

***Kimberly Churchill and Todd Churchill, on behalf of Carter Churchill v. Newfoundland and Labrador English School District et. al.***  
(Complaint File # 10171)

**IN THE MATTER OF a complaint  
pursuant to Section 11 of the  
*Human Rights Act, 2010*  
S.N.L. 2010 c. H-13.1**

**BETWEEN: KIMBERLY CHURCHILL AND TODD CHURCHILL on behalf of CARTER CHURCHILL**

**COMPLAINANT**

**AND: NEWFOUNDLAND AND LABRADOR ENGLISH SCHOOL DISTRICT**

**RESPONDENT**

**AND: HUMAN RIGHTS COMMISSION OF NEWFOUNDLAND AND LABRADOR**

**COMMISSION**

**BOARD OF INQUIRY DECISION**

**ADJUDICATOR:** C. Brodie Gallant  
(Chief Adjudicator)

**DECISION DATE:** March 1, 2023

**HEARING DATES:** August 29, 2022 – September 2, 2022  
September 6, 2022 – September 9, 2022

<b>COUNSEL:</b>	Kyle R. Rees	appearing on behalf of the Complainant
	Raylene Mackey	appearing on behalf of the Complainant
	Stephen F. Penney	appearing on behalf of the Respondent
	Sarah M. Byrne	appearing on behalf of the Respondent
	Bernadette A Cole Gendron	appearing on behalf of the Respondent
	Carey S. Majid, K.C.	appearing on behalf of the Commission

## **INTRODUCTION**

[1] On May 23, 2017, Kimberly Churchill and Todd Churchill (“**Churchills**”) commenced these proceedings on behalf of their son Carter Churchill (“**Carter**”). Their complaint alleges that the Newfoundland and Labrador English School District (“**District**”) failed to implement appropriate accommodations so that Carter could access the education services which the District offers to the public.

[2] I note that when the complaint was initially filed, the Department of Education and Early Childhood Development (“**Department**”) was also named as a respondent. The complaint against the Department was subsequently struck out and dismissed, leaving only the complaint against the District to be proceeded to a hearing for a determination of its merit (*Kimberly Churchill and Todd Churchill on behalf of Carter Churchill v. Department of Education and Early Childhood Development et.al.*, 2022 CanLII 6294 (NL HRC)).

[3] Over a number months spanning 2018-2019, the Churchills, the District, and the Department participated in a mediation process facilitated by the Human Rights Commission. Formal replies to the complaint were not filed by either respondent until the mediation process concluded.

[4] On November 22, 2019, the District, filed its Reply to the complaint. The District acknowledges that under the *Schools Act, 1997*, SNL 1997, c S-12.2, the District is responsible for the administration of English language primary, elementary, and secondary education in the province. The District denies that it violated the *Human Rights Act, 2010*, SNL 2019 c. H-13.1 (“**Act**”) or discriminated against Carter, and asserts that Carter was properly accommodated.

[5] On January 10, 2020, the Churchills filed a Rebuttal.

[6] On August 6, 2021, the complaint was referred to this Board of Inquiry for adjudication.

[7] On August 18, 2021, the Commission Record was filed with the Board of Inquiry. The Record in this case was expansive and comprised of a multi-volume set containing the pleadings, document disclosure exchanged between the parties, some preliminary written submissions, and even settlement proposals.

[8] From October 2021 – August 2022, the parties participated in numerous pre-hearing conferences overseen by the Board of Inquiry. Additional documents were added to the Record during this case management process. The parties confirmed their consent the Record being entered into evidence for the consideration of the Board of Inquiry. Settlement privilege was waived with respect to those documents to which it may have attached. Ultimately, timelines

were set for the filing written legal briefs and affidavits in advance of an in-person hearing. Affidavits were produced for most of the 26 lay-witnesses, and written reports were produced by the 2 expert witnesses. The parties were able to agree upon a schedule for the hearing which allowed full opportunity to cross examine each of the 28 witnesses.

[9] In response to requests from members of the public, and in consultation with the parties, the Human Rights Commission was able to make arrangements to secure a large venue for the hearing allowing for a public gallery. Real-time ASL interpretation by a team of skilled ASL interpreters was provided for those attending in person and the proceedings were live-streamed online with ASL interpretation and closed captioning.

[10] The complaint proceeded to a hearing spanning 9 days from August 29, 2022 – September 9, 2022. The following witnesses testified:

- (1) Kimberly Churchill
- (2) Todd Churchill
- (3) Colleen Moyst
- (4) Cathy Lawlor
- (5) Shane Porter
- (6) Aubrey Dawe
- (7) Tina Halleran
- (8) Sheila MacDonald
- (9) Joanne Van Geest
- (10) Gillian Lahoda
- (11) Line Daly
- (12) Bob Gardiner
- (13) Tammy Vaters
- (14) Bonnie Woodland
- (15) Elizabeth Churchill
- (16) Kimberly Lawlor
- (17) Lucy Warren
- (18) Michelle Taylor
- (19) Goronwy Price
- (20) Paulette Jackman
- (21) Georgina Lake
- (22) Alma McNiven
- (23) Darlene Fewer Jackson
- (24) Tony Stack
- (25) Ed Walsh
- (26) Bernie Ottenheimer

(27) Dr. Kristin Snoddon (Complainant's Expert in Deaf Education)

(28) Dr. James MacDougall (District's Expert in Deaf Education)

[11] Following the conclusion of the hearing, the parties filed post-hearing briefs.

## **TERMINOLOGY**

[12] This complaint progressed toward a hearing through an intensive case management process overseen by the Board of Inquiry. Multiple pre-hearing conferences were convened. The focus of this process was to address issues of disclosure, procedure, and the appropriate format of the hearing necessary to facilitate a fair and efficient adjudication of the merits of the case.

[13] However, during the case management process, the Churchills also raised concerns regarding the use of terminology preferred by members of the d/Deaf and hard of hearing community and Deaf culture. The Churchills, the District, and representatives of the Commission were all sensitive to the issue. The parties proposed that the Commission arrange an information session and identified Gary Malkowski as an individual with the necessary background and expertise to facilitate a presentation on d/Deaf culture and currently preferred terminology. The parties acknowledged that this presentation would not form part of the hearing and the evidence. The information session occurred in August 2023.

[14] Having said that, I take the opportunity to acknowledge a portion of what was presented with respect to preferred terminology. For the reader of this decision the source is the Canadian Association of the Deaf:

### **deaf:**

A medical/audiological term referring to those people who have little or no functional hearing (deaf, Deaf, and deafened). May also be used as a collective noun ("the deaf" or "small-d deaf") to refer to people who are medically deaf but who do not necessarily identify with the Deaf community. In addition, children who are deaf are usually referred to as "deaf" because they may not yet have been socialized into either the Deaf or the non-Deaf culture. If they use Sign as their first language, they are referred to as "Deaf".

### **("big-D") Deaf:**

A sociological term referring to those individuals who are medically deaf or hard of hearing who identify with and participate in the culture, society, and language of Deaf people, which is based on Sign language. Their preferred mode of communication is Sign.

**D/deaf:**

Used as a collective noun to refer to both those “Deaf” people who identify with the Deaf culture and those “deaf” people who do not.

**hard of hearing:**

A person whose hearing loss ranges from mild to profound and whose usual means of communication is speech. It is both a medical and a sociological term.

**hearing impaired:**

This term is not acceptable in referring to people with a hearing loss. “Hearing impairment” is a medical condition; it is not a collective noun for people who have varying degrees of hearing loss. It also fails to recognize the differences between the Deaf and the hard of hearing communities.<sup>1</sup>

[15] The use of preferred terminology can present challenges but the goal is respect for the individual. Language preferences evolve and change over time. Terminology that was once considered respectful may over time be perceived as offensive. Another challenge in this case occurs because terminology was not always used with consistency within some written submissions. For example in many instances the term “d/Deaf” was preferred whereas the Canadian Association of the Deaf would appear to reverse the order and employ the term “D/deaf”. In written submissions Carter is referred to variously as being “profoundly Deaf”, “profoundly deaf”, “deaf”, and “Deaf”. It was not always clear that the meaning intended was one with accords with the definitions as set out above. In writing my decision I often turned my mind to whether a conscious choice of language had been made but it did not always appear this was the case.

[16] I also I wish to acknowledge that the use of preferred terminology can present some other challenges for Human Rights tribunals. The *Human Rights Act, 2010* prescribes that the prohibited grounds of discrimination include “disability.” The appellate jurisprudence of this province concerning the legal test to prove “disability” set a legal standard that requires proof of “impairment”, with a relative degree of “permanence”, of a person’s abilities whether they be mental or physical (***Human rights commission v. Health Care Corp. of St-John's***, 2003 NLCA 13 (CanLII); ***Human Rights Commission v. Newfoundland and Labrador***, 2007 NLCA 10 (CanLII)). These cases predate the enactment of the *Human Rights Act, 2010*. However, the *Act* does not define disability and so the permanent impairment test remains the law in this province (***Malone v Dave Gulliver’s Cabs Limited***, 2016 CanLII 152826 (NL HRC); ***Philpott v City Tire and Auto Centre Limited***, 2020 CanLII 99196 (NL HRC)).

[17] Throughout my decision I will, by necessity, refer to the terminology employed by the *Act* and in relevant jurisprudence. I will quote from relevant documentary evidence, transcripts, and

jurisprudence. I will use the terms generally employed within written submissions. There may be need to reference terminology that appears outdated or not consistent with the language preferred by the complainants. Where I refer to Carter’s particular needs, abilities, or disabilities, I must trust that it is understood that I do so recognizing that he is first and foremost a little boy, a person, and he is entitled to respect and dignity. My dominant focus at all times has been with respect to the application of the *Act* and whether there has been compliance or violation of the provisions of the statute.

[18] In this regard I am guided by the decision of the Nova Scotia Court of Appeal in *Disability Rights Coalition v. Nova Scotia (Attorney General)*, 2021 NSCA 70 (CanLII)

### **A Word About Language**

[12] Words matter. Appropriately used, they can build people up and acknowledge their worth. The careless or insensitive use of words can have the opposite effect.

[13] Throughout this decision we will be talking about people, both individually and collectively. Because the [Act](#) specifies “mental disability” as a ground of discrimination, we will necessarily be using that term in our reasons. As we will explain later, that does not mean all persons who may fall within the statutory definition are the same. Quite the opposite.

[14] Despite tailoring our analysis to match the wording of the legislation, we have endeavoured to use language, where possible, that reflects a “person first” approach to discussing the individuals central to these reasons. At times we have quoted passages from documents that use outdated language to describe persons living with differing abilities. We view these quotations, written at a different time, as being important for our reasons and our recitation thereof should be viewed accordingly

## **OVERVIEW OF THE COMPLAINT**

[19] The Churchill’s complaint states that Carter has cerebral palsy and is profoundly deaf. Carter does not have any intellectual disability or issues with cognitive function. Carter received bilateral cochlear implants at 11 months of age intended to allow him access to sound. Implants are not always successful. Carter did not develop the ability to communicate using speech and is described as non-verbal. From an early age, his primary form of both receptive and expressive communication was early sign language. Prior to his arrival in the school system, the medical professionals on Carter’s cochlear implant team were concerned that supports based in

auditory/verbal communication would not address Carter's needs. They recommended that he be supported in developing competence in language based in American Sign Language (ASL).

[20] The complaint was filed during Carter's Kindergarten school year. The initial focus of the complaint was with respect to the sufficiency of supports and accommodations implemented by the District to address Carter's communication needs and to further his development of language skills necessary to engage with the school curriculum. Through the Commission led investigation into their complaint, the Churchills learned that during Carter's school years the District's roster of Itinerant Teachers of the Deaf and Hard of Hearing (ITDHH) had repeatedly raised concerns with District staff regarding the level of service being provided to students with cochlear implants such as Carter, and the severe language delays they were observing in this cohort. The ITDHHs made multiple proposals to establish a satellite classroom where intensive intervention to support language development could be provided to these students. By the time this matter was referred to a Board of Inquiry for adjudication, the District's failure to explore these proposals was identified by the Churchills as a further act of discrimination.

[21] The Churchills say that the District's conduct contravened section 11(1) of the *Act*, which prohibits discrimination against a person or class of persons with respect to services that are customarily offered to the public. Section 11(1) states:

**Goods, services, accommodation, and facilities**

11. (1) A person shall not, on the basis of a prohibited ground of discrimination,
- (a) deny to a person or class of persons goods, services, accommodation or facilities that are customarily offered to the public; or
  - (b) discriminate against a person or class of persons with respect to goods, services, accommodation or facilities that are customarily offered to the public.

[22] The District acknowledges that Carter has a disability engaging the protections afforded by the *Act*. The District's position acknowledges that it treated Carter differently from other students who availed of its education services. The District's position acknowledges that Carter could not avail of the education services that it offers to the public without accommodations – Carter's ability to have meaningful access to this service required proper accommodation. However, the District denies that the evidence supports a finding of discrimination. The District takes the position that it did implement proper accommodations, including all of those requested by the Churchills. The District asserts that the accommodations implemented were reasonable and were sufficient to enable the Carter to have meaningful access to the education services that the District provides to the public.

[23] For the reasons which are set out in this decision, I have found the complaint is justified in part. In particular, I find deficiencies in the accommodations implemented for Carter by the District during each of the following school years: Kindergarten (2016-2017); Grade 1 (2017-2018); Grade 2 (2018-2019); and Grade 3 (2019-2020). I find that the accommodations provided during this period were not responsive to his needs and they were therefore not reasonable. I also observed evidence of systemic issues within the District during this period which negatively impacted students in the St. John's Metro Region who had cochlear implants and were exhibiting severe language delays. Carter was one of these students. The overall result is that the level of accommodation provided was insufficient for Carter to have meaningful access to the education services customarily offered to the public by the District and therefore the District failed to deliver upon the mandate and objectives of the public education system of this province.

[24] However, in advance of Carter's Grade 4 year the District developed its own proposal for the implementation of a DHH Classroom that was responsive to the needs of students exhibiting severe language delays like Carter. This addressed the systemic issue that had previously persisted in the programming offered to students like Carter, and the implementation of the DHH Classroom provided Carter with a level of accommodation which was both reasonable and responsive to his need. For these reasons, I have found the complaint is not justified with respect to the following school years Grade 4 (2020-2021); Grade 5 (2021-2022); and Grade 6 (2022-2023).

[25] I have set out in detail the remedies ordered at the conclusion of this decision.

### **DISCUSSION OF THE LAW AND ITS APPLICATION TO THIS CASE**

[26] In this section I will set out the dominant legal principles relevant to the parties' positions that have guided me in this decision.

[27] This complaint asserts that Carter was discriminated against with respect to education services on the basis of disability contrary to section 11 of the *Act* which states:

#### **Goods, services, accommodation, and facilities**

11. (1) A person shall not, on the basis of a prohibited ground of discrimination,
  - (a) deny to a person or class of persons goods, services, accommodation or facilities that are customarily offered to the public; or



- (b) discriminate against a person or class of persons with respect to goods, services, accommodation or facilities that are customarily offered to the public.

[28] In any Human Rights complaint the initial burden of proof rests with the complainant who must adduce evidence sufficient to establish a *prima facie* case of discrimination. A *prima facie* case is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent. The evidence is assessed in accordance with the civil standard of proof: a balance of probabilities.

[29] Discrimination in contravention of the *Act* does not require proof of an intention to discriminate and often a discriminatory distinction is made innocently in the sense that a distinction is made without the intent to disadvantage a particular individual or group, but nevertheless the imposition of adverse consequences and disadvantage is the result.

[30] In this case, to demonstrate *prima facie* discrimination, the Churchills are required provide evidence sufficient to support a finding that:

- (1) Carter has a characteristic protected from discrimination under the *Act*;
- (2) Carter experienced an adverse impact with respect to the education services offered to the public by the District; and
- (3) Carter's disability was a factor in the adverse impact.

[31] In ***British Columbia (Ministry of Education) v Moore (Moore)***, 2012 SCC 61 ("***Moore***"), the Supreme Court of Canada re-affirmed this long-standing test to establish *prima facie* discrimination (***Moore*** para 33).

[33] As the Tribunal properly recognized, to demonstrate prima facie discrimination, complainants are required to show that they have a characteristic protected from discrimination under the Code; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

[32] If a *prima facie* case of discrimination is established, the burden of proof shifts to the respondent. At this stage the respondent may provide evidence sufficient to rebut the complainant's *prima facie* case – i.e. that it did in fact provide reasonable accommodation which were informed by the complainant's needs and which were responsive to complainant's needs so that he/she was enabled to access the service which the respondent offers to the public.

[33] Alternatively the respondent may advance an argument based upon “undue hardship” (i.e. “that it could not have done anything else reasonable or practical to avoid the negative impact on the individual”) (*Moore infra* at para 49), and that its conduct is therefore “justified” within the meaning of an exemption or exclusion recognized in by the language of the *Act*. In this case such a defense would potentially engage the statutory exemption under section 11 (3)(e) of the *Act*:

11(3) Subsection (1) does not apply

(e) to other situations where a good faith reason exists for the denial of or discrimination with respect to accommodation, services, facilities or goods.

[34] In the present case, the District's position is focused upon the sufficiency of the accommodations it provided. In substance the District's position acknowledges that it treated Carter differently from other students who availed of its education services. The District's position acknowledges that Carter could not avail of the education services that it offers to the public without accommodations – Carter's ability to have meaningful access to this service required accommodation. However, the District takes the position that it did implement proper accommodations, in particular all of those requested by the Churchills. It asserts that these accommodations were sufficient to allow Carter to have meaningful access to education services. It is on this basis alone that the District opposes the complaint. If I accept that the evidence supports the District's position, I must dismiss the complaint because the Churchills will have failed to establish discrimination.

[35] The District does not advance or rely upon an argument based upon “undue hardship”<sup>2</sup>. If I accept the District's position, and I find that the accommodations it provided were appropriate, then it has discharged its legal duty, and it has done what the law requires. A respondent is required to provide reasonable accommodation, not perfect accommodation, and not the complainant's preferred accommodation.

[36] The District's position must be properly explored, and since it does not rely upon any statutory justification or undue hardship argument – it is important that we understand what is legally required of the District before we consider the evidence.

[37] The leading case concerning allegations of discrimination specifically in the context of education services is the decision of the Supreme Court of Canada in **Moore**. In that case, the court provided the following guidance which is relevant to the District's position:

[34] There is no dispute that Jeffrey's dyslexia is a disability. There is equally no question that any adverse impact he suffered is related to his membership in this group. The question then is whether Jeffrey has, without reasonable justification, been denied access to the general education available to the public in British Columbia based on his disability, access that must be "meaningful" ...

[35] The answer is informed by the mandate and objectives of public education in British Columbia during the relevant period. As with many public services, educational policies often contemplate that students will achieve certain results. But the fact that a particular student has not achieved a given result does not end the inquiry. In some cases, the government may well have done what was necessary to give the student access to the service, yet the hoped-for results did not follow. Moreover, policy documents tend to be aspirational in nature, and may not reflect realistic objectives. A margin of deference is, as a result, owed to governments and administrators in implementing these broad, aspirational policies.

[36] But if the evidence demonstrates that the government failed to deliver the mandate and objectives of public education such that a given student was denied meaningful access to the service based on a protected ground, this will justify a finding of prima facie discrimination.

