriately trained aide for Darren in the classroom, and until that time, they wished Darren to be placed at McMillan with one of his home-based members as his aide.

[237] The Hewkos met with Mr. Godden on September 10, 2003. They were not told by Mr. Godden before or after this meeting that he considered that the meeting was their appeal from the placement proposal. Mrs. Hewko told Mr. Godden that she felt people at the school were not communicating with her. She requested the District's proposal in writing because she felt the District personnel had a way of telling her things, and not following through, and then saying they never agreed to things at all. She wanted it in writing so that the District could not back out of anything. Mrs. Hewko explained what they were looking for in a TA for Darren – someone who was trained to work with Darren in his home protocol in the home program, someone who had instructional control, and someone who was a member of the home team.

[238] Mrs. Hewko set out further concerns they had about the proposed placement, including the fact that Mountain was a couple of miles away and not Darren's neighbourhood school, so he would be unfamiliar with the environment and also be unable to walk home from school with friends and also get less exercise. Mrs. Hewko also noted that the 'group TA' situation at Mountain was not satisfactory (even if the Hewkos could train one of the TAs in Darren's protocol, the other TAs would not be trained).

[239] Mr. Godden communicated his decision to the Hewkos by letter dated September 11, 2003. The decision of the District was that the resource room at Mountain was the "most enabling environment" for Darren. I set out the letter in full:

Dear Mr. and Ms. Hewko,

Re: Darren Hewko
DOB: 1997-02-05

Thank you for attending the meeting held to resolve your appeal of the district's decision to place your son, Darren, in the Resource Program at Mountain Elementary School. Based on the points of our discussion, I would like to confirm the following conclusions:

- Given the continuum of services available, it is the district's position that the Resource Program is the most enabling environment for Darren. I concur with the McMillan School Based Team position that they do not have the necessary resources to successfully meet Darren's education needs to the standard expected by the district. It is important to reiterate that placement in such a program does not preclude integration in a regular classroom. Rather, the program will better allow us to provide Darren with specialized intervention as well as access to a regular classroom as appropriate.
- It is also the district's position that we have qualified and trained staff to work with Darren. Both the teacher, Ms. Schwass, and the teaching assistant, Ms. Crawford, have

been trained to use discrete trial ABA style strategies to meet the goals of Darren's Individual Education Plan. As such, it is not necessary for you to provide training to our staff, or for the district to hire a member of your home team to work in the school. However, we do recognize the importance of understanding your home program in service of Darren's successful transition into school. To that end, I have agreed to allow the teaching assistant to observe the home program for an hour each day for the next two weeks. At that point, this will be reviewed with the teacher and principal, with a goal to eliminate this and have Darren attend school on a full time basis. Ms. Schwass has made a commitment to meet with your consultant as necessary to monitor the development of Darren's home plan.

- With respect to the members of your home team visiting the Resource Program, I have explained that school staff will adhere to the district protocol. That is, members of the home team are welcome to visit the classroom providing that they make prior arrangement with the principal and teacher. It is expected that all visitors respect the sanctity of classroom instruction, and demonstrate appropriate decorum with respect to staff and their work. So as to enhance communication, I have also established that any notes taken by a home team member during an observation would be copied for the classroom teacher prior to leaving the school.
- As per the School Act, Darren will have an Individual Educational Plan, and as a partner in the process you will be consulted in its ongoing development. To strengthen the communication between home and school, Ms. Schwass will use a home-school communication book (in addition to the school planner) to keep you updated on Darren's daily progress.
- I have explained that the district has a commitment to providing support to all its teachers. At the teacher's discretion any district staff may be contacted to support Darren's program. This could include the helping teacher, school psychologist, speech pathologist and/or the district autism team. However, we have agreed that in the spirit of collaboration, Ms. Schwass would consult with you prior to any such contact with your son.
- I also want to reiterate that the district does have a conflict resolution mechanism in place. Essentially, if you disagree with a decision made by any employee of the Board, you are

required to meet with that individual prior to seeking assistance from his/her supervisor. In this case, any such concerns would be brought initially to Ms. Schwass, and, in turn, to Mr. Smithe. If the situation is not resolved to your satisfaction you may contact me for assistance. Ultimately, you are entitled to appeal to the Board of School Trustees to seek resolution.

- Finally, I would ask that you meet with Ms. Schwass to secure arrangements for Darren's successful transition to Mountain Elementary. Given your concerns over staff having instructional control of Darren, I recognize that this will need to be done carefully.

Again, I thank you for meeting with me to discuss these issues. While I recognize the challenges that you, Darren and district staff experienced in his kindergarten year, I am optimistic that the supports we have established at Mountain Elementary will allow us to successfully meet his educational needs. I encourage you to continue to work with the IEP process in an atmosphere of openness and trust in order to realize the best possible outcomes for him.

Sincerely,

Kevin Golden,
Assistant Superintendent

[240] Mr. Godden's letter stated that placement in the resource room did not preclude integration in a regular classroom. Mrs. Hewko interpreted this as saying that there was a chance that he would not be integrated.

[241] At trial, Ms. Schwass testified that integration was also dependent on the child's behaviours and what was happening in the classroom, how loud the child was and so on. She stated: "So we take all of that in stride as to how much they stay and come and go".

[242] Mr. Godden had no first-hand knowledge of who applied for the posting as Darren's TA at the Mountain resource room.

[243] Mrs. Hewko remembered Ms. Crawford, Darren's proposed primary TA in the resource room, telling her that she had several years experience in the resource room and that she had taken a one week FEAT workshop that summer. Mrs. Hewko did not consider this suitable training for Darren's needs.

[244] Mr. Godden thought that Ms. Schwass would be the person best qualified to say whether Darren's needs could be met in the Mountain Resource Room.

[245] After receiving the September 11 letter, the Hewkos felt it did not reflect what they thought had been agreed to the day before. Their concern centred around two issues. First, the wording of the statements around "integration" changed the emphasis and seemed to them to ensure that the school could choose not to integrate Darren if he was not under instructional control. More important, however, was the emphasis on the District maintaining control of the training of the TAs and what the Hewkos took to mean that the District remained determined to maintain its policy of keeping the home and school programs separate. In fact, I find that, having no TA identified with training in Darren's home-based program and a specific reference to Darren's TA being allowed 10 hours of "observation", and thus no assurance that his home-based program would be integrated into his day in the Resource Room was the turning point for the Hewkos in rejecting the Resource Room option.

[246] The Hewkos did nothing further to try to communicate what they thought was the single most important element to Darren's access to an education; that is having

a TA trained in his home program so that instructional control could be maintained and integration become a realistic goal.

Darren’s Progress at the Time of Trial

[247] Dr. Joschko has considerable experience doing assessments of children and adolescents with autism and other communication and intellectual disabilities.

[248] I accept Dr. Joschko’s assessment of Darren’s intellectual and cognitive abilities and his level of functional independence as reasonably accurate. As well, Dr. Joschko provided helpful observations of Darren at his home therapy program which, at the time of his assessment, had been up and running for over four years. It is relevant to consider Darren’s current level of functioning when assessing the appropriateness of the School Board’s response to the challenges that arose in 2002-2003 to educating him in the classroom. I quote from Dr. Joschko’s report, which was marked as Exhibit 89, at pp. 15-19:

What is Darren Hewko’s current intellectual state and level of functioning?

On the basis of the results of the *Leiter-R* and the intelligence tests he could not complete, it is clear that Darren’s intellectual ability is well below average. Darren’s measured intelligence is in the range of “moderate intellectual disability” (IQ of 49, with a probable range of 41 to 57 at the 90% confidence interval). His level of functional independence is consistent with what would be expected given his level of intellectual impairment (Standard Score of 42 on the *ABAS II* with a probable range of 39 to 45 at the 95% confidence interval).

On the basis of the behaviour I observed during my evaluation of Darren and the results of previous psychometric testing in April 2002, it is my opinion that the current *Leiter-R* estimate is likely to be reliable and predictive of Darren’s future abilities. It is my opinion that Darren’s level of intelligence is not likely to improve into the normal range — therefore, it is more probable than not that he will always function

mentally like a young child, and that he will always be predictably behind his age peers in cognitive, academic, and social skills and abilities. Darren's current level of language comprehension is less than the typical child of 3 years of age, and his level of nonverbal intelligence is equivalent to a 5-year level. His overall level of adaptive ability (i.e., day-to-day independence) is equivalent to the levels expected of a child of 3 years, 7 months of age.