[Emphasis added]

**(Moore v British Columbia**, 2012 SCC 61 (Canlii) at para 33; see also **Kahn v Upper Grand District School Board**, 2019 HRTO 1137 (Canlii) at paras 228-229)

[38] In the context of discrimination in public education systems the Supreme Court of Canada framed the ultimate question as whether the student has been denied "meaningful" access to the general education available to the public; and whether the respondent failed to deliver the "mandate and objectives of public education" such that a given student was denied meaningful access to the service based on a protected ground.

[39] The mandate and objective of the public education system informs our analysis. However, the goals and objectives of the education system, often enshrined in policy documents, are aspirational in nature and may not be realistic for all students. The fact that a student does not achieve a particular academic outcome or goal is not determinative. In some cases appropriate accommodation may have been provided, and yet the desired results may not follow. A margin

of deference is owed to administrators in determining how to go about implementing policies designed to deliver upon the broad aspirational objectives of public education.

[40] In *Moore*, the mandate and objectives of British Columbia’s public education system were identified by reference to the “purpose” statement contained within the preamble of the *Schools Act* of that province as well as in other government policy documents. However, these were found to be merely an express acknowledgment that “the reason all children are entitled to an education, is because a healthy democracy and economy require their educated contribution.” Providing appropriate accommodation for students with disabilities, the Court explained, is therefore is “not a dispensable luxury”, but rather they are “the ramp that provides access to the statutory commitment to education made to all children.” (*Moore* at para 5)

[41] The same can be said for the policies in our province, prescribed by the Department, and which the respondent District was required to implement to enable students with exceptionalities meaningful access to education.

[42] In this province the relevant policy documents are the *Safe and Caring Schools Policy – Revised 2013* (“SCS Policy”) issued by the Department in 2006 and revised in 2013; the *Service Delivery Model for Students with Exceptionalities – Professional Learning Package Fall 2011* (“SDM Policy”); issued by the Department in 2011; and the *Responsive Teaching and Learning Policy* (“RTL Policy”) issued by the Department in 2018, which replaced the SDM Policy over a 3 year phase-in period.

[43] These policies, in particular the SCS Policy and the SDM Policy, promote a model of “inclusive education” which favors the integration of students with exceptionalities into mainstream classrooms whenever possible. Removal from the mainstream classroom is available in situations where it is required to meet the needs of a student. These are broadly worded, flexible documents, offering guidance but allowing considerable latitude for administrators to implement a wide range of accommodations which address a particular student’s strengths and needs in the “most appropriate setting” which may be “large group”, “small group”, or “individual”.

[44] The SCS Policy expresses as part of its foundational belief that: “All children deserve to learn and grow in peaceful schools and communities. Ensuring our young people have the opportunity to be successful in school – and ultimately, in life – requires safe and caring schools where teachers, students, parents, and the broader community work together to respect and support each other.”<sup>3</sup>

[45] Within its Policy Statements, the SCS Policy promotes differentiated instruction imbedded in the classroom, but allows for a student to be removed from the classroom to the extent required to meet their need:

#### 4. Policy Statements

...

##### 4.6 Inclusive Educational Practices

4.6.1. The following beliefs, central to inclusive education, are fundamental to Safe and Caring Schools:

4.6.1.1. All Students can learn.

4.6.1.2. Students are the responsibility of all teachers.

4.6.1.3. A student is removed from the classroom only to the extent required to meet his or her needs.

4.6.1.4. Differentiated instruction is imbedded in the classroom.

4.6.1.5. Partnerships are established with families and the community.<sup>4</sup>

[Emphasis Added]

[46] The SDM Policy promotes an “inclusive education” which it defines as:

- The right of all students to attend school with *their peers*, and to receive *appropriate and quality programming*.
- A *continuum* of supports and services in the most *appropriate setting (large group, small group, individualized)* respecting the dignity of the child.
- A welcoming school culture where all members of the school community feel they belong, realize their potential, and contribute to the life of the school.
- A school community which celebrates diversity.
- A safe and caring school environment.<sup>5</sup>

[Emphasis Added]

[47] For students with exceptionalities, both the SDM Policy and RTL Policy promote the involvement of parents and educators as part of a Program Planning Team in a collaborative process for the development of an Individual Education Plan (IEP). Through this process the strengths and needs of the individual student are to be identified and inform decisions on programming and accommodations which are then incorporated into the IEP.

[48] Human Rights jurisprudence recognizes that a proper accommodation process must be a collaborative process – both the complainant and the respondent must participate in the search for an appropriate accommodation. The complainant has a duty to share with the respondent information relevant to their need. The respondent has a duty to explore, evaluate, and implement accommodations which are reasonable and responsive to the complainant’s need. The complainant should be involved throughout the process and may make suggestions with respect to the accommodations they feel are appropriate. However the complainant does not decide or dictate what accommodations the respondent must implement. Nor does the complainant have a duty to originate a solution. Ultimately the final decision regarding what accommodation it will provide rests with the respondent. Moreover when a reasonable proposal is initiated by the respondent, the complainant must accept the proposal or risk dismissal of any subsequent complaint he or she might make (*Central Okanagan School District No. 23 v. Renaud*, 1992 CanLII 81 (SCC), [1992] 2 SCR 970 at 994-995; *Flynn v Memorial University of Newfoundland*, 2021 CanLII 35558 (NL HRC) at para 97-98; *Sears v Memorial University Of Newfoundland*, 2022 CanLII 82025 (NL HRC) at para 54; *M.M. v. Pitter Patter Daycare Inc.*, 2020 CanLII 112390 (NL HRC) at para 112).

The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. The inclusion of the complainant in the search for accommodation was recognized by this Court in O'Malley. At page 555, McIntyre J. stated:

Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment.

To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.

This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the

complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in O'Malley. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged. (*Central Okanagan School District No. 23 v. Renaud*, 1992 CanLII 81 (SCC), [1992] 2 SCR 970 at 994-995)

[49] Why does the duty to accommodate require a collaborative process? Why does it impose duties on both the complainant and respondent? The answer is simple: the accommodation process simply cannot function without collaboration. It breaks down without collaboration.

[50] Why does the process impose duties upon a complainant? Shouldn't the respondent have to figure it out? The complainant is often the person who is best informed about the facts related to their needs. Some disabilities may be difficult to observe but the complainant may be informed of a diagnosis or received advice from medical professionals. Perhaps with treatment or external support they felt they have not needed the respondent to know about their personal circumstances until now. Sharing this information may be the very first step triggering the accommodation process. Requiring a complainant to share information is essential to the process and informs the respondent's duty to explore, consider, and evaluate options to accommodate the complainant. Accommodations cannot be reasonable without understanding the complainant's need and being responsive to that need. It may be that neither the complainant nor the respondent fully and accurately understand the complainant's need and the process may therefore require input from professionals or require independent assessments.

[51] Why does the respondent get to decide what accommodation is ultimately implemented? Why do we afford their decision any deference at all? The respondent is often the person best informed about the service it offers and how to accommodate the complainant so they can access this service. It may be that this is the first time a complainant has sought accommodation. Conversely the respondent may have prior experience with accommodation. The respondent may have dealt with a similar situation before. Perhaps it employs professionals who have relevant training and expertise related to the complainant's issues. For example, in the present case the District employs a roster of Itinerant Teachers of the Deaf and Hard of Hearing. These specialized teachers generally have post-secondary education at the master's level directly related to issues touching upon the needs of students who are d/Deaf or hard of hearing. Many of the District's ITDHHs have decades of experience educating such students. Some of them were previously employed by the Newfoundland School for the Deaf and they are familiar with the teaching methodologies that were used – what worked and what did not. Generally one can reasonably expect that a respondent will rely upon the internal knowledge and experience of its personnel to arrive at reasonable accommodation. That's how the process is supposed to work.

[52] The duty to accommodate therefore has both a procedural and a substantive component. The procedural aspect of the duty to accommodate concerns the process followed by the respondent. It requires a respondent to undertake an individualized investigation of the potential accommodation measures needed to accommodate the complainant. The substantive aspect of the duty to accommodate on the other hand, is about the actual the decisions made and the accommodations implemented or not implemented. It requires a respondent to consider the reasonableness of the accommodation offered to the complainant, and/or the reasonableness of not providing such accommodation (*British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 SCR 3 at para 66; *B.M. v. Cambridge (City)*, 2010 HRTO 1104 (CanLII) at para 39-44; *C.M. vs. Toronto District School Board*, 2012 HRTO 1853 (CanLII) at para 109; *Benson v Central Health Authority*, 2021 CanLII 86245 (NL HRC) at para 47).

[53] In this case the District grounds its defence in the fact that it completed a proper program planning process and that it implemented the accommodations recorded in Individual Education Plans, and Individual Support Service Plans developed through a similar consultative process. The District suggests that this discharges both the procedural and substantive aspects of its duty. The District relies upon *Schafer v. Toronto District School Board*, 2010 HRTO 403 (CanLII), which on its surface appears to support this position.

[14] In special education cases, it is self-evident that a child with special needs is unable to access the education system equally without accommodations. Generally the burden will rest with the respondent school board to establish the procedural and substantive steps they have taken to accommodate the child's special needs. The statutory scheme sets out the procedural steps and the recommendations of the IPRC and/or found in the IEP will generally be the substantive accommodations offered.

[15] However, it is not the role of this Tribunal to oversee the implementation of the Education Act. Whether or not a school board strictly follows the procedures to arrange IPRCs or prepare IEPs is not for the Tribunal to determine. So long as there are steps taken to assess the child's needs and prepare accommodations, then generally the procedural standard of the duty to accommodate will be met.

[16] Similarly, as long as the substantive accommodations as recommended in the IPRC and IEP are generally implemented, the substantive standard of the duty to accommodate will be met. The issue is not whether the accommodations implemented are what the student or parent wanted, whether they were the ideal accommodations, or whether other accommodations would have been equally appropriate. The simple question is this; did the school board implement accommodations (generally, but not necessarily as recommended by the IPRC or IEP) that met the child's special needs?



[17] It appears to me that generally the best approach would be for the TDSB to present their evidence first and then turn to the child and parents to present their evidence why the accommodation was inadequate.

...

[71] The Human Rights Tribunal is not an alternative or substitute body to monitor and regulate the special education scheme under the Education Act. Generally the Tribunal will not second guess the IPRC placement and recommended accommodations and will not supervise a school's implementation of an IEP. In order to establish discrimination under the Code, the evidence must demonstrate that the accommodations provided were significantly inappropriate or inadequate.

[54] I agree with the decision in **Schafer** in as much as it describes the procedural component of the duty to accommodate. However, to the extent that it is interpreted in support of a principle that simply implementing the accommodations proposed in an IEP or ISSP is conclusive proof that the substantive duty to accommodate has been fulfilled – I think it was wrongly decided. In keeping with the direction of the Supreme Court of Canada (see **Central Okanagan School District No. 23 v. Renaud**, 1992 CanLII 81 (SCC), [1992] 2 SCR 970 at 994-995); **Eaton v. Brant County Board of Education**, 1997 CanLII 366 (SCC) at 277-278), a complainant cannot dictate what accommodation is implemented by a respondent. Ultimately, it is within the authority of the respondent to determine what accommodation they will provide. A complainant may make suggestions, but if they refuse the respondent's proposal they risk dismissal of their complaint on the basis of their failure to cooperate. Parental consent does not necessarily mean that the respondent's proposal is actually reasonable or that it has discharged its substantive duty to accommodate.

[55] Because we expect respondents to understand how best to deliver their own service, and that they will leverage their own internal experience, expertise, as well as independent assessments as necessary, we allow some deference to the decisions made by the respondent. However, review of both the procedural and substantive aspects of the duty to accommodate falls within the purview of this Board of Inquiry. If the accommodations are found not to be reasonable because of flaws in the respondent's process or because the accommodations are in substance not responsive to the complainant's need, then discrimination may have occurred.

[56] In my view this approach is consistent with the recent guidance of the Supreme Court of Canada in **Moore**:

...A margin of deference is, as a result, owed to governments and administrators in implementing these broad, aspirational policies.

[36] But if the evidence demonstrates that the government failed to deliver the mandate and objectives of public education such that a given student was denied meaningful access to the service based on a protected ground, this will justify a finding of prima facie discrimination.

*(Moore v British Columbia, 2012 SCC 61 (Canlii) at para 35-36)*

[57] Finally, I will note that in considering a Human Rights complaint, the jurisdiction of the Board of Inquiry is confined to the question of whether the particular complaint referred to the Board of Inquiry is justified. More often than not this means that the focus of the inquiry limited to the circumstances of the particular complainant; the complainant's personal characteristics and needs; whether accommodation was required in order for the complainant to access a service; and whether the complainant was provided reasonable accommodation up to the point of undue hardship. There are however cases where it is appropriate to consider evidence of broader systemic issues if those issues caused or contributed to the negative impacts experienced by the particular complainant.

[58] Systemic discrimination may arise where practices and attitudes have the effect of limiting an individual's or group's right to opportunities generally available because of characteristics attributed to the group rather than the actual characteristics of the group. It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. Systemic discrimination is discrimination that results from the simple operation of established procedures and practices, none of which is necessarily designed to promote discrimination. To combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged (*Disability Rights Coalition v. Nova Scotia (Attorney General)*, 2021 NSCA 70 (CanLII) at 189-193) *CN v. Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 S.C.R. 1114 at pp. 1138–1139).

[59] In recognizing that for some cases it may be appropriate to consider evidence of systemic issues which may have impacted a particular complainant, I am also cognizant of the guidance in *Moore* which cautioned Human Rights tribunals not to expand their inquiry beyond the scope of the particular complaint assigned to them. The Board of Inquiry must consider all evidence that is relevant and necessary for the determination of the particular complaint, but it is not our function to inquire beyond that scope. To paraphrase from the decision of Justice Abella in

**Moore:** this Board of Inquiry is an adjudicator of the particular claim before it, not a Royal Commission.

60 The inquiry is into whether there is discrimination, period. The question in every case is the same: does the practice result in the claimant suffering arbitrary — or unjustified — barriers on the basis of his or her membership in a protected group. Where it does, discrimination will be established.

...

64 ...the remedy must flow from the claim. In this case, the claim was made on behalf of Jeffrey, and the evidence giving concrete support to the claim all centred on him. While the Tribunal was certainly entitled to consider systemic evidence in order to determine whether Jeffrey had suffered discrimination, it was unnecessary for it to hold an extensive inquiry into the precise format of the provincial funding mechanism or the entire provincial administration of special education in order to determine whether *Jeffrey* was discriminated against. The Tribunal, with great respect, is an adjudicator of the particular claim that is before it, not a Royal Commission.

**(*Moore v British Columbia*, 2012 SCC 61 (Canlii) at paras 60&64)**

[60] Ultimately, when a complaint is brought before a Board of Inquiry on behalf of an individual student it is not the function of the Board to scrutinize and overhaul the entire education system. That said, where I observe evidence of systemic issues I may consider whether these issues impacted the complainant. Remedies ordered in favor of an individual complainant may prompt a change in the practices of respondents beyond the scope of the particular complaint, and in that sense they can have systemic effect. However, my jurisdiction does not extend beyond the scope of the particular complaint and it is not within my authority to intervene at a systemic level with broad sweeping directives for changes to the education system at large (***Disability Rights Coalition v. Nova Scotia (Attorney General)***, 2021 NSCA 70 (CanLII) at para 192).

## **MATERIAL FACTS & DISCUSSION OF THE EVIDENCE**

[61] The evidentiary record, in this case, is substantial. The Documentary Record alone contains thousands of pages of information which had to be reviewed. This Record was supplemented by affidavit and *viva voce* evidence. It is not practical to recount the entire history. In this section, I provide a chronological overview of the facts which I considered most relevant to my decision-making process.

[62] The complaint referred to this Board of Inquiry alleges that Carter experienced discrimination while he was a student enrolled in the public school system. The focus of the complaint is whether he was provided accommodations which were reasonable and sufficient to allow him meaningful access to the education services which the District offers to students.

[63] My discussion of evidence concerning events which occurred prior to Carter's entry into the public school system is relevant to the complaint only in so much as it provides an understanding of Carter's abilities and needs at the time he started school. It is not within the scope of my jurisdiction to assess the supports and services provided for Carter during his pre-school years.

### ***2011-2016: Carter's Pre-School years***

[64] On **February 8, 2011**, Carter Churchill was born. His parents are Kimberly Churchill and Todd Churchill.

[65] On **May 16, 2011**, hearing tests revealed that Carter was profoundly deaf. At that time the Audiology department presented the Churchills with three options as to how to proceed. The first option was the use of hearing aids. However, the Churchills were told that this route was not likely to remedy the issue given the degree of hearing loss. The second option was cochlear implant surgery and the Churchills were told that implants would allow Carter access to sound. With enough work, Carter could learn to speak and would be on par with his hearing peers by the time he started school. The third option was for Carter to learn sign language.

[66] Ms. Churchill recalled that it was explained to her that these options were mutually exclusive and that combining technological intervention to access sound and sign language could have a detrimental impact on developing speech. I accept that there has historically been some controversy regarding the appropriate early intervention for children who are born with a profound hearing loss. Dr. James MacDougall, the District's expert witness, referred to this as part of a larger "communication controversy" which can be traced back over 300 years of history.

[67] Ultimately the Churchills decided to proceed with cochlear implant surgery, and on **December 16, 2011**, Carter underwent surgery and received bilateral cochlear implants.

[68] On **January 16, 2012**, Carter was diagnosed with cerebral palsy, and during the **Spring of 2012**, Carter attended weekly physiotherapy at the Janeway Children's Hospital. At one of his appointments, the Churchills had a chance encounter with another family from the Burin Peninsula who had a young child who like Carter had received cochlear implants. The Churchills

learned that this child was learning sign language through weekly sessions with a teacher assigned by the District, and that this service could be accessed in addition to other services which focused on audition/oral communication, such as Auditory Verbal Therapy and Speech Language Pathology. Ms. Churchill contacted the District and made arrangements for Carter to have access to this service as well.

[69] In the **Fall of 2012**, Carter was assigned to the caseload of Cathy Lawlor Itinerant Teacher of the Deaf and Hard of Hearing (“ITDHH”). Ms. Lawlor provided affidavit evidence and testified when this complaint proceeded to a hearing. Ms. Lawlor has a Bachelor of Arts (Dalhousie University - 1982), Bachelor of Education (Mount Saint Vincent University - 1983), and a Master Degree in Deaf Education (Universite de Moncton - 1985) and over 30 years experience teaching children who are d/Deaf or hard of hearing.

[70] Ms. Lawlor completed her intake session with Carter on November 27, 2012 and her first session of direct service with Carter occurred on December 18, 2012 and continued until the end of the 2012-2013 school year. She provided direct service to Carter on January 7, 2013; January 17, 2013; January 24, 2013; January 31, 2013; February 5, 2013; February 13, 2013; and, February 20, 2013.

[71] Ms. Lawlor describes that Carter was a “core student” because of the degree of his hearing loss and his lack of language skills. As with other preschool students with language delays, Ms. Lawlor saw Carter once a week and each session was about 45 minutes in length. Sessions were play-based and signs would be introduced during their activities. For example she would sign things like “stack the blocks” and “here is a red block.” They worked on signs to identify objects (eg: “chair”, “table”), family members (eg “mommy”, “daddy”), and functional signs (eg. “hungry”, “thirsty”, “tired”). They worked on keeping focus on activities for longer periods. They followed guidelines for language, speech, and listening development as well as the expanded core curriculum for overall development.

[72] Ms. Lawlor described her work with Carter employed a “total communication” approach working on Carter’s oral/auditory skills as well as sign language. However, as Carter progressed their focus became more on signing which both she and Ms. Churchill supported. Carter was only two years old but already there was some indication that sign language would be an important tool for Carter.

[73] On **March 7, 2013**, an Individual Services and Supports Plan (ISSP) meeting was held in relation to Carter Churchill at the Janeway Children’s Hospital.<sup>6</sup> The document prepared in relation to the ISSP meeting which I will refer to collectively as the ISSP minutes, identify Heather Fogwill as the ISSP manager at that time. The Churchills were present as were representatives from Social Work, Audiology, Speech Pathology, Auditory Verbal Therapy, Physiotherapy,

Occupational Therapy, Music Therapy, as well as Ms. Lawlor, Itinerant Teacher of the Deaf and Hard of Hearing.

[74] The ISSP minutes identify “strengths” describing Carter’s capabilities at that time. Many of these related to his general development such as noting his abilities: *to roll, reaching for toys, transferring objects from one hand to another, recognizing himself in a mirror, and enjoying play.* With respect to communication, he is noted: *to respond to friendly speech, understanding “bye bye”, making different sounds “squeals” “cries” “ah” “ew”, communicating to protest or gain attention or request, eye contact.*

[75] The ISSP minutes list “needs” and “goals” for Carter’s further development of his capabilities. These related to both auditory/oral communication, as well as manual/visual communication using sign. With respect to communication, Carter was noted to have needs including: *to consistently vocalize with intent; to consistently make choices with pictures; to continue to produce more sign with less hand-over-hand assistance and less prompting; to continue to increase speech and sound inventory; to keep his cochlear implants on; to localize sound; to respond to his own name; and to pair sound with object identification.*

[76] Following the March 7, 2013 ISSP meeting, among other services Ms. Lawlor continued to provide direct service to Carter on: March 14, 2013; March 27, 2013; April 18, 2013; April 26, 2013; May 2, 2013; May 9, 2013; May 17, 2013; May 24, 2013; May 27, 2013; and June 18, 2013.

[77] Ms. Lawlor’s end of year report indicates that Carter would be transferred to the caseload of Andrea Hawley, Auditory Verbal Therapist with the District for follow up, and the Churchills were told that Ms. Hawley would begin providing direct service to Carter in the fall of 2013.

[78] It seems that in **June 2013** there had been a change in policy. All children with cochlear implants in the St. John’s Metro region were transferred from the caseload of the Districts’ Itinerant Teachers of the Deaf and Hard of Hearing, and instead placed on the case load of Auditory Verbal Therapists employed by the Janeway Children’s Hospital. This decision was made after some consultation between the Department of Health and the Department of Education and Early Childhood Development.

[79] During the **fall of 2013** Carter actually did not receive any direct service from either a ITDHH or AVT therapist. Because of the policy change, the plan had been for Carter to begin receiving AVT therapy from Ms. Andrea Hawley. However, due to the personal circumstances of Ms. Hawley, this did not occur.

[80] By **December 2013**, the Churchills were following up by making inquiries to various professionals seeking assistance in advocating for direct service to be provided for Carter.

Thereafter, each of the service providers with Eastern Health who were supporting Carter in aspects of his auditory/oral communication (SLP, AVT, and Audiology), wrote to representatives of the District expressing their concern that an auditory/oral approach alone would not meet Carter's needs, and that he would require supports in developing manual/visual communication through sign language.

[81] Correspondence dated **March 4, 2014** from Anneliese Ellis, (Eastern Health - **Departments of Speech Pathology & Psychology**), to Janice McKay (District Itinerant for Student Support Services) refers to the needs of a particular pre-schooler (Carter) being followed by Ms. Ellis who had bilateral cochlear implants and spastic athetoid cerebral palsy. The letter cautions that the needs of this particular child cannot be served by AVT therapy alone and emphasizes the need for sign language. The letter advocates for a change in policy in the metro region to allow this child access to services from an Itinerant Teacher of the Deaf and Hard of Hearing:

I am writing in support of a family in their attempts to avail of services for their son; in so doing, I am also advocating for a change in policy to Auditory Verbal Therapy and Itinerant Services for the Deaf and Hard of Hearing for the St. John's Metro area.

I am currently following a preschooler who has bilateral cochlear implants and spastic athetoid cerebral palsy. He is improving in his audition comprehension and definitely requires follow-up from an AVT to maximize his auditory potential. However, he also requires a total communication approach given his physical involvement. He is extremely receptive to sign and is using a combination of sign and verbal approximations to communicate. He is also making some choices with digital photos. All options for communication are currently being explored and sign is certainly proving beneficial, both for language comprehension and for expressive participation in activities.

I understand that cochlear implant recipients are being followed solely by the AVT service in the St. John's Metro area, but I am concerned that this limits this particular child's potential for language learning given his complex presentation. I am hopeful that he can avail of both services to maximize his potential and that the NLESD can change the guidelines for AVT/Itinerant Services in this region so that care plans are reviewed on a case by case basis to suit the individual needs of the child most effectively. <sup>7</sup>

[82] Correspondence dated **March 31, 2014** from Susan Lawlor, (Eastern Health - **Department of Audiology**), to Bonnie Woodland (District SEO – Student Support Services) expressly identifies Carter Churchill as the subject of the correspondences and states:

I am writing to you as an Audiologist on the Cochlear Implant Team with Eastern Health regarding my concerns of available services for a patient that I follow, Carter Churchill. Carter is a lovely 3 year old boy with a history of profound deafness and cerebral palsy.

Carter received bilateral cochlear implants on Dec. 16, 2011, which have provided him with auditory awareness since that time. However, given Carter's extensive medical history, he has been unable to use spoken language as a mode of expressive communication. It is therefore important that he receives supports that are not focused solely on an auditory-verbal perspective, but can encompass the mode(s) of communication that best benefit him.

Carter previously received services from an Itinerant Teacher for the Deaf and Hard of Hearing in 2012-2013 through which he benefited from early sign language support and made considerable growth in expressive communication using sign language. However, this service to preschool CI users in the St. John's metro region was changed in September 2013 when it was announced that supports would now be provided by the Auditory Verbal Therapy (AVT) program within the Department of Education which left the family feeling a true loss of service. In late Feb/14 it was decided that metro preschoolers would now receive AVT support solely from the Department of Health, with the Department of Education coming on board for the Kinderstart year. While I'm pleased that there is finally some clarity on who will provide this service, and that this service has been streamlined for our young CI users, I am concerned that this falls short for children like Carter who are unable to use spoken language to communicate. While AVT will continue for this child who benefits from the receptive language component, there is a need to help this child communicate expressively.

In writing this letter, it is my hope that the Department of Education will provide support for Carter to facilitate his expressive language development, which has shown the most growth thus far through early sign language. This is a service for children that is currently lacking – it is important that all children with hearing loss have supports made available to them to facilitate language development, and we cannot disregard the fact that a need for sign language support will arise. For Carter, we propose that this support may be provided by an Itinerant Teacher who has the background and knowledge to provide such a support. As early intervention is key for language development, I hope that you will consider this request favorably for this child and his family.<sup>8</sup>

[83] Correspondence dated **March 2014** from Paula O'Reilly, (Eastern Health - **Department of Auditory Verbal Therapy**), to Bonnie Woodland (NLESD SEO – Student Support Services) expressly identifies Carter Churchill as the subject of the correspondences and states:



I am writing this letter to express concerns regarding the lack of availability of appropriate services for Carter Churchill. Carter Churchill is a 3 year old little boy, who has a history of cerebral palsy, deafness, and other health concerns due to significant medical problems at birth.

Carter received bilateral cochlear implants at 12 months of age, and uses binaural speech processors to hear on a daily basis. Since his hearing loss was diagnosed, Carter has been receiving consultative and direct support from the Janeway Cochlear Implant team, including Auditory Verbal Therapy services, to support device use/retention and the development of early listening and communication skills. Carter has also received ongoing support from Janeway Rehabilitation team (including services from OT, PT and SLP).

Given he has cerebral palsy, Carter has been unable to develop spoken language or use his voice. In 2012-13 Carter received support from a local Itinerant Teacher of the Deaf and Hard of hearing (ITDHH) who initiated sign language (non-verbal mode of communication) as a means of developing his communication. In September 2013, the Department of Education hanged services for METRO preschoolers with cochlear implants; they now avail of Education based AVT services rather than ITDHH services. In most cases AVT direct therapy and support is the most appropriate form of therapy for children with cochlear implants, especially in the first years of acquiring listening and spoken language skills. However, in Carter's situation, he has been unable to develop spoken language but has successfully demonstrated that he is able to understand and use early signs to communicate. Carter has not received formal support for sign language since June (2013). We are asking that this little boy be given direct support to further develop his manual communication skills (early sign language). We are asking that Carter receive support from an Itinerant Teacher of the Deaf and Hard of Hearing who has teaching expertise in early sign language with the preschool population.

Carter will continue to receive auditory skill and receptive language development from AVT and SLP services through the Janeway, however we recognize Eastern Health does not have the resources to support teaching sign language. We are reaching out to the Department of Education to ask that you provide sign language support for Carter.

Acquiring language in any form (auditory, verbal, or manual) is an extremely time sensitive issue for all children. We ask that you please consider this letter as a request for Carter to receive support from The Department of Education (Student Support Services) as soon as possible. <sup>9</sup>

[84] During this time period, Bonnie Woodland was employed by the District in the role of Senior Education Officer and Director of Student Services – Programs (Avalon). Ms. Woodland provided affidavit evidence to this Board of Inquiry, and she testified when the matter proceeded to a Hearing. Ms. Woodland’s areas of responsibility included the management of caseloads for the District’s roster of Itinerant Teachers of the Deaf and Hard of Hearing.

[85] In her evidence, Ms. Woodland acknowledged receiving the letters referenced above sent by Susan Lawlor, and Paula O’Reilly. She indicated she specifically recalled receiving these letters because they had been sent by “snail mail”, which she recalled was unusual. However, she did not recall taking any particular action in response to these letters or whether she followed up with the writers of these letters. Ms. Woodland also testified that at the time she was unaware of the policy change in 2013 which removed children with cochlear implants in the St. John’s Metro region from the caseload of the Districts’ Itinerant Teachers of the Deaf and Hearing, and instead placed these children on the caseload of Auditory Verbal Therapists employed by the Janeway Children’s Hospital.<sup>10</sup>

[86] I found Ms. Woodland’s testimony on this point perplexing. The letters clearly refer to the discontinuance of ITDHH support for Carter, the policy change in 2013 when children with cochlear implants were transferred off of the caseload of the Districts’ DHH Itinerants, and the letters clearly advocate for this service to be resumed for Carter. Caseloads for ITDHHs was one of Ms. Woodland’s areas of responsibility. The fact that Ms. Woodland did not appear aware that children with cochlear implants had been taken off this caseload; that she did not interpret these letters as seeking a change to that policy necessary to meet the needs of children like Carter; and that she does not recall taking any action in response to these letters caused me some concern. This was one of the first indicators of a potential systemic issue which might be impacting children with needs like Carter’s.

[87] On **May 2, 2014**, an Individual Services and Supports Plan (ISSP) meeting was held in relation to Carter Churchill at the Janeway Children’s Hospital.<sup>11</sup> The ISSP minutes identify Anneliese Ellis and Kimberly Churchill as the ISSP manager at that time. The Churchills were present as were representatives from, the Department of Education and Early Childhood Development, as well as the Department of Health. Physiotherapy, Social Work, Auditory Verbal Therapy, Occupational Therapy, and Audiology were all represented.

[88] The ISSP minutes identify “strengths” describing Carter’s capabilities at that time. With respect to communication he is noted to: *point to familiar and desirable objects (make requests through pointing); use several signs, some spontaneously, some through imitation; great engagement in activities, longer attention span in recent months; wearing CIs more consistently at home, retention of CI headpiece has dramatically improved; continues to build on manual communication skills/sign, produces 15 signs spontaneously; makes choices between digital*

*photos for requests, both with ipad and with photos; with extra time can produce a number of speech sounds “m, b, d, th, n, g, h” and vowels “ah”, “oh” inconsistently.*

[89] The ISSP minutes list “needs” and “goals” for Carter’s further development of his capabilities. With respect to communication Carter was noted to have needs including: *expand receptive and expressive language through auditory + sign; use sign to indicate choice; increase use of CI at daycare and increase to both Cis; to identify daycare, school and home related objects on command (20-30); to understand 8-10 action words/verbs; to understand 4-6 describing pairs (big/small, wet/dry, clean/dirty, etc); to understand/produce 20-30 signs spontaneously (relating to above vocabulary); to use pictures (choice of 4-6) to request, make choices and to comment, either with communication board or ipad; to produce listed sounds consistently/meaningfully.*

[90] The comments/signature page of the ISSP minutes note, among other items, *“ISSP Manager to contact Itinerant for Student Support Services re Itinerant Involvement & programming”.*

[91] On **October 16, 2014**, Carter Churchill was returned to the caseload of Cathy Lawlor, ITDHH. During the 2014-2015 pre-school year Ms. Lawlor provided direct service to Carter on: October 16, 2014; October 22, 2014; October 30, 2014; November 5, 2014; November 6, 2014; November 12, 2014; November 18, 2014; November 21, 2014; November 25, 2014; November 26, 2014; December 2, 2014; December 9, 2014; January 15, 2015; January 20, 2015; February 10, 2015; February 19, 2015; February 26, 2015; March 3, 2015; March 12, 2015; March 19, 2015; March 26, 2015; April 2, 2015; June 4, 2015; June 9, 2015; June 18, 2015; and, June 25, 2015.

[92] Ms. Lawlor describes that during this period she continued to follow a “total communication” approach, talking and signing at the same time, and working on listening skills. However, it was clear to Ms. Lawlor that Carter’s oral skills were simply not developing, and so she focused on sign language and improving Carter’s expressive and receptive communication skills using sign. This presented its own challenges because Carter’s cerebral palsy impacted his motor control and affected his ability to produce signs. With his motor control impacted, Carter would make approximations of signs, and if he was able to do this consistently Ms. Lawlor would accept the approximated sign as a sign. Ms. Lawlor describes that Carter’s expressive communication skills lagged behind his receptive skills. However, his receptive language was observed to improve and expand over time.

[93] During the 2015-2016 pre-school year Ms. Lawlor continued to provide direct service to Carter on October 2, 2015; October 6, 2015; October 13, 2015; October 20, 2015; November 10, 2015; November 17, 2015; November 26, 2015; December 3, 2015; December 10, 2015; December 17, 2015; January 7, 2016; January 14, 2016; January 21, 2016; January 28, 2016; February 4, 2016; February 18, 2016; March 3, 2016; March 8, 2016; March 15, 2016; March 24,

2016; April 12, 2016; April 21, 2016; April 26, 2016; May 3, 2016; May 12, 2016; May 19, 2016; May 24, 2016; June 7, 2015; and, June 21, 2015.

[94] Ms. Lawlor describes that during this time all of her teaching sessions with Carter during this time took place using sign language. Her focus was on Carter's Kindergarten readiness: colours, matching objects and pictures, number recognition and counting, letter recognition and signs for letters, concept pairs such as big/little, more/less, and following directions (put the ball in the box) etc.

[95] A Preschool Assessment Report dated **January 25, 2016**, authored by Jennifer Wall, Occupational Therapist with Eastern Health's Janeway Child/Rehab Center confirms that Carter is "non-speaking", "communicates using gestures and sign", and will require multiple accommodations to allow him access to the curriculum and to demonstrate his knowledge of concept being taught and evaluated":

Introduction:

Carter is a young boy with cerebral palsy who will be starting kindergarten at Beachy Cove Elementary in September 2016. He has difficulty controlling his gross and fine-motor movements; has significant hearing impairment (wears bilateral cochlear implants) and is non-speaking. He uses a manual wheelchair for most mobility outside of his home.

...

Social Function Domain:

Strengths:

- Communicates using a gestures and signs (sic)
- Is learning to use an iPad for structured communication tasks in therapy with his Speech Language Pathologist.
- Has a great sense of humour.
- Loves to play
- Understands familiar routines and rules.

Caregiver assistance required for:

- Facilitation to use various communication strategies including iPad.

Summary:

Carter is a wonderful little boy who is very excited to be going to school in the fall. He has many pre-requisite skills for kindergarten but will require multiple accommodations to allow him access to the curriculum and to demonstrate his knowledge of concepts being taught and evaluated. Use of technology will be very important in his academic life both in terms of meeting his communication needs and accommodating his limited fine-motor

skills. It is anticipated that Carter will rely on technology at school for all written output; specific needs will need to be determined as his literacy skills develop.<sup>12</sup>

[96] On **February 1, 2016**, in Individual Services and Supports Plan (ISSP) meeting was held in relation to Carter Churchill in anticipation of his attendance at Beachy Cove Elementary.<sup>13</sup> The ISSP minutes identify Anneliese Ellis and Kimberly Churchill as the ISSP manager at that time. The Churchills were present as were representatives from Speech Language Pathology (Janeway and School); an Instructional Resource Teacher; a Kindergarten Teacher; an Itinerant Teacher of the Deaf and Hard of Hearing; Auditory Verbal Therapy; Kid Kampus; Occupational Therapy; Physiotherapy; and the school's Guidance Counsellor.

[97] The ISSP minutes identify "strengths" describing Carter's capabilities at that time. With respect to communication he is noted to: *identify a variety of common objects, foods, clothing, on command either verbal or sign; can follow simple, contextual 1-step instructions; can understand some verbs verbally and/or via sign; can initiate communication for a variety of social functions; can point to a picture successfully using a keyguard + Proloquo2Go to request and/or participate in an activity (choice of 6-9 pictures); Carter is very responsive to speech and environmental sounds when wearing his implants; Carter is able to correctly identify the LING 6 sounds through picture pointing, with some inconsistencies; Carter recognizes several familiar names, and common objects through audition; Carter consistently wears 1 cochlear implant, and very occasionally wears 2; Carter's expressive communication is strongly supported by his ITDHH teacher, where he continues to communicate through sign language. He not only imitates, but now initiates and labels common object and familiar people using sign.*

[98] The ISSP minutes list "needs" and "goals" for Carter's further development of his capabilities. With respect to communication, Carter was noted to have needs including: *to understand words for school-related vocabulary, via gesture/sign or verbally; to understand 10-20 verbs + 4-6 describing pairs/adjectives, either verbally or via sign; to make requests/choices consistently using Proloquo2Go; To participate in Kindergarten activities using a voice output communication aid (VOCA); to answer social suggestions consistently using Proloquo2Go; Carter needs to continue developing receptive and expressive language skills through a combination of spoken language (receptive), sign language as well as picture pointing (expressive).*

[99] The comments/signature page of the ISSP minutes states: *Mom expressed concerns around having adequate Student Assistance/Support to ensure that he is safe, cochlear implants are in place, communication needs are met, and he is engaged in the fine motor/academic tasks; Mom expressed the importance of having a Student Assistant + IRT who are familiar with sign language so that he will be able to Communicate with children and adults. Rehab team in agreement with this need. Parents want Carter to be fully included in all activities and would appreciate effort to use his abilities in sign language.*

[100] A Psychological Assessment Report dated **March 7, 2016** authored by Amy Stackhouse Harris, M.A., R.Psych., re-affirms the need for Carter to be supported by a student assistant with ASL training to facilitate communication:

**SUMMARY:**

Carter presented as a happy and engaging four-year-old boy at the time of the current assessment. Unfortunately, individual assessment results were not felt to be valid, as noted above. The results of the current assessment suggest that Carter does present with adaptive functioning needs related to cerebral palsy, and he will require a high level of support as he transitions into the school system.