On the basis of the history I have reviewed and Darren's current test results, I expect Darren's rate of learning to continue to be slower than average. It is likely that he will fall further behind relative to his age peers in terms of his intelligence and on any cognitive tasks involving abstraction, factual knowledge, or reasoning in situations that are not directly trained and practiced. This is because IQ scores or other psychometric estimates of ability (percentile and standard scores) reflect standings relative to age peers—they are not an indication of an absolute level of performance, per se. This means it is quite possible that Darren's percentile score on a test measuring, for example, receptive vocabulary (even if assessed through printed materials) could decrease over time (because Darren has not kept up to the rate of development of age-peers in receptive vocabulary) even though Darren's own skills relative to himself have actually improved and his "raw" score (i.e., number of items he is able to get correct on a test) actually shows an increase.

As indicated earlier in this report, Darren has learned and developed skills relative to his previous assessment in 2002. However, there is no indication that he has improved in his standing relative to his peers (i.e., that he is catching up) or that his intellectual disability is improving. Darren has learned in his therapy program, in a very rote way, a number of important concepts and behaviors. Given his level of intellectual disability, it is doubtful that Darren will be able to apply these concepts and behaviours in community or social settings in a practical way without direct teaching and prompting. Even if he should be able to apply on his own what he is being taught in his therapy program, it is unlikely that the level of what he learns and is able to apply will be anywhere near an age appropriate level. I believe that there will always be a significant cognitive gap between what he learns through his rote learning in his therapy sessions and what others his age are able to understand and do. I do not believe any amount of therapy will overcome his intellectual disability or reverse or normalize his cognitive problems. Children with a moderate level of intellectual disability such as Darren (i.e., IQs in the range 40 to 54) develop a mental age roughly in the range of 5 to 8 years by the time they are adults—I do not believe that it is likely that Darren will exceed this level of intellectual ability regardless of the level or type of intervention he receives.

Is the School District's placement proposal (i.e., a resource room with one to one assistance of an ABA-trained Special Education Assistant and an ABA trained teacher, with as much opportunity for integration as possible) appropriate for Darren? Darren has had approximately 5 years of a highly individualized, intensive behavioural intervention program utilizing the principles and techniques of applied behaviour analysis, and he has responded to this approach to teaching him in his home setting. He has learned many skills through this systematic behavioural teaching, and for the most part his behaviour is controlled in the structured therapy setting at home. Although many of his symptoms of autism are controlled in the therapy setting, they do surface in his free time or when he is not consistently reinforced. Although there are many skills being taught and learned in his home behavioural therapy program, there is no indication that his cognitive skills or abilities have improved (relative to age peers) in the areas in which he was previously assessed in 2002. Furthermore, there is no indication that his overall cognitive level is approaching "normal" or average for his age. Therefore, it will not be possible for Darren to follow an educational curriculum similar to others his age — his educational program will continue to have to be modified and adapted for his needs.

Darren will continue to require an entirely individualized one-to-one therapy program utilizing the principles and techniques of applied behaviour analysis in a very structured and closely supervised setting — that is, he will require appropriate educational interventions that feature instruction based in the principles and techniques of applied behavioural analysis. This will be required until his attention, self-regulation, problem solving, information gathering, compliance and social skills are at a level that he can function successfully in a less structured classroom setting. I do not believe that choice of behavioural education program needs to be limited to the specific program designed by his current behavioural consultant, since the principles of applied behavioural analysis can be utilized successfully by appropriately trained interventionists supervised by appropriately trained psychologists, teachers, or behavioural consultants who might develop different therapy targets.

Darren's home program is essentially a resource room of one, and this appears to work for the control of his symptoms and the teaching of a number of discrete skills and concepts. This home program does not currently appear to address social interactions and social problem-solving with other children.

Prior to attending a "regular" elementary school classroom, Darren will need very gradual and carefully planned, step-by-step integration into a larger setting where there will be considerably more distractions,

multiple social expectations, and many unexpected events which do not fit his own routine or expectations. Until the nature of his reinforcement regime changes (i.e., the very frequent use of video clips or other visually or auditorily distracting stimuli; the use of auditory volume as a reward; etc.) and the rate of verbal reinforcement decreases (i.e., very frequent, clearly audible verbal comments from his therapists), it would likely be disruptive in the extreme and socially alienating to try to carry out his current ABA program within the confines of a typical elementary classroom without some significant modifications to the physical set up of the classroom (such as, a soundproof work area within the classroom, a video monitor shielded from other children, a soundproof and private place where Darren can bounce and stomp the floor while he watches television at a very high sound volume, etc.).

Darren has had a number of different therapists since he began his therapy program in June 2000. He has also had a very significant change to his home therapy team over the last year —Mrs. Hewko told me that Darren “*has accepted a whole new therapy team since January 2005*”, and that “*he took it all in stride*”. Therefore, it should be possible for Darren to learn to accept and work with different interventionists at school.

It is my opinion that Darren will continue to require and respond to a program of teaching based on the principles of applied behavioural analysis, and that this can be accomplished with ABA trained teachers and assistants at school in a resource room model with social integration wherever possible either into a regular classroom or through “reverse integration” by having children without disabilities come into the resource room.

It is axiomatic that the behavioural intervention techniques used with Darren need to be as consistent as possible between his home and school programs, and that there would be regular and ongoing communication between the home and school interventionists.

In your view, what are the deficiencies of the home program that Darren Hewko is currently receiving, if any, and what adaptations to the home program would benefit Darren?

Darren’s home program is intensive, well managed, and carried out by competent and committed interventionists under the direct supervision of Darren’s mother and the overview of a qualified Master’s level behavioural consultant, Ms. Rachel Russell.

If the intent and plan is to eventually have Darren reintegrate into a public school setting, then a number of specialized consultations to his

home team would be helpful, and it will be important to increase his exposure to other children his age in a systematic and controlled way. In my opinion, there are areas of Darren's home program that could be improved and that would likely have tangible benefits for Darren. Please note that I am not suggesting that Darren's current intensive ABA home program should be dramatically altered and changed, or that it should be directed by non-ABA specialists —the general ABA principles and techniques that are working with Darren should be continued. It is my opinion, however, that input of other perspectives is very important and that such input will likely improve the selection and teaching of targeted skills and behaviours within Darren's current ABA program.

Consultations with an elementary school special education teacher could help ensure that the behavioural targets chosen for Darren's program will mesh well with the social, behavioural and cognitive requirements for success at school. Since Darren has profound receptive and expressive language impairments, it is my opinion that some consultations with an experienced speech and language pathologist would likely be helpful to Darren's mother and therapists in fine tuning his communication program and the target words and language simulation they are providing Darren. Since Darren has an intellectual disability, consultations with a child psychologist might be helpful in more closely adapting Darren's program to his cognitive limitations. Since Darren's level of functional independence is poor, consultations with an occupational therapist might lead to a more fine tuned approach to teaching him functional skills (such as taking a shower or preparing a simple snack).

Darren's exposure to, and tolerance for, other children, could be increased by some carefully planned "reverse integration" where one or two children are invited into his therapy sessions and social activities in the community. Mrs. Hewko told me that Darren does get some exposure to other children during outings in the community and when his brother's friends come over and include him in their activities, but these do not appear to be planned aspects of his program.

[249] Darren enjoys many independent play activities such as painting, colouring, mazes, word searches, puzzles and Lite-Brite. Ms. Russell noted that these are independent play activities.

[250] Mrs. Hewko testified in April, 2006 that Darren had a sight word vocabulary of about 400 words and a spelling list of well over 100 words. As Dr. Joschko pointed out, the average 8 year old has a sight vocabulary of 20,000 words.

[251] Darren's negative behaviours have decreased significantly, both in frequency and intensity from what they were after a month or two of an ineffective Kindergarten experience. A "pinch" is now no more than the touch of a single finger at the top of someone's hand.

[252] Mrs. Hewko testified that Darren is a lot more aware of his environment now and that he is very happy and compliant. He has recently been learning to set the table by himself. He loves to go hiking. He wants to interact with people. He is happy to be with his brother Bryce's friends on the trampoline, playing with Lego, following them around the house and takes enjoyment when company comes to the house. He goes with the family to watch Bryce's soccer games where he will also play with other children at the playground, even if he does not know the other children.

[253] Mrs. Hewko believes that Darren could go back to school in a normal class as long as he has an appropriate teaching assistant, that is, someone who is trained in his home program under the training and guidance of Ms. Russell and Theresa Tournemille, his home-based senior instructor. Ongoing training would also be important to ensure that the TA maintains instructional control of Darren.

[254] Ms. Russell is of the opinion that Darren needs to get back into the school environment because it will offer him important access to social interaction and friends. This opinion was universal among all experts who testified and his family.

LEGAL ANALYSIS

Appeal under Section 11 of the *School Act*

[255] Mrs. Hewko felt she had no other avenues to take but to appeal the District's decision to the Abbotsford School Board: "We thought that we were at the end of our rope".