**RECOMMENDATIONS:**

The results of this assessment represent only one piece of information to be accessed in working with Carter on a daily basis. They should be used in conjunction with input from other education and health professionals, as well as Carter's parents. Based on the current assessment results, the following recommendations are made:

1. Carter presents as an engaging child who will require student assistant support due to adaptive functioning needs, including mobility, toileting, safety, and to ensure his cochlear implants are functional. It seems highly appropriate for his(sic) to be provided a student assistant with ASL training to facilitate communication, as well as sensitivity training regarding disability awareness, as discussed with his parents.

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[101] Before I move on to discuss Carter's school years I wish to recognize all of the professionals involved with Carter up to this point appear to recognize manual/visual communication based in sign language to be Carter's primary means of communication. These professionals advocate for Carter to receive appropriate supports in this area. At the same time, I recognize that none of the professionals involved during Carter's preschool years advocated for terminating other supports such as Speech Language Pathology and/or Auditory Verbal Therapy and I understand that such services remained in place for Carter in the hope that his audition and oral communication skills might develop further. Little direct evidence was presented concerning these supports and no witness involved in these areas provided an affidavit or testified at the hearing. At the same time, I recognized that the reasonableness of such supports was not challenged and I have no basis upon which I might find that supporting Carter in these areas was unreasonable.

[102] Similarly, I am also aware that certain assistive technologies such iPads, pencil grips etc. were used as tools intended to support Carter's learning. In fact, some evidence was presented that as of the date of the hearing assistive technology remained necessary in order for Carter to produce written work. Although the Churchills have opposed reliance upon technology as a substitute for language development, I do not view these supports as unreasonable as they appear to be responsive to at least some aspects of Carters complex needs related to his disability(ies).

[103] As I discuss each of Carter's school years I will endeavor to recognize all of forms of supports provided for Carter. However, the fact that reasonable accommodations were provided in one area of need does not necessarily mean that the level of support provided for another need were appropriate (*Eaton v. Brant County Board of Education*, 1997 CanLII 366 (SCC); [1997] 1. S.C.R 241 at 275<sup>15</sup>). If, for example, a child with mobility issues, as well as a learning disability, is provided with appropriate supports in the area of mobility this would not mean that the needs associated with their learning disability are also reasonably accommodated.

[104] The focus of the complaint concerned the accommodations provided to support Carter's language development and his communication skills. If supports in these areas were lacking such that Carter was negatively impacted in his access to school curriculum, was isolated socially, and suffered emotionally, this may be sufficient to ground a finding of discrimination notwithstanding the supports provided in other areas.

### ***2016-2017 School Year: Carter's Kindergarten Year***

[105] In **September 2016**, Carter started Kindergarten at Beachy Cove Elementary. The Principal of the School at the time was Aubrey Dawe. The teacher assigned to Carter's class was Shane Porter. Carter was also assigned a full time Student Assistant. He was allocated time with an Itinerant Teacher of the Deaf and Hard of Hearing, Tina Halleran.

[106] I understand that Carter was also provided other supports such as Speech Language Pathology, allotted time with an Instructional Resource Teacher, and was provided assistive technology generally as described in the previous ISSP/subsequent IEP.

[107] Tina Halleran the Itinerant Teacher of the Deaf and Hard of Hearing assigned to Carter during his Kindergarten year also submitted an affidavit to the Board of Inquiry and testified at the hearing. Ms. Halleran has a Bachelor of Education degree (MUN 1999), a Master's degree in Deaf Education (Mount Saint Vincent University 2000), and over 20 years experience teaching children who are d/Deaf and hard of hearing.

[108] In her evidence, Ms. Halleran described that she followed a total communication approach consistent with the approach previously taken by Cathy Lawlor. Ms. Halleran did not focus on literacy although she indicated that there were times when Carter's classroom teacher, Mr. Porter would ask her to review reading books with Carter and she would do so. She did work on audition with Carter. She used sign language during all of her sessions and taught language skills using sign language at a developmentally appropriate level. She describes that Carter was able to respond to combined sign and oral instruction. She, like others, notes that it was challenging to understand Carter's signs due to the impact of his Cerebral Palsy.

[109] Carter was one of the twenty-four children assigned to Ms. Halleran's caseload. Twelve of those students, including Carter, were considered core students and she was able to provide direct service to Carter for 2-3 sessions on average per 7 day cycle with each session being between 40-50 minutes in duration.

[110] Ms. Halleran's affidavit describes that due to high caseloads, ITDHH had to employ a sort of triage approach to providing service. She considered Carter a top priority and so she tried to provide him a level of service sufficient to meet his need. This meant that other students received less support than she wished to provide. Her affidavit states:

24. During Carter's kindergarten year, I considered Carter to be a top priority, notwithstanding the fact that Carter was receiving supports from an Instructional Resource Teacher, a Speech Language Pathologist, and student assistants. While DHH Itinerants expressed concerns about caseloads and the access that students had to DHH Itinerant services, there was no risk for Carter due to my understanding of his priority status. This meant, however, that given my caseload, other students on my caseload may have received less support than I may have wished to provide.<sup>16</sup>

[111] Ms. Halleran's affidavit suggests that at the time she thought that by prioritizing Carter, she was able to provide a level of support that exceeded the guidelines of the Department's "Criteria for DHH Services – NL". However, when she testified at the hearing she acknowledged that based upon Carter's need he ought to have been receiving direct service at 4-5 times per week, at minimum 3 times per week, just to comply with the level of support contemplated by the "Criteria for DHH Services – NL". She was not able to provide this level of service given her caseload.

[112] By **October 14, 2016**, Carter's ITDHH, Tina Halleran together with other ITDHHs had sent correspondence to Bonnie Woodland, NLESD SEO – Student Support Services and Kim Lawlor, NLESD Program Specialist for Student Services expressing their concern that Itinerants were not able to meet the needs of their students due to caseloads and increasing referrals to the ITDHHs.



This correspondence refers to ITDHH concerns having been raised at previous meetings as well as a caseload analysis completed April 16, 2015, and I infer from this that because the concerns of the ITDHH were not addressed they were now putting their concerns in writing:

Please accept this letter as a request for an additional DHH itinerant teaching unit for the Eastern school region of NLESD. As indicated by the DHH itinerant teachers' caseload analysis dated April 16, which was submitted to Kim Lawlor, Program Specialist for Student Support Services (K-6), the current Itinerant teachers' caseloads exceed what is an acceptable provision of service, as outlined by the Department of Education Service Delivery Model for Students who are Deaf and Hard of Hearing. Please refer to each Itinerant Teacher's caseload analysis and the Department of Education DHH Support Services Model (see below).

Below is a brief overview which highlights the number of students currently being seen for direct service. These numbers have increased over the past two years due to a number of ESL students being diagnosed with hearing loss, as well as, a high number of bilateral cochlear implant students entering school with low language levels requiring intensive DHH itinerant support services including but not limited to sign language support.

...

As discussed in previous meetings, the DHH itinerant teachers' caseloads as shown through detailed caseload analysis are no longer able to meet the needs of the students in the Eastern Region due to the increasing number of students who require intensive DHH itinerant support services (ESL students and profoundly deaf cochlear implant students). Many of these new students have profound hearing loss and extremely low language levels, which impact their ability to access curriculum. An additional unit is required to fulfill the recommended guidelines for service as outlined in the service delivery model by the Division of Student Support Services at the Department of Education.<sup>17</sup>

[113] This appears to have prompted a further meeting on **December 2, 2016** between Kimberly Lawlor and the roster of Itinerant Teachers of the Deaf and Hard of Hearing including Carter's teacher, Tina Halleran. The minutes from that meeting records the concerns of ITDHHs with respect to the service provided to students with cochlear implants and low language levels like Carter Churchill:

Students who have CI and Low Language

Discussion. Some very young children with CI's receive lots of support at school but have very low language/comprehension skills. There is significant concerns that their programming is not what they need.

It would be helpful if local students with CI/hearing impairments to get together to communicate/learn. Can we bring these students together once a week? It would be helpful for the children to see others with CI's.

Strategies to be used by school teachers? Concerns that students are not able to access the curriculum. There is a gap left between the closure of the School for the Deaf and the current service delivery model. Teachers are concerned that this is a Human Rights concern. Reverse integration is used in some other provinces. Is it possible for some of our students access APSEA for short term programs, assessments and consult for developing programs? There is a different relationship with APSEA for our DHH and BVI. Some of our young students need intensive language intervention.

Bonnie and Kim met with NL association of the Deaf. General conversation re students. Relationship with other organizations (ASNL, etc.)

DHH itinerants feel that some students with hearing impairments need additional service from a trained teacher for the deaf to access the curriculum...<sup>18</sup>

[114] Although Bonnie Woodland was not in attendance at this meeting, in her testimony she acknowledged that she was provided a copy of the minutes from this meeting, and she met with Ms. Lawlor to have further discussions about the information presented at the meeting. However, it appears no specific action was taken in response to the information presented. Ms. Woodland's testified that, although she could not recall taking any action, she expressed that she "hoped that we would've brought this forward and had conversations with our Department of Education because it is – you know, it may have been part of their mandate as well, but honestly I don't recall any specific action that we took."<sup>19</sup>

[115] From this I conclude that the District was aware that the level of support and programming it was providing was not appropriate and not meeting the needs of students with cochlear implants, including Carter. Nevertheless, the District appears to have taken no specific action in response.

[116] In the meanwhile, Carter's Kindergarten year was off to a rocky start. Shane Porter, Carter's classroom teacher for the Kindergarten year, submitted an affidavit to the Board of Inquiry and testified at the hearing. I should note that I was left with the impression that Mr. Porter is an educator who cared deeply for the students assigned to his class including Carter

Churchill. However, Mr. Porter also acknowledged his own limitations and his reliance upon others to facilitate communication with Carter. Mr. Porter is not d/Deaf or hard of hearing, he does not know ASL, and he had no particular training or qualifications directly related to teaching students who are d/Deaf or hard of hearing.

[117] Mr. Porter describes that he devoted time during his evenings and weekends attempting to differentiate his lessons and assessments so that Carter could succeed. He tried to teach himself some signs such as numbers 1-10 to use in teaching Carter. Some of the methodologies attempted appear more problematic than others. One example is found in draft comments for Carter's first term report card where it is described that "When assessing Carter, [the Instructional Resource Teacher] will often speak directly into his ear while the classroom teacher speaks to his face." While there were good intentions behind exploring different methods, and Mr. Porter's goal was to explore any and all avenues to further Carter's education, as I said, some efforts appear misguided and not consistent with Carter's abilities.

[118] I wish to be very clear that I do not think this reflects poorly on Mr. Porter. Again – I emphasize that Mr. Porter went to great lengths and devoted his personal time after hours to try to enhance his own abilities and to come up with innovative solutions and approaches to teaching Carter. The problem was that Mr. Porter was provided little to no guidance on how to teach Carter given his unique needs.

[119] During the hearing, Mr. Porter acknowledged that he was given little or no direction as to how to adapt his teaching methodologies to instruct Carter. Although he was made aware of the other supports implemented for Carter, there was no explanation or direction provided to Mr. Porter as to how these different services might support or interact with each other, for example what his role vs. the role of the ITDHH would be, or what role the student assistants would play in facilitating communication:

*"I guess that was kind of left up to myself, the IRT, and trying to figure out the best – what would work best, or what we thought would work best, you know, what we could do, but no there wasn't anything explicit"<sup>20</sup>*

[120] Mr. Porter was aware that Carter used ASL to communicate. Mr. Porter described that he could not communicate directly with Carter using ASL but that he could do so with the assistance of Carter's student assistant. Again, Mr. Porter was not provided direction on how the student assistants might be involved in his teaching Carter but Mr. Porter appears to have relied heavily on the student assistants to relay information to Carter and to check in with Carter to ensure he understood. Mr. Porter's understanding was that these student assistants were sufficiently skilled in ASL to facilitate such communication with Carter. Mr. Porter describes that it was also his understanding that Carter could receive classroom instruction through oral

discussion, play-based instruction, interactions with peers, and via ASL with the support of the student assistants.

[121] In her Affidavit, Ms. Kimberly Churchill indicates that from the first day of Kindergarten and continuing throughout the Kindergarten year, the Churchills had concerns regarding the supports implemented for Carter. The Churchills now have concerns regarding the level of support Carter was allocated with a ITDHH, and with respect to the lack of direction and guidance provided to Mr. Porter by the District. However, the first area of concern identified by the Churchills at that time was with respect to the student assistants assigned to Carter and whether they had sufficient training in ASL to facilitate communication for Carter. Throughout the year they continuously advocated for improved supports for Carter in this area.

[122] Ms. Churchill describes that she attended at the school during the morning of Carter's first day of school, **September 8, 2016**, and she met Mr. Porter, as well as the First Student Assistant<sup>21</sup> assigned to Carter. Ms. Churchill describes that she had a discussion with Carter's First Student Assistant and when Ms. Churchill asked this student assistant whether she knew ASL, the First Student Assistant indicated that she had taken one course a year before but had never used her ASL skills and that during her interview for the position she had expressed her own concerns as to whether she was suitable for the position.

[123] On **September 12, 2016**, Ms. Churchill learned that a Second Student Assistant was working with Carter whenever the First Student Assistant was taking her break. Ms. Churchill knew the Second Student Assistant from having previously participated in the same ASL classes offered by the Newfoundland and Labrador Association of the Deaf (NLAD). The Second Student Assistant shared her concerns that the First Student Assistant did not have a sufficient competence in ASL to enable her to communicate with Carter. She disclosed to Ms. Churchill that the First Student Assistant was frequently coming to her to ask her to help with basic signs.

[124] On **September 21, 2016**, Ms. Churchill met with Tina Halleran, ITDHH. At that time Ms. Churchill expressed her concerns regarding the First Student Assistant's limited ASL abilities and she asked Ms. Halleran to sit in and observed the First Student Assistant to assess the First Student Assistant's use of ASL. Ms. Halleran testified that she did not feel it was her role to evaluate or assess the abilities of the student assistants and she did not do so.

[125] On **September 29, 2016**, Ms. Churchill learned that the Second Student Assistant had offered a full-time position at another school she would not be working with Carter going forward. Ms. Churchill was also told that the First Student Assistant was applying for other jobs.

[126] On **November 23, 2016**, Ms. Churchill learned from a Facebook post that the First Student Assistant had taken another position and would not be working with Carter going forward. She

contacted the school principal to ask who would be working with Carter and whether they had fluency in ASL. Mr. Dawe advised Ms. Churchill who the Third Student Assistant would be. He also indicated that he did not know the specifics of her ASL proficiency but that it had been listed as a requirement in the job advertisement.

[127] On **November 24, 2015**, the Third Student Assistant began working with Carter. Ms. Churchill met with her and asked what level of ASL proficiency she had. The Third Student Assistant told Ms. Churchill she would have to call and “ask the board”.

[128] The student assistants assigned to Carter during the Kindergarten year did not provide evidence for this Board of Inquiry. However, I was provided with the results from an ASL proficiency interview completed by the Third Student Assistant. The results record the following description of the Third Student Assistant’s demonstrated skill level

*[she] had considerable difficulty in producing appropriate signs. Inaccurately produced the sign for school signing ‘nice’ repeatedly. She began the conversation by incorrectly fingerspelling her name...*

*[she] did not respond appropriately in target language to many queries restricted to conversation to predictable topics which is seen in survival mode. Conversation was held to short sentences which at times were inaccurate and incomplete. Limited signed vocabulary is quite apparent. Comprehension required my repeated production with misunderstandings occurring often”.<sup>22</sup>*

[129] This description is the only direct evidence presented with respect to the signing abilities of any of the student assistants. From this evidence, I infer that the Third Student Assistant, who was assigned to Carter for the bulk of the Kindergarten year, was not sufficiently skilled in ASL to effect more than very basic communication with Carter using ASL let alone to interpret or relay lessons or instruction from Mr. Porter or facilitate Carter’s participation in discussions.

[130] On **November 28, 2016**, an Individual Education Plan (IEP) Meeting was held to discuss the Individual Education Plan for Carter Churchill. I will refer to the documentation produced in relation to IEP meetings as IEP minutes<sup>23</sup>. Although the IEP minutes do not record who was in attendance, the affidavit of Kimberly Churchill indicates that in addition to the Churchills the attendees included Aubrey Dawe (Principal), Ms. Miranda Gosse (Guidance Counsellor), Shane Porter (Classroom Teacher), Viki Duffenais (IRT), Tina Halleran (Teacher DHH), Catherine Power (School Psychologist), Kim Lawlor (Student Support Services NLESD), Susan Clarke (SLP), Raven Williams (IRT), Jennifer Douglas (OT) and Michelle O’Brien (PT). The format of the IEP minutes is similar to that of the minutes from ISSP meetings and it records Carter’s strengths and needs.

[131] The IEP Minutes record strengths related to Carter's communication abilities including: *wears 2 CI processors consistently and indicates when they are off; detects ling 6 sounds through pictures/objects, most of the time; understands daily school vocabulary; such as "Good Morning/Afternoon", bus, play, art, music, etc.; can manipulate chunky crayon independently to color; can sign 18/26 uppercase letters; can sign numbers 1-5; can follow simple one step directions; can point to picture successfully using ProLoquo2Go to request an activity (with support); can answer (with support) some social questions about himself using technology/ASL.*

[132] The IEP Minutes record needs related to Carter's communication abilities including: *to improve his expressive language skills by using technology or ASL; to answer simple questions; to make choices/requests consistently using technology; to spell his name independently; to answer simple questions about himself using technology/ASL; to continue and elaborate his school vocab using verbs and adjectives using ASL/technology; to follow simple 2-step instructions.*

[133] The IEP Minutes record that the following "Additional Education Services" would be provided: *Speech-Language Pathologist; Instructional Resource Teacher; Student Assistant; Special Transportation; Hearing Itinerant Teacher.*

[134] The IEP Minutes include a "Record of Alternative Program(s)" which records that Carter would be provided accommodation to participate in all of the Kindergarten prescribed courses/programming for: Language Arts; Math; Social Studies; Religion; Health; Art; Phys.Ed; and Music. An Alternate course/Non-curricular course with accommodation is identified: Communication which lists two Itinerant Resource teachers.

[135] The IEP minutes include a form entitled "Record of Accommodations" which specifies the following accommodations would be provided: *closed captions; communication aid ProLoQuo2Go; FM system; slant board; pencil grip; extended time; alternate setting; clarification of instructions; and Other (specify): ASL, Hush Ups.* These accommodations are noted to be required for instruction and evaluation for all subjects.

[136] Kimberly Churchill and school Principal Aubrey Dawe signed off on the IEP on **November 30, 2016**. However, the Churchills continued to have concerns regarding the supports implemented for Carter and they communicated these concerns to the District.

[137] On **December 1, 2016**, the Churchills received correspondence from Kimberley Lawlor, Program Specialist, Student Support Services with the District. This correspondence was following up on their discussions during the IEP meeting, and the Churchills' concerns regarding the student assistants' proficiency in ASL. Ms. Lawlor advised the Churchills that the job description for student assistants states that ASL was required and that it was the expectation that the student assistants were using ASL.

[138] On **December 19, 2016**, Mr. Churchill followed up on Ms. Lawlor's email from December 1, 2016 and asked for further clarification. He asked specifically whether it was expected that student assistants would use ASL only for Carter's "personal needs, eg are you hungry, thirsty, need to use the washroom, etc" or "would it also be used to bridge the obvious gap between Carter and his teacher who has very limited knowledge of ASL... without that bridge it is hard for his teacher to assess what Carter does or does not know with regard to the taught curriculum as he is non-verbal and unable to communicate his level of understanding verbally."

[139] On **January 9, 2017**, Ms. Lawlor responded to Mr. Churchill's email from December 19, 2022 and confirmed her understanding that "the Student Assistant is using ASL as a communication bridge when appropriate... the Student Assistant is not an interpreter but is using ASL to assist Carter's comprehension of material presented and to assist with his expression of information." Given that subsequent ASL proficiency testing revealed the Third Student Assistant actually had very limited ASL abilities, the repeated assurances offered to the Churchills appear to misrepresent the level of student assistant support being provided to Carter during the Kindergarten year.

[140] In her Affidavit, Ms. Churchill provided examples of the school contacting the Churchills because Carter appeared to be in some distress and it appears his student assistant could not understand why. During one such incident, Mr. Porter called home because Carter had been pulling on his sleeve all morning and Mr. Porter was concerned that Carter's cochlear implants were bothering him. Ms. Churchill describes in her affidavit that when she arrived home with Carter and removed his coat he immediately began giving the sign for long sleeve shirt. She signed back "you cold you" and Carter confirmed he was cold at school. She describes that she sent Carter to school every day with a hoodie but because nobody could communicate with Carter, his basic personal needs were not addressed and he had spent the day cold and uncomfortable.

[141] On another occasion, Ms. Churchill was contacted by Mr. Porter because Carter was repeatedly pointing to his groin and signing "it hurts it hurts". She explained that he had a band-aid on his upper leg and she wondered if it the student assistant could check if that was making him uncomfortable. She says that Mr. Porter advised her Carter was giving the sign for "penis dad hurt." She felt that Mr. Porter was insinuating that Mr. Churchill had harmed Carter. When Carter arrived home, he pointed and produced the signs for "hurt" "dad" "fix". In his evidence, Mr. Porter disputed that he had insinuated Mr. Churchill had harmed Carter. He recalled that he was relaying information from the student assistant that Carter was signing groin and that the area hurt.

[142] On **January 11, 2017**, the Churchills remained concerned about the level of support being provided to Carter and they reached out to David Brazil, a Member of the House of Assembly and education critic at the time. On **February 24, 2017**, the Churchills met with MHA Brazil who reassured them that he would follow up including reaching out to the Education Minister, Dale Kirby. On **March 15, 2017**, the Churchills met with MHA Brazil again, but they left that meeting feeling less than re-assured.

[143] On **March 16, 2017**, the Churchills contacted the Human Rights Commission and submitted their complaint alleging multiple deficiencies in the accommodations actually being provided for Carter and asserting that these deficiencies amounted to discrimination.

[144] On **May 5, 2017**, the roster of Itinerant Teachers of the Deaf and Hard of Hearing, including Tina Halleran, submitted a proposal to establish a Satellite Support Classrooms for Students who are Deaf/Hard of Hearing, and requesting that it be implemented as a pilot project in the upcoming 2017-2018 school year. This proposal was submitted to the District via email to Bonnie Woodland (NLESD SEO – Student Support Services) and Kim Lawlor, (NLESD Program Specialist for Student Services). The proposal states:

#### **Proposal for Satellite Support Classrooms for Students who are Deaf/Hard of Hearing**

There are approximately seven students from the Greater St. John's Area who require Satellite Classrooms with Full-Time Teachers of the Deaf and Student Assistants who are proficient in ASL. These students have significant language delays based on observation, informal and formal assessment. **These Students needs CANNOT be met on the Itinerant Teachers' caseloads. They require intensive language and communication support in a specialized classroom with qualified teachers of the Deaf.**

These students are presently receiving other supports such as IRT support, Student Assistants, special transportation, SLP, AVT, and Itinerant Services. **Even with all of this support in place, these students are NOT able to access the regular curriculum outcomes.** The support is fragmented and delivered by many people who are not trained to work with Students who are Deaf. **These students are not making significant gains and the language/communication/academic/social gaps are getting larger and will continue to do so.** The children who are learning Sign Language are making gains but with a Full-Time Teacher of the Deaf using Total Communication in a smaller classroom setting, these students could potentially experience more success with this Total Communication Approach. Given that the Satellite Classrooms will be located in a school within the St. John's Area, these students will have opportunities to be included in school activities and may be able to transition into some of their Grade level academic classes. This will be determined on an individual basis.



As this model has already been established at the McDonald Drive Junior High and Gonzaga High Schools, we ask you to please consider a Satellite Support Classroom as a Pilot for the upcoming 2017-18 school year in one of the Primary/Elementary Schools in St. John's.<sup>24</sup>

[145] The proposal to establish a satellite classroom was submitted via email at approximately 3:11PM on **May 5, 2017**. By 4:52pm that day Bonnie Woodland responded by email expressing the opinion that this proposal was not consistent with Department of Education programming and guidelines, and cautioning the DHH Itinerants not to discuss the proposal with parents:

Thank you for your opinions and your submission. This in no way aligns with any program or guidelines outlined by the Department of Education. However, I will certainly review the program, instruction and report cards of each of these students that you are referring to. Please forward their names and schools.

Providing exclusionary service is as (sic) huge step – but I do see that you are suggesting a model to provide intensive instruction. I would also like to hear about your ideas on building capacity to provide further service/instruction with our existing resources and within an inclusionary setting.

I will certainly review the progress of these children and discuss your proposal with District and the Department

Have you discussed this proposal with program planning teams? I am sure that you have not discussed this with parents as it would be premature to do so.<sup>25</sup>

[146] Shortly thereafter, at 5:00pm on **May 5, 2017**, Ms. Woodland emailed Bernie Ottenheimer, Director of Student Services with the Department of Education. In her email, Ms. Woodland informed Ms. Ottenheimer that a proposal for a satellite classroom had been received from the DHH Itinerants, and advised that “We are not embracing this – but I wonder if we also should discuss at our upcoming meeting”:

I think we should discuss – you can put this on the agenda if you wish – or we will discuss – it is a Metro response in some cases....still under discussion. Also we have received a proposal from our DHH teachers for a satellite classroom for Satellite Classrooms with Full-Time Teachers of the Deaf and Student Assistants who are proficient in ASL. We are not embracing this – but I wonder if we also should discuss at our upcoming meeting? Or just with you and Paulette?<sup>26</sup>

[147] Bernie Ottenheimer provided affidavit evidence to this Board of Inquiry, and she testified when the matter proceeded to a hearing. She was the Director of Student Services with the Department of Education from September 2013 – April 2017. Ms. Ottenheimer acknowledged receiving the email from Bonnie Woodland, and that she would have been involved further if the District had moved forward and submitted a proposal to the Department. Ultimately, the District did not bring forward a proposal to the Department at that time and Ms. Ottenheimer did not recall any further follow up discussions with Ms. Woodland or others.<sup>27</sup>

[148] Lucy Warren, provided affidavit evidence to this Board of Inquiry, and she testified when the matter proceeded to a hearing. She was the Assistant Director of Education with the District (September 2013 - May 2017) and later the Associate Director of Education (Programs and Operations) with the District (May 2017 - January 2019). Ms. Warren was Bonnie Woodland's superior within the executive level of the District's bureaucracy. She testified that she made the final decision not to bring forward the proposal to the Department, and she felt unable to build a strong enough case for it.<sup>28</sup>

[149] Both Ms. Warren and Ms. Woodland also suggested that the rejection of the satellite classroom proposal was also partly due to a resourcing issue. When questioned on this point Ms. Woodland acknowledged that the resources which would be required were a physical space (classroom), DHH teachers, student assistants and later educational interpreters, and arranging transportation by bus for students. Arranging transportation by bus would have required a request to be submitted to the Department. Otherwise, all of these resources were available within the District or could be made available by re-allocating resources as was done when a DHH Classroom was subsequently implemented for the 2020-2021 school year. Ms. Warren acknowledged that she could have raised resourcing issues with the Department but she did not do so.

[150] Both Ms. Warren and Ms. Woodland suggested that one rationale for rejecting the satellite classroom proposal was because it was found to be inconsistent with Department of Education policy. Ms. Woodland suggested that the proposal was contrary to "inclusive education." Ms. Warren indicated that the proposal was contrary to the philosophy that students should attend their local school. She also indicated that the proposal was problematic because it would only serve six or seven students and could not be scaled to service the entire province. Again, these perceived challenges were proved not to be real barriers when DHH Classroom was implemented for the 2020-2021 school year<sup>29</sup>.

[151] Before moving on, I wish to make a few further comments on the assertions that implementing a satellite classroom was perceived to be contrary to the policies of the Department of Education, I considered this question previously in my previous decision ***Kimberly Churchill and Todd Churchill on behalf of Carter Churchill v. Department of Education and Early***

***Childhood Development et.al.***, 2022 CanLII 6294 (NL HRC), wherein I dismissed the complaint against the Department. At that time I reviewed the Department’s policies governing the delivery of special education services. The Department has issued two policy documents relevant to special education. In 2011 the Department issued the Department of Education: Service Delivery Model for Students with Exceptionalities – Professional Learning Package Fall 2011” (“SDM Policy”). In 2018 the Department issued the Responsive Teaching and Learning Policy (“RTL Policy”) which replaced the SDM Policy over the course of a 3 year phase-in process. These policies and the inclusive education model which they promote, are not inconsistent with the implementation of a satellite classroom. The SDM Policy, which was in place at the time the decision to reject the satellite classroom occurred, defines inclusive education as follows:

- The right of all students to attend school with their peers, and to receive appropriate and quality programming
- A continuum of supports and services in the most appropriate setting (large group, small group, individualized) respecting the dignity of the child
- A welcoming school culture where all members of the school community feel they belong, realize their potential, and contribute to the life of the school
- A school community which celebrates diversity
- A safe and caring school environment.<sup>30</sup>

[152] The SDM Policy contemplates a student attending school with “their peers”, and it contemplates a continuum of supports which may be implemented in the “most appropriate setting” with large group, small group, and individualized being offered as examples. Within the document there is express reference to “An alternate setting may be required for students with exceptionalities”. The document also contemplates a collaborative approach to accommodation and “a shared responsibility among school staff parents and the community at large”. Although the policy does not prescribe criteria for when a proposal such as the satellite classroom proposal must be implemented, I do not see any barrier to its implementation in the SDM Policy. Similarly, I do not see any barriers in the subsequent RTL Policy. I do see the lack of consultation with parents prior to a decision being made as potentially problematic and contrary to the spirit of the SDM Policy and RTL Policy. This interpretation is further supported by the fact that eventually (although a number of years later) a satellite classroom was eventually implemented in consultation with parents in the form of the DHH Classroom at East Point Elementary which will be discussed further in the context of Carter’s Grades 4 and 5 years.

[153] I will note at this point that the roster of ITDHHs re-submitted/submitted a substantially similar proposal again in advance of the 2019-2020 school year. Bonnie Woodland was again involved in the rejection of this proposal for substantially the same reasons, and the explanation of same remains unsatisfactory. It appears these proposals were rejected quickly instead of being fully explored at the time they were proposed. Furthermore, because DHH Itinerants were

given the guidance not to discuss the proposals with parents, parents were not allowed the opportunity to advocate for their implementation.

[154] There appear to be a number of examples of the District being resistant to change and when issues were raised internally concerning the supports offered for d/Deaf education, these were quickly dismissed. This is a systemic problem arising outside the individualized IEP process implemented for students like Carter. However, since Carter Churchill was one of the students who might have benefited from the implementation of these proposals the systemic problem had an adverse impact on him at an individual level.

[155] On **June 6, 2017**, another IEP Meeting was held to discuss the Individual Education plan for Carter Churchill.<sup>31</sup> This IEP Minutes adds to the list of communication related “strengths” identified in the previous IEP identifying a number of new or improved “strengths” including: *can point to correct letters to spell his name; with assistance can sign the letters of his name; can sign many colors; can follow simple 1-2 directions.*

[156] The IEP Minutes adds a number of items to the list of needs related to Carter’s communication abilities including: *to count to 10 independently using technology/ASL; to combine 2-3 words to create phrases or simple sentences using ASL/Technology; to combine 2-3 step directions.*

[157] The IEP Minutes record that the same “Additional Education Services” would be continue to be provided: *Speech-Language Pathologist; Instructional Resource Teacher; Student Assistant; Special Transportation; Hearing Itinerant Teacher.*

[158] The IEP Minutes include a “Record of Alternative Program(s)” which records that Carter would continue to be provided accommodation to participate in all of the Kindergarten prescribed courses/programing for: *Language Arts; Math; Social Studies; Religion; Health; Art; Phys.Ed; and Music.* Two Alternate course(s)/Non-curricular course(s) with accommodation is identified: *Communication and Self-Help.*

[159] The IEP minutes include a form entitled “Record of Accommodations” which specifies the following accommodations would be provided: *closed captions; communication aid ProLoQuo2Go; FM system; slant board; pencil grip; extended time; alternate setting; clarification of instructions; and Other (specify): ASL, Hush Ups.* These accommodations are noted to be required for instruction and evaluation for all subjects. A further note is added which records: *Student Assistant with proficient ASL; Teaching in ASL & ASL Language has been requested to NLESD; Decision Pending.*

[160] Kimberly Churchill, Todd Churchill and school Principal Aubrey Dawe had signed off on the IEP by **June 21, 2017**. However, I must note that given my observations related to concerns raised by its roster of ITDHH and the District's response to those concerns, it is clear to me that the legitimacy of the IEP process was impacted. In the context of the ITDHH being cautioned not to discuss their concerns with parents, I question whether there could be true collaboration and assessment of Carter's needs with a view to identifying appropriate supports necessary for him to have meaningful access to education services.

[161] Moreover, it seems apparent to me that the District was already aware that there were issues regarding the level of ITDHH service and the programming which was being offered to students like Carter. The District made its decision to stay the course outside of the IEP process and without consultation with parents.

[162] Carter's first IEP meeting on November 28, 2016 was a full month after the ITDHH's correspondence sent October 14, 2016 expressing significant concerns regarding caseloads impacting the level of service they were able to offer. Carter's IEP was on a Monday and Ms. Lawlor was scheduled to meet with the ITDHHs to discuss their concerns on Friday that same week. Kimberley Lawlor was in attendance at Carter's IEP, the concerns of ITDHHs were not discussed, and no changes were made to the level of ITDHH service for Carter following that meeting.

[163] Carter's second IEP on June 6, 2017 was one full month after the ITDHH had submitted a proposal on May 5, 2017 to establish a satellite classroom to address serious concerns they were seeing in the programming for students with cochlear implants in the metro St. John's region. Again, the concerns of the roster of ITDHHs were not discussed at the IEP meeting, and no changes were made to the level of ITDHH service for Carter following that meeting.

[164] Before leaving the Kindergarten year, as a final note I wish to recognize the evidence of Aubrey Dawe, the school Principal at Beachy Cove Elementary. When Mr. Dawe testified at the hearing he acknowledged that the Churchills were constantly advocating for improved supports for Carter during and outside of the IEP processes. Mr. Dawe's evidence was that the Churchills raised concerns regarding many aspects of Carter's programming including the level of instruction Carter was receiving in ASL and with ASL,<sup>32</sup> the sufficiency of student assistance for Carter, the failure to use ASL proficiency testing of personnel to confirm whether appropriate supports were in place, as well as Carter's social isolation within a class of hearing students. Mr. Dawe indicated that when the Churchills expressed their concerns to him in writing they often copied District personnel, and Department personnel. Mr. Dawe says he advocated on behalf of the Churchills as well by relaying and repeating their concerns to the District.

[165] Mr. Dawe's evidence was that human resourcing issues were not within his authority to address. He relayed the Churchills' concerns to the District. The school was trying to provide the best education it had with the resources it was allowed by the District. In Mr. Dawe's words he was "playing the cards I've been dealt".

### ***2017-2018 School Year: Carter's Grade 1 Year***

[166] On **September 6, 2017**, Carter started Grade 1 at Beachy Cove Elementary. The Principal of the school at the time was Aubrey Dawe. The teacher assigned to Carter's class was Christy House. Carter was to have the support of a student assistant Tammy Vaters. He was also allocated daily sessions with an Itinerant Teacher of the Deaf and Hard of Hearing, Sheila MacDonald. These sessions were initially 2 hours per day and this was later increased to full day (5 hour) support.

[167] I understand that Carter continued to be provided support in the area such as Speech Language Pathology, allotted time with an Instructional Resource Teacher, as described in the previous IEP.

[168] There were also additional efforts this year to obtain a new assessment of Carter's abilities and needs. Arrangements were made for the Churchills to travel to Halifax, Nova Scotia with Carter so that he could participate in assessments offered by the Atlantic Provinces Special Education Authority ("APSEA"). Assessments proceeded over two days, October 5, 2017-October 6, 2017. APSEA would later produce a written report dated November 3, 2017 outlining its findings and recommendations regarding Carter's education. It was after this assessment that Carter's allocation of ITDHH support was increased to full time daily support on November 27, 2017.

[169] I should note that neither student assistance nor ITDHH supports were in place for Carter's first day of school and as a result Carter had his first session with Ms. MacDonald (ITDHH) on September 8, 2017. The following day, on September 9, 2017 a student assistant was assigned temporarily to Carter. This Fourth Student Assistant explained to the Churchills that her assignment was only temporary because she did not know ASL. By September 12, 2017 this situation was remedied and Carter was assigned to his Fifth Student Assistant, Tammy Vaters.

[170] I note the delay in implementing these services because, for the first few days, Carter was placed in a classroom without anyone who could communicate using ASL. Leaving aside the question of whether Carter could have had meaningful access to school curriculum during that brief period, I am concerned that Carter would not have been able to effectively communicate his basic personal needs. It was not adequately explained to me how Carter was expected to

communicate or to whom he would communicate his need to use the washroom, whether he was cold or hungry or thirsty.

[171] Overall I found the best evidence of Carter's experiences in Grade 1 came from the evidence ITDHH Sheila MacDonald, and Student Assistant Tammy Vaters who were assigned to work with Carter during the Grade 1 year.