[256] The Hewkos instructed counsel to send their appeal material to the Board office, which she did on October 6, 2003. The appeal was made pursuant to s. 11 of the ***School Act***.

[257] Prior to hearing the Hewko appeal, the Abbotsford School Board held two special "in camera" meetings at which the Hewko matter appeared on the agenda. Mr. Godden attended both those meetings. He testified that as one of the District's officers, he always attends the special "in camera" meetings. Mr. Godden confirmed that the Hewkos were not told of these meetings, nor could they have attended the meetings as they were "in camera", closed to the public.

[258] The Board met "in camera" on September 22, 2003 and considered Mrs. Hewko's correspondence from September 8 as well as Mr. Godden's letter of September 11, 2003 (the outcome of the appeal to Mr. Godden from the school-based decision).

[259] Mr. Godden provided written information to the Board at the meeting on September 22, 2003. The information dealt with “An Overview of the Autism Picture in Abbotsford”. Among other things, the document stressed, in bold letters, that: “The continuum of services within our district has allowed us to successfully meet the needs of our students with autism. These services will be strengthened as a result of our capability to offer ABA style supports for students who would benefit from it”. Mr. Godden did not give a copy to the Hewkos, nor tell them that he had provided the Board with the information.

[260] Ms. Schwass was apparently not asked to provide any written input with respect to the Hewko appeal, nor did she attend the hearing. The Board therefore did not have any direct evidence from Ms. Schwass when they considered the Hewko appeal.

[261] Ms. Harris, counsel to the Board, and Mr. Godden spoke by telephone for more than 20 minutes the day before the hearing. There is no evidence of what they discussed.

[262] The s. 11 appeal was heard on October 28, 2003. Mr. and Mrs. Hewko attended with their counsel, Ms. von Krosigk. Also in attendance were Mr. Godden, Ms. Clarke, Mr. Arden, the Superintendent, the School Board Trustees and counsel, Ms. Harris. No witnesses were sworn in and there was apparently no opportunity for cross-examination. Ms. von Krosigk requested that the proceedings be recorded, but this request was denied. She also requested that minutes be kept of the meeting but the response was that the Board does not keep minutes. The Hewkos

were told that they had 30 minutes to state their case and that they had no right to appeal the decision of the Board. The Hewkos were subsequently allowed to go over the 30 minute period.

[263] Ms. Harris, counsel for the Board, stayed with the Board during their deliberations and offered unspecified advice.

[264] On October 30, 2003, the School Board rendered a written decision in the following terms:

... that the staff recommendation be upheld.

... that the Board of School Trustees direct Assistant Superintendent, Mr. Kevin Godden, to facilitate the regular and frequent communication between the school-based team, the parents and the home-based team with regard to ongoing development and implementation of the Individual Education Plan for Darren Hewko

... that it is the Board's expectation that consultation will include reasonable access for the Autism Treatment Consultant to observe Darren in the classroom.

[265] Ms. von Krosigk wrote to the Board on November 27, 2003, informing them that Mr. and Mrs. Hewko had decided to make alternate arrangements for Darren and that they regretted this as they felt that Darren would be able to return to the school setting, provided he had an appropriately qualified aide.

[266] The Board held another special "in camera" meeting on December 11, 2003 at which the Hewko matter was also discussed. Again, the Hewkos were not told of this meeting, nor were they invited to attend. Mr. Godden could not recall if he attended that meeting.

[267] Despite the above information, Abbotsford submitted a “1701 form” to the Ministry of Education showing Darren as a student with autism in the District. Consequently the District received the regular student enrolment funding for him as well as the extra block funding available for students with autism. The funds have not been returned to the Ministry even though Darren did not attend school at all in the Abbotsford School District in 2003/2004 or since then.

[268] Both the defendant School Board and the defendant Province plead that the failure to bring a judicial review proceeding of the Board’s determination of the s. 11 appeal is a bar to this action. Further, the defendants plead that the causes of action pleaded by the plaintiffs could have been raised in the statutory appeal.

[269] The defendant District withdrew its reliance on the s. 11 appeal as a bar to this action as a result of the evidence relating to Mr. Godden’s involvement in “in camera” meetings and his telephone meeting with counsel for the Board.

[270] The Province continues to rely on that pleading. In my view, this case does not solely concern which educational programs a District must offer and at which schools. In the end, this case deals with whether the Province and the Abbotsford School District considered only Darren’s best interest in concluding what school and what program would be offered to him, and whether they did so in a manner that was fair and consistent with their statutory duties.

[271] The conduct of the appeal, particularly Mr. Godden’s role in having access to the Board and its counsel before the hearing, raised a reasonable apprehension of bias. Thus, even if the defendants were correct that this action is really only an

impermissible collateral attack on the s.11 appeal, which I find not to be the case, the reasonable apprehension of bias renders the hearing of no legal effect in these proceedings.

Statutory Duties of the School Board and the Ministry of Education

Statutory Framework and Policy pertaining to the Provision of Education and Special Education in British Columbia

[272] The **School Act** (the “**Act**”) allocates authority and responsibility among teachers, school boards, the Minister of Education, the Lieutenant-Governor in Council and parents. The purpose of the **Act**, is set out in the preamble:

Whereas it is the goal of a democratic society to ensure that all of its members receive an education that enables them to become personally fulfilled and publicly useful, thereby increasing the strength and contributions to the health and stability of that society;

And whereas the purpose of the British Columbia school system is to enable all learners to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society and a prosperous and sustainable economy;...

It is clear that “all learners” includes students with special needs.

[273] Access to an educational program is prescribed in s. 2(1) of the **Act**: a person is entitled to enrol in an educational program provided by the board of a school district if the person (a) is of school age, and (b) is resident in that school district.

[274] The provision of an educational program is governed by s. 75 (1) of the **Act**: a board must make available an educational program to all persons of school age who enrol in a school in the district. Section 82 of the **Act** stipulates that the board must provide, free of charge to every student of school age enrolled in an educational

program, instruction sufficient to meet the general requirements for graduation, instruction in an educational program after the student has met the general requirements for graduation and educational resource materials necessary to participate in the educational program.

[275] The comprehensive definition of an educational program in s. 75(1) and s. 1 does not appear to provide for anything less than an entitlement to an appropriate educational program. Given the definition of an “educational program” found in the **Act** it is foreseeable that a specialized, varied and dynamic program might be necessary in order for a particular student to meet the defined objectives.

[276] Section 1(1) of the **Act** defines "educational program" as an organized set of learning activities that, in the opinion of the board is designed to enable learners to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society and a prosperous and sustainable economy.

[277] Section 75(6) of the **Act** provides that the board may recognize an educational activity that is not provided by the board as being a part of a student's educational program. Section 75(4) permits a board to assign and reassign students to specific schools or educational programs.

[278] Section 17 of the **Act** provides that teachers' responsibilities include designing, supervising and assessing educational programs and instructing, assessing and evaluating individual students and groups of students and performing the duties set out in the **Regulations**. Teacher's responsibilities are subject to the

supervision and evaluation of the board. Section 75(7) provides that “[s]ubject to the regulations, a board...is responsible for evaluating all of the educational programs and services provided by the board...”.

[279] Section 11(2) of the **Act** provides that “[i]f a decision of an employee of a board significantly affects the education, health or safety of a student, the parent or the student may...appeal that decision to the board”. Section 11(6) provides that “[a] board may make any decision that it considers appropriate in respect of the matter that is appealed to it under this section, and the decision of the board is final.”

[280] Teachers' assistants can be employed by a board to assist teachers in carrying out their responsibilities and duties under the **Act** and regulations. They must work under the general supervision of a teacher principal, vice principal or director of instruction (s. 18 of the **Act**).

[281] The Jurisdiction of the Minister of Education is set out in s. 168 of the **Act**. The Minister may make orders for the purpose of carrying out any of the minister's powers, duties or functions and may make orders governing the provision of educational programs, determining the general requirements for graduation from an educational program, determining the general nature of educational programs and specifying educational program guides, preparing a process for the assessment of the effectiveness of educational programs, preparing a process for measuring individual student performance, governing educational resource materials in support of educational programs, establishing and causing to be operated Provincial

resource programs and Provincial schools in British Columbia, and providing in them specialized types of education.

[282] Relevant to the issues in this case, the Minister's jurisdiction to make orders as per s. 168 was exercised when the following orders were made:

- The Special Needs Students Order (Ministerial Order 150/89) states that school boards must ensure that a principal, vice principal or director of instruction offers to consult with a parent or a student with special needs regarding the placement of that student in an educational program. The order also states that school boards 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.
- The Individual Education Plan ("IEP") Order (Ministerial Order 683/95) states that school boards must ensure that an IEP is designed for a student with special needs and must ensure that the IEP is reviewed at least once each school year, and where necessary, it is revised, or cancelled, and school boards must offer the parent of the student, and where appropriate, the student, the opportunity to be consulted about the preparation of the IEP. School boards must also offer each student learning activities in accordance with the IEP designed for that student. (emphasis added)

[283] There is no mandatory provision in the **Act** that requires the Minister to create or impose any requirements or standards with respect to the IEPs' of special-needs children.

[284] Section 175 of the **School Act** permits the Lieutenant-Governor in Council to make regulations referred to in s. 41 of the **Interpretation Act**, R.S.B.C. 1996, c. 238. The plaintiffs say the Ministry could and should overrule a school board's decision, if in the Ministry's opinion, that decision does not meet the objectives of the

Act. However, I accept the Province's submission that the Lieutenant-Governor in Council could not enact a regulation empowering the Minister of Education to overrule a school board in relation to an IEP for an individual student because such a regulation would be inconsistent with s. 11 of the **School Act**. Section 11 gives the school board the final decision making power in such matters.

[285] Pursuant to s. 169 of the **Act**, the Minister must make a report annually on the state of education in British Columbia including the effectiveness of educational programs, and must from time to time issue a statement of education policy for British Columbia subject to approval by the Lieutenant Governor in Council.

[286] The power and capacity of school boards are defined in s. 85. Subject to the **Act** and the regulations, a board may: determine local policy for the effective and efficient operation of schools in the school district; subject to the orders of the minister, approve educational resource materials and other supplies and services for use by students; make rules respecting the establishment, operation, administration and management of schools operated by the board and educational programs provided by the board, and respecting any other matter under the jurisdiction of the board; subject to the orders of the minister, evaluate and recognize educational activities of an educational program undertaken by a student outside of the school; and develop and offer local programs for use in schools in the school district.

[287] Funding for the delivery and support of educational programs, including special education programs and services, is established and announced by the Minister of Education to the school boards (s. 106.2 of the **Act**). The Minister of

Finance must pay each of the school boards the operating grant and the debt service grant (s. 114 of the **Act**). Section 115 of the **Act** provides that the Minister of Finance may also pay a board a special grant or a grant for the operation of a provincial resource program.

[288] Support services for schools including health services, social services and other support services must be provided by the board in accordance with any orders made by the Minister (s. 88(1)) of the **Act**.³

[289] The Ministry of Education has within it a Special Education Branch (the “SEB”). The roles and responsibilities of the SEB are outlined in the Ministry’s Manual of Policies, Procedures and Guidelines (the “Ministry’s Manual”). The purpose of the SEB is to enable the equitable participation of students with special needs in the educational system in British Columbia.

[290] To achieve this purpose, the SEB has the following responsibilities:

- Set standards and develop the necessary policies, procedures and guidelines to implement provincial legislation and the financial administration related to funding of special education programs and services.
- Review and monitor special education programs and services for accountability to established standards, guidelines and levels of resource allocation.
- Co-ordinate efforts with other branches of the ministry to facilitate a consistent approach to the accommodation of students with special needs in the education system.
- Work with other ministries and provincial agencies to facilitate the improved delivery of non-educational support services to students, and in particular those covered by protocol agreements.
- Establish and maintain appropriate program evaluation procedures in special education.

- Foster the professional development of teachers, administrators, and support staff related to meeting the educational needs of exceptional children.
- Identify best practices in special education and provide advice, consultation and support to the field regarding these.
- Monitor program and technical trends and changes in special education in British Columbia and elsewhere, and provide leadership in the improvement of standards of practice.
- Monitor student enrolment trends in special education in British Columbia.
- Manage the development of and fiscal requirements for provincial resource programs and special education technology sites.
- Provide leadership in program development and resource selection activities to ensure that effective programs for children with special educational needs are designed and provided in a timely and cost-effective manner.
- Participate in long-term planning and priority setting for special education in British Columbia.

[291] Ms. Kennedy, the representative of the Ministry of Education called to testify at trial, was cross-examined at length about the Ministry's obligations and actions pursuant to the Ministry's policy objectives set out above.

[292] I found Ms. Kennedy to be an excellent witness. She was knowledgeable, straightforward and candid, particularly regarding the Ministry's attempts to be responsive to the needs of children with autism. The lobbying effort by FEAT and other persons and organizations with expertise with autism culminated in a submission from the Ministry of Children and Families in 2005 to the Ministry of Education. These submissions were put to Ms. Kennedy. They included education issues identified by the parents involved in the ***Auton/Anderson*** litigation thought to be of greatest concern, including:

- lack of expertise of trained aides and teachers in the area of autism;

- lack of commitment to integrated and coordinated approach between school and home environments, and
- lack of consistency between behavioural interventions programs being implemented in the school and at home.

[293] Ms. Kennedy agreed that the Ministry of Education had heard of such concerns “considerably before” receiving this information from the Ministry for Children and Families and that the Ministry had been aware that there were professionals, social workers, educators and parents who held similar views. By inference, particularly before 2005, the Ministry justifiably considered some of the views expressed by such lobby groups as controversial insofar as what they were proposing as the best solution to the acknowledged problems.

[294] Ms. Kennedy was asked whether any effort was undertaken by the Ministry of Education in response to these concerns. She responded:

A We have taken one first step towards bringing, aligning the definitions and the assessment practices of all the ministries for autism spectrum disorder together; that is the first step in trying to better integrate the programmes to meet kids’ needs. Starting July 1st there will be new guidelines for autism spectrum. So it’s a baby step towards, we hope, something that will be a big improvement in the future.

Q And in the meantime, for the Darren Hewkos in British Columbia, what has been done?

A Nothing.

Is ABA-IBI therapy as an educational tool novel and emergent?

[295] This issue was pleaded as a defence by the defendants early in the case management of this action. Those pleadings were abandoned. However, the plaintiffs urge this court to make a declaration that ABA-IBI therapy is not novel or

emergent, which is said to be consistent with findings in the **Wynberg/Deskin** trial decision and not disturbed by the Ontario Court of Appeal.

[296] The following discussion of that issue is *obiter* but is relevant to the discussion of the issues raised by the plaintiffs relating to alleged breaches of Darren Hewko's s. 15 **Charter** rights and the Province's statutory duties.

[297] Simply put, as pointed out by the Province, ABA services are available and provided within the British Columbia school system. There was and is no denial of such services to Darren Hewko. There is an issue as to how ABA-IBI services can and will be delivered. There is a further issue as to whether ABA services can and must be the only education services provided to a child with autism attending a public school. Assuming without deciding that ABA-IBI services were and are the only effective educational tool for furthering the educational goals of a child with autism because ABA-IBI methodology as an educational tool is a relatively recent educational development, the infrastructure in British Columbia is in its infancy. This is in large part because to deliver education services by means of ABA-IBI methodology requires lengthy and intensive training for the deliverers of such programs and even lengthier and more intensive training for the professionals to design such programs for delivery. Nevertheless, the evidence is clear that such educational programming is being developed in British Columbia and has been for at least the last five years.

[298] The issue of whether ABA-IBI is the only effective tool for delivery of educational services to children with autism in the public schools occupied a great

deal of court time. I can come to only one conclusion: There is a spirited debate among professionals with varying degrees of expertise on this issue. The evidence before the court was that from early diagnosis to about the age of six, ABA-IBI methodology is maximally effective in treating children with autism such that they can maximize their potential for communication and thus learning. ABA-IBI has proven itself effective in maintaining instructional control of children with autism. Instructional control is essential, of course, to enabling a child to learn in any environment. For a child with even moderate autism, instructional control means enabling the child to maintain focus on whatever subject is to be learned.

[299] Even the expert, Dr. Foxx, who could be said to be one of the foremost experts on and proponents of ABA-IBI as an education tool, opined that the median number of years for ABA-IBI treatment, if begun at the earliest time possible, is two years at 20-25 hours per week. The intensive one-on-one nature of the therapy dictates its limits. Dr. Foxx did not opine that more hours or more years might not be appropriate in some cases. What is inferentially clear, however, is that any child with autism who has received 20-25 hours per week of ABA-IBI for at least two years or more must utilize other methodology or learning experiences for the rest of the child's school years and beyond. Thus, it is no stretch to conclude that in the arsenal of learning tools for children with autism, there is room for more than one method for continued learning, if ABA-IBI or some form of ABA methodology is available and utilized while maximally effective.

[300] The plaintiffs ask the court to declare that ABA-IBI is not a novel and emergent therapy. It is not necessary for me to decide that in this case. As a matter

of *obiter*, however, I can say that, not only is it not necessary for me to make such a declaration in this case because ABA-IBI is allowed for and deemed appropriate, but that it is not so novel and emergent that its novelty is any basis for refusing to provide it where it can be effective.

Breach of Statutory Duty by the Province?