[172] Sheila MacDonald (ITDHH) provided affidavit evidence to this Board of Inquiry, and she testified when the matter proceeded to a hearing. Ms. MacDonald has a Bachelor of Arts (French) degree (1984) a Bachelor of Education degree (1986), and a Master's degree in Deaf Education (1987), as well as 35 years experience teaching children who are d/Deaf or hard of hearing. Ms. MacDonald's affidavit evidence was fairly direct in expressing her concern that the educational needs of students like Carter Churchill who needed to learn ASL were not being met:

7. I have no recollection of ever referring to Carter's programming as a "shit show". However, I did feel that the educational needs of students, generally, were not being addressed. I believed that there was no plan put in place by the Department of Education, or the respective school boards, for students who needed ASL after the closure of the Newfoundland School for the Deaf.<sup>33</sup>

[173] Ms. MacDonald explains that when she started working with Carter during Grade 1, he was scheduled for daily service for part of each day (i.e. 2 hours per day). By November 27, 2017, this support was increased to daily service for the full day (i.e. 5 hours per day) although she was not specifically informed of the reason for this increase. He also received support from a student assistant Tammy Vaters who was herself Deaf and a native signer.

[174] Ms. MacDonald's affidavit describes that:

14. During [Grade 1], the approach to Carter's education was that he be fully integrated into his grade 1 classroom. This meant that he was being taught the regular grade 1 curriculum with certain supports, including a sound field system in the classroom, a personal FM worn by the classroom teacher to optimize auditory learning, part-time (and later full time) access to a DHH itinerant, and a Deaf student assistant. However, the instruction of regular grade 1 curriculum was not entirely feasible given Carter's skills at the time. For example, Carter did not know the alphabet, nor could he count to 10. Effectively, he was in the process of learning both ASL and English, which prevented him from being able to keep up with some of the grade 1 curriculum.

15. The classroom teacher handled all the instruction in the classroom to the hearing children. Carter had his own desk in the classroom which was situated for him to be able

to see clearly what was happening in the room. There was a sound field system in the classroom and a personal FM that the classroom teacher wore to optimize anything that Carter could understand auditorily.

16. In grade 1, there was no use of assistive communication technology such as Proloquo2Go. It was my understanding that Mrs. and Mr. Churchill did not want assistive communication technology, and instead wanted to focus on ASL.

17. Most of the time, Carter was in his regular grade 1 classroom. However, sometimes I took him out to a separate room to do work, depending on the situation. For grade 1, we were able to use a room that no one else used. We used this separate room as required or considered desirable, including instances where I felt that the classroom was perhaps too noisy, or if Carter needed extra explanation or to focus on work being completed.<sup>34</sup>

[175] What Ms. MacDonald describes here, and that significant portions of the day focused on learning by auditory communication causes me concern given Carter's limited access to sound, questionable comprehension of information presented through auditory means only, and the evidence presented of Carter's relative strength in receptive communication via sign/ASL or when auditory communication is combined with sign/ASL. Ms. MacDonald testified that Carter had neither the language nor vocabulary skills to understand what was being taught even if she could have interpreted the classroom teacher's lessons in real time. So after the classroom teacher would finish delivering her instruction to the class, Ms. MacDonald would try to explain in ASL what had happened in the classroom and what lesson or activity Carter had to work on. In the meanwhile, the other students were busy completing the task.

[176] Ms. MacDonald had prior experience working as a classroom teacher at Newfoundland School for the Deaf (NSD) from 1987 – 2007, and she was able to provide a comparison contrasting the learning environment provided to Carter with that which existed at the NSD prior to its closure in 2010. She described that most if not everybody at the NSD knew sign language. This included the educators and the students but also the kitchen and cleaning staff, lab technicians, and dorm supervisors. The students were immersed in the language and observed it in the hallways and residences. The students communicated with each other and with their teachers using ASL. Instruction at the NSD was based more in visual presentation rather than auditory instruction and every lesson regardless of the subject matter had a language component as the teachers provided the vocabulary necessary to understand the material presented. Students learned ASL from their teachers but they also learned, acquired, and "pick up" the language and other knowledge from observing by others in their learning environment. This "incidental learning" was not available to Carter by his inclusion in a class of hearing students.



[177] Ms. MacDonald describes that her work with Carter was primarily ASL-oriented. She had to focus on basic signing skills and vocabulary, literacy and numeracy skills such as learning the alphabet and counting to 10, and trying to increase Carter's receptive and expressive signing skills. However, Carter had no opportunity for incidental learning and could not learn from his peers, older students in the school, or even his own classroom teacher because none of them knew ASL.

[178] The only two individuals in the entire school who communicated with sign other than Carter, were Ms. MacDonald and Ms. Vaters. Although either she or Ms. Vaters were present with Carter at all times, and more often than not both were present with Carter at the same time in his classroom, opportunities for Carter to observe conversational signing were limited: "Ms. Vaters and I would not simply start a conversation while in the classroom with Carter".

[179] I am left with the impression that Ms. MacDonald was observing the same issues previously raised by the roster of ITDHHs. Severe language delays present in the cohort of students with cochlear implants, including Carter, were preventing these students from having meaningful access to grade level curriculum. These students were socially isolated and deprived of incidental learning opportunities when compared to their hearing peers. Intensive intervention was required to address the underlying language and communication issues. Development in these areas was needed to build a foundation upon which these students could access the broader school curriculum. Without remediating these fundamental issues, these students would fall further and further behind their hearing peers.

[180] Ms. Tammy Vaters, the Fifth Student Assistant assigned to support Carter Churchill provided an affidavit to this Board of Inquiry and she testified when the matter proceeded to a hearing. Ms. Vaters has a background in accounting and worked in that field for ten years after completing her degree. However, in 2008 began working within the education system. Ms. Vaters is Deaf and her first language is ASL. In August 2017, the District offered her a position as a student assistant and she began working with Carter Churchill on September 12, 2017 during Carter's grade 1 year.

[181] Ms. Vaters describes that as a student assistant, her responsibilities generally included assisting students with transportation, feeding, toileting, or assisting the student with behavioural needs if such needs are present. She describes that in working with Carter she realized that supporting his communication needs would be a significant part of her work. When she first started working with Carter he knew very little signs, and she did as much as she could to expose him to ASL.

[182] Ms. Vaters rode the bus with Carter daily and she used this opportunity to use books, activities, and games to expose him to ASL. She would show him pictures and introduce

corresponding signs. She would act out the stories in her books to give Carter a visual and engage with him. She describes Carter laughing and enjoying these interactions drawing the attention of other students on the bus. She contrasted this with the environment in Carter's classroom.

[S]o we'd go into the classroom and the teacher would speak and I had no access to that and neither did Carter.... The teacher would teach, hand out the papers. The kids would have already heard all of the content, all of the instructions and they're ready to write. I haven't got any of that and so, then when I get the paper, I have to take time to explain to Carter what that was all about. So completely unfair to him and he needs more time.

...

So, I think basically I assumed some of the teaching roles, whatever the teacher was trying to say, because there was no communication, I ended up by default. I mean, the teacher could barely communicate, barely. And if Carter was struggling, you know – there would even be an announcement made in the school. We had no access to that.<sup>35</sup>

[183] In addition to her concerns that Carter couldn't access information being taught during classroom instruction, Ms. Vaters, like Ms. MacDonald, expressed concern regarding Carter's exclusion from group discussions and play.

... There's no communication between those children. So in a large group discussion, the kids would be all talking with each other. I'd have no access to it and therefore Carter had no access to it. There was one or two kids who demonstrate a little interest in Carter... who would come and they tried to learn, you know, a little bit of sign and, again, 30 children in the classroom. He was largely ignored. Of Course those group conversations are going on all the time. He wasn't a participant. He wasn't included.<sup>36</sup>

[184] She describes her frustration in trying to bridge the communication gap and Carter's frustration in being excluded:

Carter knows. I mean, he can see what's going on. And so, he knows that he was treated differently. Hearing kids would be talking. He realized that kids weren't playing with him which would be very very sad for him. He knows. He can see what's going on in the environment; that he couldn't get in there. And so, we would try and bridge that communication gap with other kids, but he was pretty darn frustrated....<sup>37</sup>

[185] I find Ms. Vaters' evidence offers relevant observations of how the programming offered for Carter had a negative impact on his emotional wellbeing.

[186] I do find the supports provided this year to be a significant step forward. Carter would eventually have the combined benefit of full time access to an ITDHH and a student assistant with native signing proficiency. There were also additional efforts this year to obtain a new assessment of Carter’s abilities and needs – specifically the APSEA assessment in October.

[187] However, the evidence of Ms. MacDonald and Ms. Vaters has persuaded me that Carter’s programming this year remained inappropriate and did not respond adequately to his needs. I repeat my finding that the District was aware that the programming offered to the cohort of students with cochlear implants in the St. John’s metro region was not meeting the needs of these students. In my view, the failure to explore the proposals for a satellite classroom to provide intensive supports for these students to develop language and communication skills was a missed opportunity. In the absence of any evidence that such a proposal could not be implemented or could not be implemented without imposing undue hardship on the District, I cannot conclude that this missed opportunity is justified.

[188] On **February 21, 2018**, an ISSP Meeting was held to discuss the Individual Support Services Plan for Carter Churchill.<sup>38</sup> The Churchills were present as were representatives from Occupational Therapy and Physiotherapy from the Janeway Hospital, Carter’s ITDHH, his Grade 1 teacher, the school principal and guidance counselor as well as an education psychologist from the District.

[189] The ISSP minutes identify “strengths” describing Carter’s capabilities at that time. With respect to communication, the minutes note: *[Carter is] very social – tries to interact/communicate his news to teachers and students; Always indicates if CI is not working; Developing communication skills and facial expression in ASL.*

[190] The ISSP minutes list “needs” and “goals” for Carter’s further development of his capabilities. With respect to communication Carter was noted to have needs including: *to continue to develop expressive and receptive skills both in ASL and English; to develop typing skills using the keyboard/ipad; to limit the use of pointing and to communicate using at least 2-3 signs; to participate in sentence writing by contributing ideas; to continue to develop vocabulary; to complete as much of the grade 1 curriculum as he can.*

[191] The comments/signature page of the ISSP minutes note, among other items, *Parents wish for current supports to remain in place in respect to Carter accessing a student assistant proficient in ASL. In addition they feel the services of the Itinerant for the Deaf and Hard of Hearing needs to remain in place at the current level. Aubrey [Dawe, school principal] explained process for school profile and allocation of resources, clearly outlining Carter’s needs will be key in that.*

[192] All attendees signed off on the ISSP on **February 21, 2018**.

[193] ITDHH support for Carter was extended into the summer months with funding provided by the Department. Carter was again assigned to Cathy Lawlor ITDHH who had worked with Carter during his preschool years. She describes in her affidavit that during this period she worked with Carter on a variety of areas including vocabulary, sight words, developing stories from pictures, and using descriptive words to expand sentences. They worked on reading comprehension skills. Signing with some ASL components was the main method of communication during their sessions, and she noted Carter had made some progress in both his receptive and expressive communication skills since they last worked together in 2016 but his language skills were still quite delayed in comparison with his peers.

### ***2018-2019 School Year: Carter's Grade 2 Year***

[194] In **September 2018**, Carter Churchill started Grade 2 at Beachy Cove Elementary. Carter continued to be supported within a class of hearing students. These supports continued to include full time services from Sheila MacDonald ITDHH, and from Tammy Vaters the same Student Assistant as in the previous year who was herself Deaf and with native fluency in ASL.

[195] I understand that Carter continued to be provided support in the area such as Speech Language Pathology, allotted time with an Instructional Resource Teacher, and was provided assistive technology generally as described in the previous IEP.

[196] In her affidavit and in her testimony at the hearing, Ms. MacDonald confirmed that there were no significant changes in the approach to Carter's education from Grade 1 to Grade 2 with one exception. During the Grade 1 year, Ms. MacDonald was able to take Carter out of his regular classroom into a separate small quiet room where she could provide one on one direct service to Carter. During the Grade 2 year, this small quiet room was not available to them. Instead Ms. MacDonald had access to an office space shared with another teacher who used the space as a "calm down" space for children with autism. Five students with autism attending the school were allowed access to this space for "calm down" which might include viewing a video or movie, and at other times these children would arrive very escalated, screaming, etc. and the space was used to de-escalate these students. Ms. MacDonald described her frustration with this situation.

Sometimes it was frustrating. Like sometimes we were in there and were doing work and if a student came in and was upset or if we went in and there was already a student there watching a video or something like that, then you know, it was then that was distracting for Carter. He could hear quite a bit through his cochlear implants and you know, noise was distracting.<sup>39</sup>

[197] This appears to be a regression in the level of accommodation provided for Carter.

[198] A progress report dated February 2019 authored by Sheila MacDonald and submitted to the District, she describes Carter's progress in ASL/Communication as follows:

#### ASL/Communication

Receptively, Carter has come a long way. His understanding of sign language is improving every day. He is observant and picks up on other cues as well such as facial expressions and body movement.

Carter attends well when stories are read/signed to him, and can answer "who, what, when, where" questions about these stories. "Why" questions are more difficult for Carter to answer.

Expressively, Carter still tends to point or use one or two signs, thus prompting questions to be asked of him to help clarify his message. That being said, he can still convey lots of information about his personal experiences and he loves to share this information. Sometimes Carter's signs are not clear because of the cerebral palsy, and it can be difficult at times to understand his message.<sup>40</sup>

[199] The progress report also includes Ms. MacDonald's concerns regarding the learning environment provided for Carter and how this limits his access to the language aspects of school curriculum:

Carter is learning new vocabulary every day related to the curriculum, and he remembers these new words and signs. However, it is still very difficult for Carter to expand his vocabulary and communication skills. He is the only student who uses sign language in the school and there are only 2 adults in the building who can communicate with him, and model the correct sign and correct use of ASL. These 2 adults have to alternate their time with Carter i.e. when one is there the other is not. Therefore, Carter rarely sees 2-way communication or conversations. If there is anyone else in the school beginning to use sign language, then they are at a level lower than Carter, and cannot help him expand his language. Carter is in a situation where he is linguistically isolated, and he has to be taught everything – every vocabulary word, every concept, every phrase. This is not a natural way to learn a language, and is made more difficult with the lack of human resources i.e. the people who have the language knowledge to help him. The curriculum is full of activities based on listening, and videos which may or may not have captioning – generally captioning is awful at the best of times, mostly consisting of one long run on

sentence with no capitalization, no punctuation and no differentiation to show alternating speakers.

There is nothing incidental about Carter's learning, which is often the case with many deaf students. To say that because Carter has a teacher and a student assistant who know ASL that everything is fine with his learning situation is making everything too simplistic. The curriculum is created for students who can hear, who start school with a wealth of vocabulary and language on which to build their learning. Carter is still missing many basic vocabulary words which other students knew when they were 2 and 3 years old. Work continues to develop his vocabulary and expressive/receptive language.<sup>41</sup>

[200] This is a further example of an ITDHH raising concerns with the District regarding the programming and accommodation provided for a student with cochlear implants exhibiting severe language delays. Again no evidence was presented as to any change or substantive response from the District.

[201] In her evidence Tammy Vaters described her experience during a Professional Learning Day held at Beachy Cove Elementary on or about September 22, 2018. She had been invited to participate in a discussion session with 8 teachers and other student assistants. Jamie Coady, Director of Schools with the District was present. Ms. Vaters describes this as a "brilliant" "really rich" conversation. She was advocating for changes to Deaf education generally and the learning environment provided for Carter specifically. They discussed Deaf culture, and ways to improve the resources provided to d/Deaf and hard of hearing students, and improve accessibility. Ms. Vaters describes that the discussion came to an abrupt halt when Mr. Coady said: "That is not our priority". Ms. Vaters describes that she was "shocked" and "taken aback" and "I could see the teachers all looked at me".

[202] Ms. Vaters described that during a second Professional Learning Day at Beachy Cove Elementary on or about October 17, 2018, she participated in another group discussion with teachers. Mr. Coady was again present and Ms. Vaters says when she raised her concerns regarding deaf education again, Mr. Coady was dismissive of her questions. Ultimately, Ms. Vaters submitted a formal complaint regarding Mr. Coady's position that issues within Deaf Education were not a priority.<sup>42</sup> This prompted a meeting with Human Resources personnel and Mr. Coady during which Mr. Coady apologized to Ms. Vaters.

[203] This is a further example of concerns being raised with the District regarding issues in Deaf Education. Again, no evidence was presented as to any change or substantive response from the District.

[204] On **January 17, 2019**, an ISSP Meeting was held to discuss the Individual Support Services Plan for Carter Churchill.<sup>43</sup> The Churchills were present as were representatives from Occupational Therapy and Physiotherapy from the Janeway Hospital, Carter's ITDHH, his Grade 2 teacher, the school principal and guidance counsellor as well as an education psychologist from the District.

[205] The comments/signature page of the ISSP minutes note, among other items, "It is essential that Carter continue to receive full time services of the Itinerant for the Deaf and Hard of Hearing. In addition to being instructed in ASL, Carter requires a Student Assistant who is fluent in ASL. In order for Carter to be successful in his academics, he must develop his language. Therefore he requires access and exposure to a native ASL user. ASL is a visual language and in order to learn the grammar, syntax, facial expressions and body language he must be exposed to conversations in ASL that he can not only participate in but also witness. Language development is critical not only academically but also socially. It is imperative that children, carter interacts with also learn some basic signs to minimize the risk associated with isolation and mental health problems. Carter's classroom suggested once a cycle a teaching period for his classmates to learn ASL."

[206] This ISSP acknowledges that Carter has significant needs in the area of language development which are not being addressed by the supports provided for him. The ISSP indicates Carter's academic success and social development is dependent upon addressing this need. What is required according to the ISSP is access and exposure to a native ASL user, opportunities to participate and observe conversation in ASL and interaction with other children who are ASL users in order to mitigate the risk of social isolation and mental health problems.

[207] I reiterate that during this school year the roster of Itinerant Teachers of the Deaf and Hard of Hearing, re-submitted their proposal that the District establish a Satellite Support Classrooms for Students who are Deaf/Hard of Hearing, a proposal which would have responded to the requirements of the ISSP. The ITDHH requested that this be implemented as a pilot project for the upcoming 2019-2020 school year. It was not pursued by the District.

[208] Again I say that given my observations related to concerns repeatedly raised by District personnel on the front lines of Deaf Education, and the District's response or lack of response to those concerns at the executive level, I have misgivings as to whether Carter's ISSP and IEP process was impacted. I question whether there was true collaboration with a view to identifying, evaluating, and exploring appropriate supports necessary for him to have meaningful access to education services. It seems to me, the District was aware of issues indicating that students like Carter were not receiving the level of intervention required to meet their needs. The ISSP removes all doubt that Carter was one of the students in need of this level of service. Nevertheless, the District made the decision to stay the course. In my view, the District cannot

rely upon parental consent to discharge its duty to provide reasonable accommodation when it had information suggesting that the accommodations it was providing were not meeting the needs of students.

[209] ITDHH support for Carter was again extended into the summer months with funding provided by the Department of Education and Early Childhood Development. The Churchills supplemented this by hiring Tammy Vaters to provide additional hours each week for language exposure for Carter.

### ***2019-2020 School Year: Carter's Grade 3 Year***

[210] On **September 4, 2019**, Carter started Grade 3 at Beachy Cove Elementary. Carter continued to be supported within a grade 3 class of hearing students taught by Angela Hatcher. Student assistance continued to be provided by Tammy Vaters. However, his previous ITDHH Sheila MacDonald had retired and Carter was assigned a new ITDHH Ms. Joanne Van Geest for full time support.