[301] The complaint against the Province is essentially that the funding and programming put in place to provide necessary therapy for children with autism so that they can access educational opportunities in the public school system is too little too late. The infrastructure gap is the result of wrongful inaction on the part of the Province.

[302] Further, the plaintiffs say that autism intervention funding now in place following the trial and Court of Appeal decisions in *Auton*, is too limited. The plaintiff points out that even in the Supreme Court of Canada's reasons for decision overturning the British Columbia Court of Appeal – the too little too late response to the need for autism intervention funding was noted (at para. 59):

The government's failing was to delay putting in place what was emerging in the late-1990s as the most, indeed the only known, effective therapy for autism, while continuing to fund increasingly discredited treatments.

[303] Thus, the plaintiffs say that the lack of funding and resources in place to ensure that persons engaged in special education programming for children with autism or ASD have the training to provide ABA-IBI programs as needed has continued. This is the basis for the claim of discrimination pursuant to s. 15 of the *Charter* and breach of statutory duty on the part of the Province.

[304] The plaintiffs say that, when one considers the evidence presented and the testimony heard, the responsibilities listed in the Ministry's manual do not quite mirror what the SEB actually accomplishes, certainly with respect to children with autism. However, the deficits pointed to by the plaintiffs are deficits flowing from policy not the statute.

[305] This then raises the question of whether a policy enunciated by a government is enforceable against that government and whether any remedy exists for a party claiming to be injured by a failure to adhere to the policy.

[306] The short answer is no, policies are distinguishable from statutory duties in that they do not create any rights enforceable at law. Courts have come up with a variety of ways of drawing the distinction.

Recourse for the Breach of a Statutory Duty

[307] The appropriate remedy for a breach of statutory duty would be for relief in the form of mandamus. Mandamus is a discretionary remedy and compels a delegate to fulfill statutory duties. The applicant must show that there resides in him the legal right to the performance of a legal duty imposed by statute upon the party against whom mandamus is sought. There is also a requirement that the statute impose a duty, the performance or non-performance of which is not a matter of discretion (***Re Ferguson and Commissioner for Federal Judicial Affairs (1982)*** 140 DLR (3d) 542 (F.T.D.).

Duty of Fairness in the Application of Policy

[308] In both ***Young v. Minister of Employment and Immigration*** [1987] 8 F.T.R. 218 (***Young***) and ***Rai v. Minister of Employment and Immigration***, [1986] 6 F.T.R. 109, (***Rai***), the court considered whether there were any grounds for review by way of *certiorari*. This would be the case if the applicant could show that, in the course of *applying* the policy, the Minister had breached a duty of fairness or failed to consider all aspects of the applicant's situation. That cause of action is not really applicable to the roles and responsibilities of the SEB as outlined in the Ministry's Manual as there was no decision made pursuant to the policy which could be reviewed. We are dealing simply with a policy that the Province has set out for itself to guide its own work in the provision of special education.

The Distinction between Acts/Regulations and Policies/Programmes

[309] In ***Young***, a refugee sought to compel the issuance of a Minister's permit which was being issued to certain foreign nationals pursuant to a policy adopted to deal with a backlog of refugee claims. The decision is relevant to the present case in that the Court drew a distinction between the ***Immigration Act*** and Regulations on the one hand and policies or programmes of the Ministry on the other. Policies and programmes were held not to create enforceable legal rights.

[310] In ***Rai***, the Minister had refused to adjust the applicant's status to that of permanent resident pursuant to the "Long Term Illegal Migrant Programme". Jerome, A.C.J. held that, as a matter of law, the distinction between a statute establishing legal rights and a policy must be borne in mind.

Section 2 of the Interpretation Act

[311] In **Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)**, [1989] 26 F.T.R. 245, affirmed [1989] F.C. 309 (FCA), the issue was whether the Minister could be required to comply with the Environmental Assessment and Review Process Guidelines Order, S.O.R./84-467 (the “EARP Guidelines Order”). The EARP Guidelines Order was formulated pursuant to subsection 6(2) of the **Environment Act**, R.S., c. 14 (2nd supp) s. 2.

[312] Cullen J. looked to the **Interpretation Act** to draw the distinction between Acts and Regulations that create enforceable rights on the one hand and policy or programmes on the other. He found that the order in question was an enactment or regulation as defined in s. 2 of the **Interpretation Act** and therefore was not a mere description of a policy or programme; it may create rights which may be enforceable by way of mandamus:

s. 2

“enactment” means an Act or regulation or any portion of an Act or regulation;...

“regulation” includes an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

- (a) in the execution of a power conferred by or under the authority of an Act, or
- (b) by or under the authority of the Governor in Council

Is the Policy of an Administrative or Legislative Nature?

[313] In **Friends of the Oldman River Society v. Canada (Minister of Transport)**, [1992] 1 S.C.R. 3 (“*Oldman River*”), the Court once again examined the

nature and enforceability of the EARP Guidelines Order. The Court held that the fact that the EARP Guidelines Order was authorized by statute is not determinative and that it is necessary to look at whether the EARP Guidelines Order is of an administrative or legislative nature. The Court states “there is little doubt that ordinarily a Minister has an implicit power to issue directives to implement the administration of a statute for which he is responsible, see, for example, *Maple Leaf Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2. It is also clear that a violation of such directives will only give rise to administrative rather than judicial sanction because they do not have the full force of law” [para 36].

[314] The following passage from **R. Dussault and L. Borgeat in Administrative Law** (2nd ed. 1985), vol. 1, at pp. 338-39 helps to elucidate the above principle:

When a government considers it necessary to regulate a situation through norms of behaviour, it may have a law passed or make a regulation itself, or act administratively by means of directives. In the first case, it is bound by the formalities surrounding the legislative or regulatory process; conversely, it knows that once these formalities have been observed, the new norms will come within a framework of "law" and that by virtue of the Rule of Law they will be applied by the courts. In the second case, that is, when it chooses to proceed by way of directives, whether or not they are authorized by legislation, it opts instead for a less formalized means based upon hierarchical authority, to which the courts do not have to ensure obedience. To confer upon a directive the force of a regulation is to exceed legislative intent. It is said that the Legislature does not speak without a purpose; its implicit wish to leave a situation outside the strict framework of "law" must be respected.

[315] Considering the plaintiffs' position in light of the above principles and case law, it is clear that relief in the nature of mandamus is not applicable. The plaintiffs are unable to show that there is a legal right to the performance of a legal duty imposed by statute upon the Province.

[316] It is evident that the Ministry's Manual is not an act or regulation but rather a policy, both on its face and when one considers the definition in s. 2 of the

Interpretation Act.

[317] It is also clear that, despite being authorized by statute, the Ministry's Manual is of an administrative rather than legislative nature. The Minister's power to make orders in s. 168 of the **Act** was not exercised when it enunciated the responsibilities of the SEB in the Ministry's Manual. The authority to enunciate those policies likely comes from the duty in s. 169(1) to issue a statement of education policy for British Columbia from time to time or from the implicit power a Minister has to issue directives to implement the administration of a statute for which he is responsible (***Oldman River***).

[318] It is clear that this is a situation in which a government considered it necessary to regulate a situation, not by passing a law or making a regulation in a legislative capacity but by acting in an administrative capacity by means of directives. It is fair to say that the intention here was to proceed by less formalized means, a means unenforceable by a court. It is also necessary to be clear that, on the evidence in this case, the Province is in the position of incompletely meeting the objectives of a policy as opposed to not implementing any of the objectives. As such, even if a "policy" could be said to be enforceable, it would not be on facts such as these.

[319] Thus, I find that no recourse exists for the plaintiffs with respect to any injury they may have suffered as a result of the Province not adhering to its own policy or

failing to implement its own policy rapidly or effectively enough to prevent what has happened to Darren Hewko.

BC Order in Council 1280/89

[320] In addition, the plaintiffs rely on B.C. Order-In-Council 1280/89 (Mandate for the School System) in their claim that the Province has breached its statutory duties.

[321] As stated above, s. 169(3) of the **School Act** states that: "Subject to the approval of the Lieutenant Governor in Council, the Minister must from time to time issue a statement of education policy for British Columbia". The Order-in-Council states: "The Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that the attached statement of education policy for British Columbia is approved".

[322] Whether the Order-in-Council is an order and thus a regulation is a non-issue. On its face, the Order-in-Council is not the Mandate itself but rather the mechanism that the Lieutenant Governor in Council uses to approve the policy.

[323] Thus, we are again dealing with policy not statutes, orders or regulations. This Court cannot compel enforcement of a policy, particularly not a policy in the nature of the "Mandate".

[324] In the result, there can be no finding that the Province has breached its statutory duties in this case.