[211] Again, I accept that Carter continued to be provided support in the area such as Speech Language Pathology, allotted time with an Instructional Resource Teacher, and was provided assistive technology generally as described in the previous IEP. Again, little evidence was presented in relation to these supports and they were not the focus of this complaint.

[212] Joanne Van Geest provided an affidavit to this Board of Inquiry and she testified when the complaint proceeded to a hearing. Ms. Van Geest has post-secondary diplomas in Journalism (2003) and Fitness and Lifestyle Management (2006). She has a Bachelor's degree in Physical Education (MUN - 2014), and a Master's of Educational Psychology (focus of Deaf and Hard of Hearing) (Mount St. Vincent University – 2018). Ms. Van Geest described that this Master's program does not include instruction or training in ASL although some of the courses include instruction about ASL. The graduation requirements include completion of 3 ASL courses which the students must have completed independently. During the summer of 2016, she completed the level 1 course. This course was taught in person by an instructor recommended by the university but not affiliated with the university. She later completed level 2 and level 3 online through the StartASL website. When she was assigned to support Carter Churchill the District provided funding for Ms. Van Geest to access 10 hours of tutoring to refresh or improve her ASL abilities.

[213] When compared to the other ITDHH involved in Carter's education, Ms. Van Geest had less practical experience working with children who are Deaf or Hard of Hearing. Ms. Van Geest



had 1 year of experience as an ITDHH during the 2016-2017 year. She describes this experience in her affidavit:

8. During the 2016-2017 school year I worked as a D/HH Itinerant in Avalon West in a replacement position. I worked with several students to provide them with additional instruction/education in learning gaps that could be attributed to their hearing loss. For example, a child may have had difficulty consistently pronouncing and “s” at the end of plurals when speaking or may forget to write the “s” when writing. The child may not have always heard this sound due to their hearing loss, not to be used to using it and would therefore often omit it. I also assisted student with their hearing technology when required. <sup>44</sup>

[214] Ms. Churchill describes in her affidavit that she met Ms. Van Geest on the first day of school and she asked whether Ms. Van Geest knew ASL. The Churchills were immediately concerned that Ms. Van Geest’s proficiency in ASL was not sufficient to provide an appropriate level of support for Carter. She recalls that Ms. Van Geest acknowledge that although she had obtained a Master’s degree in Deaf Education, and had taken ASL classes the previous summer, her ASL was “rusty” and she did not have much experience teaching deaf children. At the end of this first interaction, Ms. Churchill told Ms. Van Geest she wasn’t qualified to teach Carter and that she would be going to the media. On September 6, 2019, the Churchills met with the school principal to express their concerns regarding Ms. Van Geest’s qualifications.

[215] On **October 12, 2019**, an IEP Meeting was held to discuss the Individual Education Plan for Carter Churchill.<sup>45</sup> The IEP Minutes record strengths related to Carter’s communication abilities including: *Loves interacting with peers; Consistently wears 2 CI processors and indicates when they are not working; Can follow simple 1 step direction through sign; Can answer wh-questions; Can sign numbers up to 100; Can fingerspell own name independently; Responds to prompting to reciprocate greetings from others; Consistently watches peers as a model of what he should be doing in music class and responds accordingly; Notifies Teacher/SA when needs to go to the bathroom.*

[216] The IEP Minutes record needs related to Carter’s communication abilities including: *To improve expressive language through ASL/Tech Aids; Expand curriculum and every day vocab using ASL/Tech. To consistently combine 2+ signs to create phrases/requests through ASL/Tech without prompting; To spontaneously initiate interactions with others; to ask questions if he needs clarification without prompting; Read beyond level A.*

[217] The IEP Minutes record an updated list of “Additional Education Services” which continued to include: *Speech-Language Pathologist; Instructional Resource Teacher; Student*

*Assistant; Special Transportation; and Hearing Itinerant Teacher. In addition "Other (ASL)" was added to the list of "Additional Education Services.*

[218] As with previous IEP Minutes a "Record of Alternative Program(s)" identifies that Carter would continue to be provided accommodation to participate in all of the prescribed courses/programming for: *Language Arts; Math; Social Studies; Religion; Health; Art; Phys.Ed; and Music.* The list of Alternate Programs now lists "*Self Help*" and "*Numeracy*" and "*Literacy/Language Development*" with the teacher of these alternate programs identified as DHH Itinerant.

[219] The IEP minutes provided to the Board of Inquiry from this IEP did not include a "Record of Accommodations".

[220] On **November 28, 2019**, Ms. Van Geest participated in ASL proficiency testing conducted at the District's conference center at 40 Strawberry Marsh Road, St. John's NL. Correspondence sent to the District outlining the results of that proficiency testing indicates that Ms. Van Geest scored at "Level 4" or "Survival" level proficiency and notes that a "passing grade as a threshold to expression and comprehension is Level 6, Intermediate". Ms. Van Geest's ASL abilities are further described as follows:

Joanne exhibits weakness in receptive and expressive signing. She does not use the grammatical features of ASL in relation to time, topic, comments/body shift and classifiers. She struggles with comprehension, needing repetition and reduced rate of signing when signs are not misproduced, they are signed with clarity but not consistently.

Joanne would benefit greatly by continuing to study sign language acquisition through immersive instruction by ASL instructors who are native Deaf signers.<sup>46</sup>

[221] In her evidence, Ms. Van Geest disputes the results of this assessment and asserts that she could communicate with Carter using ASL and that she relayed course curriculum to him using ASL. She does however acknowledge in her evidence that there were times that she reached the limit of her own ASL vocabulary and that she relied on student assistant Tammy Vaters to provide her with the ASL vocabulary for words used in the grade 3 curriculum<sup>47</sup>. Sometimes after consulting with Ms. Vaters, Ms. Van Geest would try to complete her explanation of a lesson to Carter. Other times Ms. Vaters would take it upon herself to explain the lesson to Carter.

[222] Ms. Vaters also testified regarding her involvement in supporting Ms. Van Geest in teaching Carter. Ms. Vaters described having concerns regarding Ms. Van Geest's signing abilities:

Q. In addition to Ms. Hatcher, did you spend time with Carter in Grade 3 as his student assistant while he was being taught by Joanne Van Geest?

A. Yes.

Q. And did you have to communicate the course material to Carter from Joanne Geest to Carter in ASL?

A. Joanne tried, but she couldn't communicate. She couldn't sign. And so, I would end up stepping in and helping because she simply couldn't sign.

Q. She simply couldn't sign.

A. At the barest minimum. She said she had level 3 which was really not possible. She couldn't understand. I would ask things. I would ask for information. She would nod her head in agreement and then she'd go off, but she completely misunderstood what I had asked for. So, there was a complete communication breakdown. It was very disappointing.<sup>48</sup>

...

Q. Joanne Van Geest testified yesterday and when the results of her ASL proficiency interview were put to her, she said she did not believe the results were accurate and her sign language competency was much better and that the test was wrong. What's your reaction to that?

A. She doesn't have ASL proficiency, and so, the test verified that and, as an ASL instructor, I can tell you that she had absolutely no facial grammar. She had absolutely no structure. The way that—American Sign Language structurally is different than English, just as French is different than English, and so, she couldn't manage American Sign Language. She couldn't comprehend it. The kids did understand what she was trying to say. So, her ASL proficiency would be very very low. There's a great deal of room for improvement.

Q. I notice you said that the kids don't understand what she's saying. I mean, in Grade 3, there was only Carter. Were you referring to--when you said "the kids," were you also referring to her instruction at East Point Elementary?

A. In terms of Carter, Carter would not understand her at all. And so, I acted then as a deaf interpreter for Joanne because she would say something and then I ended up

taking on a role as a deaf interpreter which was re-interpreting it. She of course did not appreciate that.<sup>49</sup>

[223] On **February 14, 2020**, Ms. Van Geest had to take a leave of absence from her position for medical reasons she remained off for the remainder of that year.

[224] On **March 13, 2020**, “in person” classes were suspended due to the Covid-19 pandemic.

[225] On **March 19, 2020**, the Churchills received an email from school Principal Aubrey Dawe indicating that a new ITDHH Gillian Lahoda had been hired to work with Carter and that she would be starting April 20, 2020.

[226] Gillian Lahoda provided an affidavit to this Board of Inquiry and she testified when the complaint proceeded to a hearing. Ms. Lahoda has a Bachelor of Education degree (MUN) and a Masters of Education (Deafness Studies) (University of Alberta).

[227] On **April 20, 2020**, the Churchills received an email from Ms. Lahoda advising that she had started as Carter’s new teacher and that she would be connecting with Ms. Hatcher to review Carter’s progress and make a plan to for moving forward. She offered to meet virtually due to the Covid-19 pandemic restrictions.

[228] On **April 27, 2020**, Mr. Churchill emailed Ms. Lahoda attaching a video of Carter introducing himself and confirming a time for an upcoming virtual meeting.

[229] On **May 4, 2020**, Ms. Lahoda started 1 hour weekly sessions (virtual) with Carter.

[230] On **May 19, 2020**, Ms. Lahoda emailed the Churchills and expressed her concern that 1 hour sessions online might be too taxing on Carter and she suggested she could be available for more frequent shorter sessions.

[231] On **May 26, 2020**, Ms. Lahoda emailed the Churchills to advise them that online learning was set to end early on June 5, 2020. However, she was approved to continue virtual sessions until the end of the regular school term if the Churchills wanted. She also proposed that she and Carter’s Student Assistant would like to surprise Carter with an in-person visit the following week.

[232] On **June 3, 2020**, Ms. Lahoda and the Ms. Vaters surprised Carter with an in person visit.

[233] On **June 25, 2020**, Ms. Lahoda arranged to take her own daughters to meet-up with Carter and his mother at Sunshine Rotary Park, although they ended up having to move this to Carter’s home due to transportation issues.

[234] Ms. Lahoda describes in her affidavit that her work with Carter from May – June 2020 focused in the area of language development in ASL. She notes that Carter had delays in both his receptive and expressive language skills. They worked on vocabulary development, asking and answering questions in ASL. They watched ASL renditions of “read aloud” children’s literature, they played games, and worked on social skill development such as maintaining conversations and repairing communication breakdowns.

[235] On **June 15, 2020**, the Churchills were advised by the District that ITDHH services would not be extended into the summer months. However \$4,000 funding was approved to hire a Deaf individual for 10 weeks at \$20/hour to facilitate Carter’s continued exposure to ASL over the summer.

[236] Over the summer months home tutoring was provided by two Deaf individuals who split the hours funded by the District.

[237] Although I have concerns about the programming offered to Carter during the 2019-2020 school year substantially for the same reasons as in his previous two years, and also with respect to Ms. Van Geest’s signing abilities, the concept of a satellite classroom for students with needs like Carter was beginning to gain traction within the District.

[238] In **September 2019**, the District the hired Darlene Fewer Jackson as Director of the Deaf and Hard of Hearing Programs and Services, a newly created position within the executive level of the District’s hierarchy. She had previously been employed as a consultant with the Department of Education from December 2008 – December 2014, and from September 2018 – August 2019.

[239] Darlene Fewer Jackson provided an affidavit to this Board of Inquiry and she testified when the complaint proceeded to a hearing. Ms. Fewer Jackson has a Bachelor of Education (MUN 1987), a Masters of Education (Hearing Impaired Program) (University of Alberta 1992) and two decades of experience as a teacher including a number of years specifically focused in the area of special education. Ms. Fewer Jackson is hard of hearing herself and other members of her family have experienced hearing loss as well.

[240] Ms. Fewer Jackson testified that during her work within the Department, and later with the District she studied the issues concerning the education of students who are d/Deaf or hard of hearing. In 2011 she co-authored a report for the Department entitled “A Review of Services for Deaf and Hard of Hearing Students in Newfoundland and Labrador”. In 2018 she returned to the Department and produced a further update to this report. When she was hired by the District to assume the newly created role of Director of Deaf and Hard of Hearing Programs and

Services, she was armed with a background and understanding that was previously lacking within the District. Ms. Fewer Jackson was prepared to explore and evaluate changes to programming and supports offered to d/Deaf and hard of hearing students. In a sense, she embodied the solution to the systemic problems that had previously persisted within the District.

[241] Upon her arrival at the District in September 2019, Ms. Fewer Jackson was a woman on a mission. She had not seen the proposal submitted by the ITDHHs in 2017 and 2019 but she was aware of it, and she had every intention of moving it forward:

Q. How long did it take you, and maybe you don't remember this? Was it a number of hours, minutes, days? How long did it take you to realize that, you know, yeah, this is a good idea, this has got legs?

A. When I walked into that role September 5th, 6th, like today, whatever, that was my mission. That was my mission, to help folks understand the urgency with which that had to happen. I was like a bit of like a dog to a bone. I mean, I don't know what other way to say it, but, yeah, we knew that we needed to do that, but then me being in the role, I had the previous knowledge, the expertise, the support, that we could probably get this off the ground for sure.<sup>50</sup>

...

Q. So, you see a serious problem, and, you know, sort of back to the satellite classroom in the metro area now--you see a serious problem. You take an idea, I think that the itinerant teachers have proposed, and you turn it into, you know, a more detailed proposal. Who do you bring this proposal to? Who green lights it?

A. So, I wrote the proposal, and I submitted it to the Director of Student Services at the time, which would have been Denise King, and to Georgina Lake at the School District level.

Q. Denise King and Georgina Lake?

A. Correct.

Q. Do you know what happens with the proposal from there, or does it go out of your hands at that point?

A. It was out of my hands.

Q. Okay. At some point, you know, you hear back that divine permission has been given –

A. Yes.

Q. - that the thing will proceed, and then are you charged with operationalizing, or overseeing the operationalizing of the classroom?

A. I was involved heavily, yes.

Q. It must have been a proud moment, you know, the first day of school in that classroom. You're taking a drink, so I'm going to get you to –

A. Don't make me emotional. Yes.<sup>51</sup>

[242] The proposal which Ms. Fewer Jackson prepared for the District acknowledges deficiencies in programming offered by the District for deaf students with language delays. The following excerpt from the "Proposal for DHH Education – September 2019" is relevant:

- Currently, deaf students are housed in their neighborhood schools and are being supported by itinerant teachers for the deaf and hard of hearing. Assessment data shows that these students have significant language delays and are struggling to meet the demands of the curriculum. In fact, their language delays are impeding their ability to access the curriculum.

...

- Research also points out that the social-emotional impact of deaf students learning in isolation, away from their deaf peers must also be considered.
- Our current model of services **does not provide deaf students:**
  - The opportunity to learn their own language,
  - The opportunity to be fully educated in their own language,
  - Full time access to a qualified teacher (DHH),
  - Full access to the curriculum or the classroom's social environment,
  - The opportunity to communicate or interact with deaf peers.

In order for deaf students to successfully access the prescribed curriculum, **every effort must be made in supporting them to become proficient in their own language.** As their language proficiency develops, so too will their success in accessing the curriculum. Developing a deaf child's language prior to beginning school also needs to be addressed.<sup>52</sup>

*[bold in original]  
[underline added]*

[243] The Churchills were invited to a meeting at the District’s offices to discuss an opportunity for Carter to participate in a new pilot project “ASL Immersion Classroom”. The meeting occurred on **June 10, 2020**. The Churchills, and other parents attended. A Power Point presentation prepared for that meeting describes the rationale for the ASL Immersion Classroom as: to provide a language enriched environment for students with significant hearing loss – who are learning American Sign Language; and to provide Individual Educational Plans for each child in order to aid their academic progression. Resources for the program are identified as including: two teachers for the Deaf/Hard of Hearing; Deaf student assistants to help promote language learning opportunities; Alternate Transportation from student’s home address to the school; Classroom setting to provide a language enriched environment. Over the coming months, the Churchills had discussions and correspondence with the District regarding the ASL Immersion Classroom and ultimately they agreed to have Carter participate in this project.

[244] Within the span of 8 months during the 2019-2020 school year, Ms. Fewer Jackson had taken the concept proposed by the ITDHHs, drafted an updated proposal, submitted it, received approval, and completed a consultation process with parents. Ms. Fewer Jackson pursued and obtained a re-allocation of resources sufficient to implement the proposal so it was ready to pilot in the 2020-2021 school year.

#### ***2020-2021 School Year: Carter’s Grade 4 Year***

[245] On **September 9, 2020**, Carter started Grade 4 in the satellite classroom now being referred to as the “DHH Classroom”<sup>53</sup> at East Point Elementary. The 8 students enrolled in the DHH Classroom were instructed by a team of two teachers – Gillian Lahoda and Alma McNiven. The students also had the support of three Deaf student assistants.

[246] Ms. Churchill acknowledged in her affidavit that this year there was a “dramatic change in school environments”. Upon arrival, the Churchills met school principal Line Daly. She spoke to Carter using ASL and signed “Good Morning”, “How are you?” and “I am learning ASL!”

[247] In her affidavit, Gillian Lahoda describes the different approach to educating deaf students in the DHH classroom:

17. In the DHH Classroom, instruction is provided in ASL. There are times when I will use ASL signs in English word order accompanied with spoken English when working with students who can use some of their residual hearing. Sometimes I speak to Carter, with or without sign accompaniment, and sometimes I use speech sounds when teaching reading and phonics, since he has access to those sounds with his cochlear implants.



Usually however, I use ASL, and in whole-group instruction I use ASL. When I tell stories, ask questions, respond to students, it is with ASL.

18. Because American Sign Language is a complex visual language with its own grammar and phonological system consisting of both manual and non-manual features, it is impossible to speak English and use ASL at the same time. The grammar and word order are entirely different between the two languages. There is no written component for ASL, so students must learn to read and write in English. When teaching reading, I will often show the English sentence, read each word individually, and ask the students to tell me the meaning of the sentence in ASL, or to describe what is happening in their own words, as a way to demonstrate their comprehension.

19. Instruction is either full group with all 8 students, small group of 2, 3, or 4, where students are grouped differently for different subject, sometimes this depends on ability, topic, age, grade level, maturity, or level of assistance needed, for example, one-on one. We have a sound field FM system and Carter also uses a personal FM system. Since I am always signing, and tend to use true ASL more than signed English with ASL signs, I don't often use the FM system unless I am working one-on-one with Carter.

20. By using his personal FM system and his cochlear implants, Carter has some access to spoken language. He often responds to spoken language without any sign support for one-step directions (e.g., "please close the door" or "put that in your locker") and conversations with expected or typical dialogues (e.g., greetings and routine based communication). His ability to distinguish between different speech sounds and words in a quiet setting is quite good. In more in-depth conversations with background noise, it is much more difficult for Carter to follow without visual cues. He seems to gravitate to ASL and demonstrates better understanding of material and concepts when taught with sign.<sup>54</sup>

[248] Ms. Lahoda taught Carter in the DHH Classroom in both the 2020-2021 and 2021-2022 school years and so her evidence with respect to Carter's progress describes his progress over the full two year period.

21. I can best describe Carter's progression with anecdotal records. In the period over two school years that I have worked with Carter, I have seen tremendous growth in both receptive and expressive communication. His ability to attend to another signer for longer periods of time has increased. He will sometimes ask questions. In grade 4, he hardly ever raised his hand or volunteered an answer, but in grade 5 he was more involved in classroom discussion. He has come a long way in his ability to describe a picture. He used to give just one or two words to describe a scene, but will now offer 8 – 10 words.