Discrimination contrary to s. 15 of the *Charter of Rights and Freedoms*

[325] Considerable assistance is to be gained by having regard to the most recent case considering the applicability of s. 15 and s. 7 of the **Charter** to education policy in a Province as it affects children with autism: the Court of Appeal for Ontario in **Wynberg**, released July 7, 2006. The claim in **Wynberg** and its companion case **Deskin**, concerned the alleged failure of the Province of Ontario to provide an “appropriate” education for children with autism because it failed to extend Ontario’s autism therapy program “Intensive Early Intervention Program (the “IEIP”) to children age six and over.

[326] In its reasons for judgment the court sets out in brief the Ontario experience:

[5] The trial judge described in detail the evolution of the IEIP. Prior to 1998, there were no publicly funded intensive services in Ontario for preschool children with autism. This began to change in 1998, in significant measure because of the efforts of Brenda Deskin, the mother of Michael Deskin. Michael had been diagnosed with autistic disorder in January of that year, at the age of thirty-five months. She brought this issue to the attention of the senior officials in the provincial Ministry of Community and Social Services (MCSS), the Ministry of Education and the Ministry of Health, and supplied them with comprehensive and persuasive documentation.

[6] MCSS responded by beginning work on what would become the IEIP. It took the lead within the provincial government to develop a framework for the program and secure the necessary funding for it. By September 2000, MCSS had created, revised and released the IEIP Guidelines describing the program and setting out the criteria for it, and in that month, autistic children age two to five began to receive services through the IEIP in those regions of Ontario where service providers were ready to do so.

[7] In brief measure, the Guidelines describe the IEIP as follows: it is to provide intensive behavioural intervention services for autistic children to begin as early as possible after early identification or diagnosis. It is to be intensive and delivered as a direct service, which, to be effective, ranges from twenty to forty hours per week, typically

lasting for one to two years. It is to be delivered by well-trained staff who are monitored and evaluated by highly trained experts. It is expected that systematic behavioural teaching methods will be used. One-to-one structured programming, which is usual at the outset, is to be used as appropriate. Other systematic methods are also to be used when appropriate for the child's skill level or stage of progress. The program will occur in a variety of settings and involve parents and caregivers directly in the child's treatment.

[8] However, as the IEIP unfolded, it became apparent that the need was greater than the capacity of the program. By October 2002, the shortage of professionals and therapists meant that the number of children turning six and becoming ineligible without ever having received this service exceeded the number being served by the program.

[9] It was also apparent by then that the education system was not responding to the special needs of these children when they entered school, through a special education program consistent with the Guidelines. The legislative provision in issue here is s. 8(3) of the *Education Act*, R.S.O. 1990, c. E.2, which obliges the Minister of Education to ensure that all "exceptional" pupils in Ontario (including those with autism) have available to them "appropriate" special education programs and services without payment of fees.

[327] It is worth noting that this case is significantly different from the Ontario case in that, in fact, British Columbia purports to provide resources and funding for ABA to be made available in schools and has been funding early intervention without age restriction for those with a diagnosis of autism.

[328] Similar to the Ontario factual situation however, the infrastructure has not kept pace with the policy objectives and thus children eligible for ABA-IBI therapy in schools do not in fact, reliably receive it.

Equality Law – Legal Principles

[329] Quoting again from the *Wynberg/Deskin* decision, I set out the relevant legal principles to be applied in analyzing the s. 15 *Charter* claim in this case:

[14] Section 15(1) [of the *Charter*] expresses the constitutional guarantee of equality in clarion language that by now is familiar:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[15] The fundamental purpose of the guarantee is to protect against the violation of essential human dignity that may arise through disadvantage, stereotyping, or political or social prejudice. It seeks to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable, and equally deserving of concern, respect, and consideration. This is the expression of the concept of equality articulated in the seminal case of *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 51.

[16] At para. 53, *Law* describes the concept of human dignity:

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.

[17] The jurisprudence that begins with *Law* also makes clear that the inquiry mandated by s. 15(1) cannot be conducted as if it were the rigid application of a mathematical formula. Rather, it entails consideration of both the full context in which the claim for equality arises and the circumstances of the claimants.

[18] In *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357, the Supreme Court of Canada underlines that this contextual analysis is to proceed on a comparative

basis, comparing the equality seeker with others who are similarly situated. The choice of the comparator group to whom the claimant should be compared must be carefully done. An assertion of the right to be treated equally must necessarily entail a comparison with the treatment accorded to others in the same circumstances. Writing for the Court, Binnie J. describes the centrality of the comparative approach at para. 1:

A person asking for equal treatment necessarily does so by reference to other people with whom he or she can legitimately invite comparison. ... A s. 15(1) claim will likely fail unless it can be demonstrated that the comparison, thus invited, is to a “comparator group” with whom the claimant shares the characteristics relevant to qualification for the benefit or burden in question apart from the personal characteristic that is said to be the ground of the wrongful discrimination [emphasis in original].

[19] Binnie J. also makes clear that the claimant makes the initial choice of the person or group to whom he or she wishes to be compared. The correctness of the choice, however, is a question for the court to determine. He explains the criteria for identifying the appropriate comparator group at para. 23.

The appropriate comparator group is the one which mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the *Charter* or omits a personal characteristic in a way that is offensive to the *Charter*.

[20] The proper identification of the comparator group permits the court to proceed, on a comparative basis, to the three broad inquiries required to analyze a claim of discrimination. *Law* describes them this way: first, is the claimant accorded differential treatment under the law; second, is that treatment based on one of the prohibited grounds listed in s. 15(1) or a ground analogous to them; and third, does the differential treatment discriminate in a substantive sense.

[21] It is up to the claimant to demonstrate an affirmative answer to each of these three questions. In *Law*, the court described four contextual factors to which a claimant may be able to turn to demonstrate discrimination: (i) pre-existing disadvantage, stereotyping, prejudice or vulnerability; (ii) the correspondence, or lack thereof, between the grounds on which the claim is based and the actual needs, capacity or circumstances of the claimant or those he or she is properly compared to; (iii) the ameliorative purpose or effect of the impugned law, program or activity upon a more disadvantaged person

or group in society; and (iv) the nature and scope of the interest affected by the impugned governmental activity.

[22] In *Hodge*, at para. 17, the Court emphasizes that each step in this inquiry proceeds on the basis of a comparison between the claimant and the appropriate comparator group.

[23] At paras. 59-60, *Law* also establishes that the inquiry must be undertaken from the perspective of a reasonable person in circumstances similar to those of the claimant. Ultimately, the question is whether, given those circumstances, the impugned state action demeans the human dignity of the claimant. It is this profound and fundamental value that the equality guaranteed by s. 15(1) protects.

[330] What is key here and is illuminated by the facts of this case is that the **School Act** and the s. 11 appeal process reserve ultimate decision making about what and how a child learns to “education experts” and ultimately the School Board who in turn rely on certified teachers and consultants. This case arises because many if not most children with autism require (in order to access an education in the public system) specialized teaching programs. The evidence is overwhelming that all effective teaching programs for children with autism are based on some form of ABA methodology.

[331] British Columbia has acknowledged the need for ABA and ABA-IBI programming for children with autism. However, training, and certification programs for teachers and teaching assistants in the area of ABA and ABA-IBI programming is still in its infancy. At the time Darren Hewko began Kindergarten in 2002, there were no specific training programs for ABA-IBI. The first such training program began in the summer of 2003. In 2006 it appears a certification program for consultant therapists has been designed and will be implemented.

[332] In other words, there is a serious gap in the “expertise” of educators in the area of effective learning systems for children with autism.

[333] The court heard no evidence that ABA-IBI is not, at this time, the most tested and effective learning system for many children with autism. However, how much ABA-IBI is effective and how exclusive the ABA-IBI programming must be in a school setting is not the subject of any consensus of experts.

[334] In this case, Darren Hewko’s ABA-IBI home program when administered by someone with mastery of it, established instructional control of him. No other methodology was able to come close. It is important to note that the “Autism Team” made suggestions and recommendations for learning methods based on ABA principles. However, different methods were used than his home-based program. As a result, instructional control of Darren was lost and never recovered in the school setting.

[335] Because there was no consultation with the home program consultant nor with Darren’s parents, it is unknown whether, the “Autism Team” could have fashioned a program for Darren that established instructional control in the school setting.

[336] Further, and perhaps most importantly, the recommendations made by the Autism Team utilizing ABA principles were ineffectively carried out by both TA’s assigned to Darren because neither had ABA or ABA-IBI training. Learning “on the job” is obviously no substitute for having basic training.

[337] What is required to provide access to an education for Darren Hewko is acknowledged and understood. Strict adherence to an ABA based learning system and the availability of ABA-IBI programming and teaching assistants trained to carry it out. It is clear that there is an infrastructure gap. There are too few teachers or teaching assistants or even certified consultants (for designing learning programs) with sufficient training to either properly evaluate home programs, or to deliver such programming in the school system such that the scheme of the **School Act** failed this child with autism.

[338] However, the facts of this case do not even approach the threshold of discrimination against Darren Hewko on the basis of physical disability or any other criterion. No matter what comparator group one looks at, there is no basis upon which the court can say that in similar circumstances other students attempting access to an education have been treated differently.

[339] For example, considering children with sight or hearing impairments (comparator groups relied upon by the plaintiffs), there was no evidence demonstrating, or allowing an inference, that special needs assistance in the form of trained TA's or resource materials were identified and made available as soon as these children started to be included in regular classrooms. It would not be surprising to find that lengthy debates were held as to what form of programming would best meet the needs of such children. Nor was there any evidence that there was no time lag between the acceptance by a consensus of experts on the best methodology or methodologies for treatment and the availability of persons qualified to administer the therapy to most, if not all, children.

[340] This court cannot find a **Charter** breach by the government nor the School Board for the fact, of what for brevity's sake I will call an infrastructure gap. That gap has been allowed to develop through the choice of priorities and some controversy on the optimal learning programs for children with autism. This has meant that children with a diagnosis of autism or ASD, including Darren Hewko, have not had sufficiently trained teachers or teaching assistants such that they can effectively access an education in a timely fashion.

Section 7 of the Charter

[341] Plaintiffs' counsel did not press the s. 7 **Charter** argument. I would rely on the reasoning in the **Wynberg/Deskin** decision, paras. 212-232, in dismissing this claim in this case.

Statutory Duties of the District

Duty to Consult

[342] The relevant statutory provisions with respect to a School District's obligation to consult with parents and students are found in the **School Act**, and in particular, ss. 4 and 7.

[343] Section 4 of the **School Act** provides that: "A student is entitled to consult with a teacher, principal, vice principal or director of instruction with regard to that student's educational program".

[344] Section 7(1) of the **Act** provides that:

A parent of a student of school age attending a school is entitled

- (a) to be informed, in accordance with the orders of the minister, of the student's attendance, behaviour and progress in school,
- (b) on request, to the school plan for the school and the accountability contract of the school district, and
- (c) to belong to a parent's advisory council established under section 8.

[345] Section 7(2) affords the parent the right to consult with school staff regarding their child's educational program:

A parent of a student of school age attending a school may, and at the request of a teacher, principal, vice principal or director of instruction must, consult with the teacher, principal, vice principal or director of instruction with respect to the student's education.

[346] The **Individual Education Plan Order** and the Mandate for the School System adopted by B.C. Order-in-Council 1280 (August 30, 1989), also require that the parents of special needs students be afforded the opportunity to be consulted about the nature of their children's education. Pursuant to s. 4 of the **Individual Education Plan Order**, school boards are required to consult with the parents of special-needs students about the content of the individual education plan for each student. It provides:

Where a board is required to provide an IEP for a student under this order, the board...must offer a parent of the student...the opportunity to be consulted about the preparation of the IEP.

[347] The Mandate for the School System reiterates that parents have the right and responsibility to participate in the process of determining the educational goals, policies and services provided for their children. Teachers have the responsibility to ensure that each student is provided with quality instruction, permitted to participate

in all normal school activities and to monitor the behaviour and progress of each learner in accordance with provincial and local policies.

*Legal Parameters of the Duty to Consult under the **School Act** and **Regulations***

[348] I have been unable to find any cases in British Columbia or in Canada which deal directly with the duty of School Districts to consult parents with regard to IEPs or otherwise.

[349] The recent developments in aboriginal law cases on the duty to consult are helpful but one must be cautious in applying such recently developed law and guidelines to ensure that the very real differences between the two areas of law are acknowledged.

[350] The legal parameters of the duty to consult in aboriginal law cases have become reasonably well-defined in recent years. They were described by Finch J.A. (as he then was) in **Halfway River First Nation v. British Columbia** (1999), 64 B.C.L.R. (3d) 206, 1999 B.C.C.A. 470, at paras. 160-61, in the context of the aboriginal right to consultation:

The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they will have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated in the proposed plan of action...

There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions...
[emphasis added]

[351] In *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R.

511, the court recognized that the duty to consult includes a process of

accommodation. This was defined as follows at para. 49:

The accommodation that may result from pre-proof consultation is just this – seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other’s concerns and move to address them.

[352] When considering the case law on consultation in the aboriginal context one

must bear in mind that the government’s duty to consult with Aboriginal peoples and

accommodate their interests is grounded in the honour of the Crown (*Haida* at para.

16). The historical significance of the relationship between the Crown and Aboriginal

peoples is an important basis for the duty to consult in this context. For example at

para. 17 of *Haida* the court stated:

The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably.

[353] In this context, the court defined the duty to consult and accommodate as

being “part of a process of fair dealing and reconciliation that begins with the

assertion of sovereignty and continues beyond formal claims resolution” (para. 32).

The duty arises where the Crown has knowledge, real or constructive, of the

potential existence of the Aboriginal right or title and contemplates conduct that

might adversely affect it (para. 35). The court noted that the scope of the duty to

consult and accommodate will vary according to the circumstances and will

generally be proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title and to the seriousness of the potentially adverse effect upon the right or title claimed.

[354] In the education context, where the duty to consult is one based on statute and exists between parents and a school board, the historical and policy considerations that inform the source and scope of the duty to consult in the aboriginal context do not come into play. However, where the interests of a child are at issue and where it is adults with unique perspectives on a child's needs who are empowered to make decisions on behalf of children, there are considerations to support the existence of a similarly defined right to consultation. For example, the School Board submitted the practical importance of consultation in the autism context as illustrated by the evidence of Dr. Foxx:

...the program will not work unless everybody signs on to it. And the reason they sign on to it is because it's a program that makes absolute sense to all the parties. It has to be – it has to be designed as a win-win for everyone so that all the parties understand.

[355] The parties made submissions on whether the relationship between the District and the child is a fiduciary one. In my view, the relationship bears all the hallmarks of a fiduciary relationship. However, because the relationship is defined by statute and the duty to consult is a statutory one, it is unnecessary to determine or make a finding that the relationship is a fiduciary one. It is a relevant consideration in interpreting the duty to consult in this context that at the very least the relationship is fiduciary-like.

[356] In *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, although the court was not charged with determining the scope of a statutory duty to consult, its comments regarding the decision-making process that must be employed when determining the interests and needs of a special-needs child are informative. In that case, the court held that the wishes of the disabled child's parents that she attend an integrated classroom did not make the school board's placement of the child in a segregated setting discriminatory. The court held that the school board had carefully reviewed the needs of the child and determined that she would be better served outside the classroom. The Court considered the need for consultation in the *Charter* context at para. 77:

We cannot forget, however, that for a child who is young or unable to communicate his or her needs or wishes, equality rights are being exercised on his or her behalf, usually by the child's parents. Moreover, the requirements for respecting these rights in this setting are decided by adults who have authority over this child. For this reason, the decision-making body must further ensure that its determination of the appropriate accommodation for an exceptional child be from a subjective, child-centred perspective, one which attempts to make equality meaningful from the child's point of view as opposed to that of the adults in his or her life. As a means of achieving this aim, it must also determine that the form of accommodation chosen is in the child's best interests. A decision-making body must determine whether the integrated setting can be adapted to meet the special needs of an exceptional child. Where this is not possible, that is, where aspects of the integrated setting which cannot reasonably be changed interfere with meeting the child's special needs, the principle of accommodation will require a special education placement outside of this setting.
[emphasis added]

[357] The Court also made it clear that the parent's wishes are not determinative and that the parent's view of their child's best interests do not dispose entirely of the question (para. 79).

[358] The plaintiffs cited an American case where the features of parents' meaningful participation in the education decisions regarding their disabled child were considered: ***Maureen Deal, Phillip Deal, parents, on behalf of Zachary Deal v. Hamilton County Board of Education***, The United States Court of Appeal for the 6th Circuit, No. 03-5396, December 16, 2004. In that case, the Court of Appeal found that the district court had erred in assuming that merely because the plaintiffs were present and spoke at the various IEP meetings that they were afforded an adequate opportunity to participate. Participation was held to be more than mere form; it had to be meaningful. School officials had to be willing to listen and parents had to have open minds. The court found that despite protestations by the plaintiffs, the School System never treated a one-on-one ABA program as a viable option. The court found that where there was no way anything the plaintiff said, or any data they produced, could have changed the School System's determination of what were appropriate services, their participation was no more than after the fact involvement.

Breach of the School District's Statutory Duties?

Consultation

[359] The Abbotsford School District's Mission Statement read as follows:

The mission of School District No. 34 (Abbotsford), in partnership with parents and the community, is to awaken and nurture in each of its students, a drive for life-long learning and excellence through the provision of relevant educational programs which ensure competence, creativity, self esteem, integrity, and social responsibility.
[emphasis added]

[360] The **Act** does not directly set out a legal presumption of integration in a regular classroom. In the Ministry of Education's "Special Education Service: A

Manual of Policies, Procedures and Guidelines”, it states that the principle of inclusion is adopted in British Columbia and that integration is one way to achieve inclusion. It also states that the goal of educating students with special needs in the regular classroom “does not preclude the appropriate use of resource rooms, self-contained classes, community-based training or other specialized settings.”

Evidence of the inappropriateness of a ‘regular’ placement includes “frequent and significant disruption of the learning environment despite appropriate classroom interventions, or the probability of physical harm to the student or others”. These policies are relevant to a consideration of the way in which the School Board must discharge the duties imposed upon it by the **School Act**. However, I adopt the reasoning in **Antonsen v. Vancouver School District No. 39**, [1989] B.C.J. No. 1387 (Q.L.), that they do not establish directions to, or impose limits on, the discretion given to a Board.

[361] It is possible to summarize some very general principles which inform or provide content to the duty to consult from the above cases.

1. Before any decision is made regarding the placement of a child within the school system and the persons who will have the responsibility to implement an IEP, the parents must be consulted.
2. The depth of consultation and the concomitant obligations for the parties to accommodate the requirements of the other will vary with the known need of a child’s requirement for a modified curriculum.
3. All necessary information in regard to either parties’ position on a proper placement and IEP must be provided in a timely way so that each will have an opportunity to express their interests and concerns and sufficient time to ensure that their representations are seriously considered and wherever possible demonstrably integrated into the proposed plan.

4. Each party to consultation has an obligation to provide timely information and an obligation to make whatever accommodations are necessary to effect an educational program which is in the best interests of the child.
5. In coming up with a placement and an IEP for a child with autism or Autism Spectrum Disorder, Dr. Foxx's opinion as set out below should be regarded as the most significant underlying principle for meaningful consultation "the program will not work unless everybody sign on to it. And the reason they sign on to it is because it's a program that makes absolute sense to all parties. It has to be designed as a win-win for everyone so that all the parties understand."
6. The parents of a special needs child do not have a veto over placement or the IEP. Meaningful consultation does not require agreement by either side – it does require that the school district maintain the right to decide after meaningful consultation.
7. The bottom-line requirement for each side in a meaningful consultation is to be able to demonstrate that the proposal put forward can produce instructional control of the child.

[362] The School Board submits that, because the **Act** and the Manual of Special Education make the classroom teacher the pre-eminent figure in the classroom, the introduction of a TA from the home team, who would be present to implement the home program in the classroom, would present difficulties for the teacher. They submit that questions would arise such as, who is in charge in the classroom, who is accountable, who is legally liable for any negligence or fault of the TA, and what is the significance of the TA interacting with other students. Some, if not all of these issues, are relevant considerations in coming to a resolution of the parties' positions on how to achieve what is in Darren's best interest with respect to educational opportunities in the Abbotsford School District. However, none of them, in my view, is a barrier to the integration of Darren's home program into a classroom. There was

some evidence that other school districts found ways to accommodate home programs by 2002/2003.

[363] In this case, two primary factors resulted in Darren Hewko being unable to attend school and access an education. First, in 2002-2003 there were too few teachers or teaching assistants with training in ABA-IBI. Apparently, there were no teaching assistants available with this training in the Abbotsford School District. This was the result of the infrastructure gap identified earlier in these reasons.

[364] Second, the mind set of the District personnel, particularly Mr. Godden and Ms. Clarke was to resist any accommodation of Darren Hewko's needs if that accommodation involved "training" of District employees in Darren's home program. Further compounding the problem was the policy stated by both Mr. Godden and Ms. Clarke, that no home-based therapist could become Darren's TA because they would not be employees of the District. However, it was made clear to the Hewkos that no home-based therapist could be hired as a TA in the District unless at the time of their application there was no other TA available with seniority.

[365] I find that given what the District knew about the failure to get or maintain instructional control of Darren by either of the TAs provided by the District, and the demonstrated instructional control by the home-based therapist when in the classroom as well as at home, the District should have considered whether an accommodation could be made to hire one of Darren's home-based therapists so that the District would have the necessary control of the classroom pursuant to the **Act**.

[366] In this case the District, through McMillan Elementary and then Mountain Elementary school personnel, had had numerous visits to the Hewko's home and "observed" his home program. Darren's home program consultant had provided several lengthy reports to the school on her program and her credentials to design such a program. She attended IEP meetings and upon being asked, attended at the McMillan School, was interviewed by the principal and observed Darren in the classroom. In other words, the District, through the Schools, had ample opportunity to evaluate the home program and the personnel involved with it, such that if there were any concerns about its legitimacy they could have been raised.

[367] In the result, no questions or concerns by way of feedback were raised about Ms. Russell's credentials, the home-based program or anything else. Instead, the District, through all personnel, apparently decided they needed to resist any inclusion of the home-based program and therapist for reasons relating to a fear of potential litigation by the Hewkos.

[368] In my view, such an approach by the District was an abdication of its responsibility to provide Darren Hewko reasonable access to an education.

[369] Reasonable accommodation is an integral part of the duty to consult. Reasonable accommodation in this case involves providing the best available teaching staff for Darren Hewko in the school. In Darren's case, as in that of all children, special needs or not, the best teaching staff are persons who can demonstrate instructional control of him. Any consultation with Darren's parents

must include an accommodation of his home-based program –at least until instructional control is gained and maintained of him in the school setting.

[370] While the court is in no position to know what constitutes fulfillment of the District’s duty to consult and accommodate the Hewkos, I find what does not. The duty to consult and accommodate is not fulfilled by assigning Darren Hewko to a resource room (or classroom) with teaching staff who have limited experience using ABA-IBI methodology for teaching and are allowed by the school to “visit” and “observe” Darren’s home program for two weeks for an hour a day.

[371] I find that the school board failed to discharge its consultation obligation by failing “...to ensure that [the plaintiffs’] representations were seriously considered and, wherever reasonably possible, demonstrably integrated into the proposed plan of action...”. Most importantly, the District through its proposals and by failing to seriously accommodate the Hewkos home-based program, failed to demonstrate it could produce instructional control of Darren.

[372] Thus, I order that:

1. the School District meet with the Hewkos and their consultant and carry out both the procedural and the substantive aspects of its consultation obligations; and,
2. this Court retain a supervisory jurisdiction over the consultation.

Educational Malpractice or Negligence Claim

[373] The plaintiffs’ pleadings do not allege either negligence or educational malpractice. Nevertheless, I have decided to consider the merit of such a claim

because the facts, if found as pleaded, could go some way in supporting a tortious cause of action.

[374] Two negligence/educational malpractice claims are possible against the School District: one with respect to Darren Hewko and another with respect to his mother, Shirley Hewko.

[375] The findings of fact I have made do not support a cause of action in negligence/educational malpractice in either case.

[376] In order to find that an action is maintainable with respect to Darren, I would need to find that the School District, in failing to accommodate the need for Darren's TA to be trained in his home program, fell below the standard of care of a reasonable school district. The action must fail because no evidence was presented as to what that standard of care was.

[377] Furthermore, I would also have to find that any damage Darren suffered flowed from a failure of the School District to meet the standard of care. There is no evidence that the failure to provide a home-based training aide has caused him any significant damage. Since he has been out of school, Darren has lost the opportunity to engage with his peers in a classroom or resource room. However, there is no compelling evidence that the loss, in terms of gains in social skills, has not or could not have been mitigated by activities outside the classroom.

[378] In order to find that an action is maintainable with respect to Shirley Hewko, I would need to find that the School District, in failing to meaningfully consult with the

Hewkos, fell below the standard of care of a reasonable school district. Again, no evidence was presented as to what that standard of care was.

[379] There is no doubt that the Hewkos have incurred additional expenses to provide Darren's home program for the last three years. The hours provided by his home program during which Darren would have been in school would be compensable in damages, if in fact a tortious cause of action were established.

SUMMARY

[380] In summary, I find a negligence/educational malpractice claim cannot be maintained against the School District.

[381] I find that Abbotsford School District breached its statutory duty to meaningfully consult with the Hewkos about Darren Hewko's education placement and program. Thus, I order that the Abbotsford School District meet with and carry out:

1. both the procedural and the substantive aspects of its consultation obligations; and,
2. this Court will retain a supervisory jurisdiction to ensure that government does so.

[382] The action against the Province is dismissed.

The Honourable Madam Justice Koenigsberg