When I first met Carter and he didn't always have the vocabulary to ask for what he wanted or tell us something he would become frustrated to the point of tears. That doesn't happen at all any more. If he is having trouble describing something, he will persevere and continue answering questions without getting upset.<sup>55</sup>

[249] When this matter proceeded to a hearing Ms. Lahoda expanded upon the evidence contained in her affidavit. Of all the evidence presented, I found Ms. Lahoda's evidence generally and the following exchange in particular, most useful in understanding the significance of the change in approach to teaching Carter after the DHH Classroom was established:

Q. To what extent can you tie that growth to Carter's exposure to the ASL immersive classroom?

A. Well, I –

Q. Given that you've seen him from beforehand.

A. I would like to think that it's made a huge difference. I think that not only being around teachers who are delivering the curriculum in Carter's language, in his first language, and he has full access to the curriculum, I think as well being surrounded by other signers has been critical in his growth, in his language growth. Being able to watch other people have a conversation is probably not something that happened for him a lot.

I think as hearing people, we sort of take it for granted that we overhear things all the time. We hear people talking. We hear the radio. We listen to music. We hear lyrics. The TV is on. For a deaf child, particularly a deaf child in a hearing family and in a hearing school, socialization would be affected.

Other children learning to sign is usually learning vocabulary. They can talk about surface things, things that are right in front of them. It's not – it's not possible, I don't think, to have a true deep friendship, I guess, if other children all have the ability to communicate with each other very easily and one child does not, if one child is struggling to communicate.

I think that having the classroom that we have now where all of the children are signing and the adults in the room are signing, it gives him full access to language. So, I would like to think that it's made a huge positive impact.

ADJUDICATOR:

Q. You mentioned Carter having full access to the curriculum now. Can you describe for me what changes you have observed in the time you've been working with Carter related to how he's been able to access school curriculum? Just walk me through what changes you've seen, increases in ability, regressions. Just walk me through the time you've been with Carter and how – if you've seen changes in his abilities to access curriculum.

A. Okay. When I say access to the curriculum, I mean that it is presented in American Sign Language. We've got some very skilled people working in our classroom. Our student assistants have gone above and beyond their actual roles and responsibilities as student assistants. They've been more like language mentors, facilitators who help the children with their ASL development.

Like I said, Carter was really quiet, I guess, at the beginning of the grade four year. He didn't get too involved. Many of the students struggled at that time. With even something like group work, knowing to keep looking at each. One would ask a question and we would have to sort of backtrack and say "okay, when he's asking a question, you have to look at him" and now you have to answer and "you have to keep looking". So, there were lots of things about kind of basic conversation and communication that we had to help the children. We had to facilitate their conversations a lot in the beginning.

As the year went on, we noticed a lot more opportunities, I guess. Like even recess and lunchtime, sometimes we would observe the students playing together and we'd see a lot more social interaction between them.

With regards to school work, I definitely saw progress with Carter. Like I said, in the beginning, he would often respond with a single sign or two signs and we would really have to work hard to pull information out of him, get him to elaborate more on what he was saying. Sometimes that would involve offering choices like "do you mean this or do you mean this?" and sometimes he wouldn't have the vocabulary to explain what he was trying to say and I definitely see that he has an easier time expressing himself now.

When I first met him online, at the end of his grade three year, I remember there was a moment where he couldn't tell us something. He wanted to tell us something and his mom was really trying her best and showing him things and showing him pictures and he couldn't get his point across and he was very upset and he was crying and it was heartbreaking because we couldn't understand what he wanted to say. And you know, this was an eight-year-old child or nine, I guess, at that time, nine-year-old child who

couldn't tell us something. It wasn't complicated. He just didn't have the vocabulary to do so.

And now, I find Carter will often come to school and he will have news to share with the class and we may not know what he is talking about. For example, he got a new fan installed in his bedroom and we had no idea what he was talking about, but he didn't get upset. He didn't cry. He just kept trying to explain it in different ways and he kept trying to show us what it looked like and how it moved and you know, we eventually figured it out, with the help of his mom actually.

But, my point is, I guess, that he persevered and he knows that eventually he will be understood. He knows that there are people out there who want to hear what he has to say.

Q. Are you able to quantify or describe the increases in vocabulary that you are observing? Can you give us any sense of concrete examples of increases in vocabulary? I'm trying to understand where he was when he started working with you and how he has progressed, if he has progressed, in his vocabulary, his ability to communicate. I mean, that's one example. But do you have – like you've said at the start –

A. I'm not sure I can off the top of my head.

Q. - at the start of your work with him, he was – you know, he was speaking in one-word sentences and answers. How long – is he communicating in paragraphs, telling full stories? You know, does he describe to you what he did on the weekend? Does he explain what level of video game he played? Where are we with his expressive language?

A. During sharing time during our morning news, he will volunteer his news. In the beginning, he did not. He will now raise his hand. He has something to say and instead of one or two signs, he will potentially throw out five or six signs. It still might not be clear. We may still need to ask him questions to kind of clarify what he's talking about, but he's definitely increased his sign utterances in length.<sup>56</sup>

...

Q. We did talk about this to some degree. Well, I guess the reason why I'm asking that now, and you have explained it, that's a fair point, given that those gaps existed when you took over – took over, when you really started to participate in Carter's learning at East Point, did that indicate to you that there had been problems with Carter's ability to access the curriculum in previous years?

A. I think that Carter would have had immense difficulty in hearing what his teachers were saying. He does have access to sound, but his understanding of speech is limited and he requires sign language in order to understand it.

Q. You also said in your affidavit, and I'll read this sentence to you because it's the last series of questions I have for you, where you say "I believe that opportunities were missed in his years," Carter's years "in grade K to 3", which is when he's at Beachy Cove, "with regard to language learning and because he was not truly part of a community of learners until now". What did you mean about missed opportunities? What were some of the opportunities that were missed?

A. Honestly, I think this goes back to the closing of the School for the Deaf. Deaf children who are mainstreamed into hearing classroom, some will succeed and not every child will. I think in Carter's case, he needed to be surrounded by people who signed. He needed to have friends, true friends, peers who understood him and who he could understand, people that he could play with. He needed to have access to that kind of a community. Kids learn so much from each other, not just from the teacher.

Q. And Carter didn't have those opportunities from kindergarten to grade three, did he?

A. As far as I know, Carter was the only deaf child in his class. So, if other children were learning ASL at that time, and they may have been, I'm just assuming that there were definitely language barriers for him. I think that there were probably a lot of days when the only person he could really speak to would have been his teacher or his student assistant.

Q. Thanks. Those are all the questions I have.<sup>57</sup>

[250] For me, Ms. Lahoda's evidence was particularly illuminating. Ms. Lahoda's evidence illustrates how truly different, enhanced, and enriched Carter's experience with education became when he was immersed in an environment rich with information that was presented to him visually using sign language. The DHH Classroom offers both direct instruction of school curriculum using ASL and also opportunities for incidental learning from observing and interacting with d/Deaf peers and adult mentors. The benefits to Carter's academic, emotional, and social development are evident.

[251] Alma McNiven also provided an affidavit to this Board of Inquiry and she testified when the complaint proceeded to a hearing. Ms. McNiven has a Bachelor of Education degree (MUN

1992) and a Master's of Education degree (focus in Deafness Studies) (University of Alberta 1996). She has over 25 years of experience teaching children who are deaf or hard of hearing. Ms. McNiven was one of Carter's teachers in the DHH Classroom during the 2020-2021 school year.

[252] When Ms. McNiven testified during the hearing and she, like Ms. Lahoda, observed tremendous progress in Carter's language skills, social skills, engagement, and participation in classroom activities. Carter appears to have continued to struggle with reading and writing in the English language, however, Carter showed progress in his ability to communicate in ASL:

Q. ... I wonder if you can just walk me through your experience in the satellite classroom, the teachers who are in there, and the modes of teaching, the methodologies that were being used, including the other supports that were in the classroom, and what their role is, but if you can just walk me through, to the best of your abilities, a good description of how the students were being taught.

A. Okay. So, the year I was there, myself and Gillian would often--sometimes we would work together, and sometimes we would split the children into groups, and sometimes the children would be split with us with groups, or often we would have an ASL group where one of the deaf staff would work at that group. So, I would do my own signing. Gillian would do her own signing. As with any language, we would often do words we weren't sure of. We would go to a deaf staff and say what is the sign for that? Sometimes they all had a different sign. Sometimes, depending on what area they had worked in before--so, we had all come to a consensus on a sign. We spoke in the class. There are children in that class who have some oral skills, and we followed the APSEA curriculum. In the ASPEA curriculum part of it is to learn to speak, to listen, sign. I believe in all modes of communication with a child. So, whatever a particular child needed, on a particular day, at a particular time, that's what I would do.

Q. You mentioned that the children are all--I think you said that the children in the class, the students, are all presenting with severe language delays.

A. Yes.

Q. I mean, I'm sure it's a spectrum and some are more delayed than others. Where does Carter fit in in terms of his delay with language?

A. Receptively--Carter has really good skills receptively. I believe his expressive are more challenging because of his CP, but we told a story one day. Tammy told an ASL story,

and at the end of the story Carter laughed, and I looked around and Carter was the kid who got the story.

Q. So, his ASL skills -

A. Receptively are very good. He can watch, and he can understand very well. Now, he's building. He's learning vocab, but, yes.

Q. Do you have a sense of where his current level is?

A. No, because I haven't--it's been a year since I was teaching in that class.

Q. I should rephrase that question. At the end of your time in the classroom--so, you were there during his grade four year, correct?

A. Yes.

Q. So, when he came into the classroom, did you come to any assessment as to where he would have been in terms of his grade level equivalency in, you know, his language skills, math skills, you know, social studies, sciences? Would you have -

A. He would have been at a very primary level. Math he would have been a little bit higher, but when I was taking goals for--when I was using the Provincial curriculum for reading and writing, I would have been choosing from Kindergarten.

Q. Did that change over time during the grade four year while you were in the satellite classroom?

A. His language absolutely increased, not doubt about it. His reading and writing? Reading, very insignificant change. Writing, a little bit more, but it wasn't a big change in his reading or writing, no, but there was a big change in his vocabulary.

Q. When you say in his vocabulary, do you mean in his vocabulary with the English language or with American Sign Language?

A. American Sign Language. He had more signs. All of the children--it was amazing the change in the children in their language.

Q. Can you describe that for me by comparing the beginning of the year to what you're observing at the end of the grade four year?

A. So, often with severe language delay because students don't have vocab, they're not making connections, that we make connections all day long. We know words are connected, right. It's almost like this. Everything is all connected, and we understand that, right, but they don't have that background. So, every lesson would have to be dissected to get back to the root, to build up no knowledge in order to teach a lesson. As the year progressed we got less and less of that, and all of a sudden the kids who couldn't have a conversation with each other--at one point they were over at a table, and they were playing a game without any support. I took a video of it. I Twittered it out. I was like, oh, my God, these kids. It was--of all the years I taught it was the most rewarding year of my career. I will never forget it. I could not believe the change in these children. I had--I can tell you it's changed the trajectory of their lives. It completely changed them.

Q. That observation--I think you described earlier in your evidence, that when they started off the children didn't know how to even communicate with one another, and now you're describing a vignette where they're playing a game together and they're interacting.

A. They're setting it up. They're taking turns. They're telling each other what to do.

Q. Do you have any reason, or any way that you could explain to me whether that's something that can be attributed to them acquiring new language skills, or them acquiring new social skills, or simply learning the game?

A. It's a combination. It's a combination of both. We could not get through not one lesson without teaching social skills. Social/emotional learning became a new thing with the board, and I love it. Every single lesson of every day we had to stop and we had to go through the social and emotional part of it. So, it was big on social/emotional, but it was also the language that they had, and the connections that they were making with language. Like it is one thing to know that your mother or your father has a bank card and they go get money. It's another thing to learn that you have to work. The money has to go into the bank, and that you're using that card. There are actually things that are happening in the background, and that's what we had to teach the children every single day, all of those things that are not seen but are important in our lives in order for us to make connections with language.<sup>58</sup>

[253] In my view, the implementation of the DHH Classroom (Grade 4 onward) appropriately responds to Carter's needs. Although the Churchills sought to have additional input into the teaching methodologies employed within the DHH Classroom and they feel that changes can be made to improve Carter's educational programming, I cannot say that Carter's needs are not



being addressed. There remains much work to be done to remediate Carter's language delay, social and emotional development all of which were negatively impacted by the level of accommodation provided during the Kindergarten – Grade 3 years. Weighing the evidence presented I cannot conclude that the supports implemented as part of the DHH Classroom are unreasonable.

### ***2021-2022 School Year: Carter's Grade 5 Year***

[254] In **September 2021**, Carter Churchill started Grade 5 in the DHH Classroom at East Point Elementary. Throughout the year, the class continued to be supported by two full time teachers, former Itinerant Teachers of the Deaf and Hard of Hearing. Gillian Lahoda remained with the class as one of the two full time teachers during the 2021-2022 school year. By this point, Ms. MacNiven had taken over the role of Director of Programs for the Deaf and Hard of Hearing within the District (the position previously held by Darlene Fewer Jackson). The second teaching position within the DHH Classrooms was filled temporarily by Angela Moyst, Sheila MacDonald, and Bridget Wilkinson. By April 2022, Joanne Van Geest returned from her leave of absence and began work as a full time teacher in the DHH Classroom. The three Deaf Student Assistants continued to support students and two Educational Interpreters were also added to the team in January 2022. The Educational Interpreters provided support in interpreting morning announcements, interpreting for visitors to the classroom. When Ms. Van Geest joined the DHH Class, the Educational Interpreters provided support in her teaching as necessary.

[255] Ms. Van Geest's affidavit confirms the important role played by each member of the team in the collaborative approach to educating students in the DHH Classroom after she began working with the class in April 2022. Ms. Van Geest confirms that the Educational Interpreters supported her delivery of lessons:

27. I began work in the DHH Classroom on April 11, 2022

28. Currently, Carter receives his education in the DHH Classroom with a group of students who also require the use of ASL to communicate. This is a small group of students who have two teachers with a master's degree in Deaf education. There are three student assistants that are part of [the] deaf community and assist in the classroom. Everyone communicates with one another using sign language. English is written and periodically spoken as some students have speech capabilities. Spoken English is primarily used at the same time they sign if they choose to use speech. All students have access to the soundfield that projects sound from the computer/smartboard or from an FM. All students have access to an Educational Interpreter. Carter has an iPad that he can use to complete his lessons if required.

29. Myself and Ms. Lahoda educate the students through a team teaching situation. We set goals and collaborate with one another on our lessons. We provide cross curricular opportunities when possible to enhance learning. We support one another at all times. Some lessons we work on together and some lessons we work on individually. For example, math and language arts are taught in rotating centers. There are three centers and in groups of two, students rotate to each center for their lessons. I am at one centre, Ms. Lahoda at the next and a student assistant at the other. At other times, we teach courses on our own but the other teacher assists in behavior or provides support with the activity when the initial teaching of the lesson is complete. For example, I would teach the students about the life cycle of a plant. After I complete my lesson, the students would complete an activity to demonstrate their learning. Ms. Lahoda would assist the students in their behavior, or with the painting or cutting of the activity.

30. The educational interpreter provides support in the classroom by interpreting the morning announcements and any announcements relayed over the speaker throughout the day. They would interpret for any visitors that come to our classroom. They interpret for other teachers when the students go to Phys Ed or Art, for example. The interpreter would assist me as needed at my rotating center and during my lessons.

31. The student assistants provided assistance with transportation and toileting. They are also from the Deaf community and help to provide clarification on different lessons to ensure the students are receiving the correct and appropriate information as would be used in the Deaf community. They are role models for the students who try to teach them what is appropriate behaviour in the Deaf community, how to use an interpreter (where to sit to focus on the interpreter in relation to what is being presented, for example). They model ASL as well as use drama and visuals to help enhance the students' understanding of ASL. They promote Deaf culture and Deaf history. The student assistants also provide support to the students (hand-over-hand writing, cutting, painting, typing) during their lessons.<sup>59</sup>

[256] From Ms. Lahoda's evidence, I understand that, other than the introduction of Educational Interpreters, there were no major changes in the approach to educating students until instruction shifted to online learning temporarily in January 2022. She describes in her affidavit that during online learning they followed a consistent and structured routine.

22. During online learning in January of 2022, the teaching team (all teachers and student assistants) met with the student group from 9:00 to 9:50. We did activities such as Calendar, News, and Weather, SEL Check-in, Sharing Time, ASL stories, Sign Games, Show and Tell. From 10:00 to 10:40 we split into groups in two separate Google Meet links.

Ms. Wilkinson's group did math while my group focused on language arts. There was always a signing adult present in Ms. Wilkinson's group (e.g. a Deaf student assistant with native signing skill, or the educational interpreters once they were integrated into the classroom). I was not involved in the instruction in the math groups.<sup>60</sup>

[257] Ms. Lahoda also describes the collaborative approach to educating students in the DHH Classroom continued after Ms. Joanne Van Geest joined the class as a full time teacher in April 2022.

24. It is a team teaching situation where a lot of collaboration and planning happens with regard to cross curricular goals and outcomes. Sometimes we work together with the full group (e.g., calendar time, sharing time, games, outings, social skills development etc.). Sometimes we work on the same activity with different groups of students, grouped by ability or interest). Sometimes we teach separate courses. For example, we each take our preparation periods during time when the other is busy with the full group. Ms. Van Geest and I support each other's lessons in a variety of ways. While one is teaching the group, the other is able to deal with behavior concerns, to offer one-on-one support if someone is struggling, to work on different outcomes with other students, for example.

25. Ms. Van Geest is responsible for lessons in math, science, and religion. I am responsible for language arts, social studies, and health. We both work with students in all areas of the curriculum, however. For example, Ms. Van Geest plans lessons for math but the students work in small groups with different teachers. We do a lot of rotating centers. Students might be learning a new skill in math at one table with Ms. Van Geest, practicing those skills in a different context at a table with me, and then playing math games with a student assistant to solidify their understanding. The interpreter sits at the table with Ms. Van Geest during small group work to ensure that both teacher and student are understanding each other. The same is true of our rotating language arts centers. Students may practice reading at one table, writing journal entries at another table, and working on specific literacy skills (in either ASL or English) at a third table.

26. The educational interpreters work to interpret the morning announcements that are presented daily on Google Meet, to interpret announcements made over the PA system throughout the day, to interpret for visitors to the classroom (either planned or impromptu), to interpret for classes with other teachers (e.g., Phys Ed and Art), and to interpret for Ms. Van Geest when required (e.g. the interpreter will voice for the students or will sign for Ms. Van Geest).

27. The student assistants help with feeding, portering, toileting, self-care, transportation runs, accompaniment to non-academic classes, and assistance with school work on a daily basis. Because our student assistants are themselves members of the Deaf community

with native fluency in ASL, they also routinely offer clarification and expansion of messages for both staff and student messages. If a message is unclear, the Deaf student assistant will help everyone understand. The student assistants meet the children at their current language levels to ensure true comprehension and understanding of materials, and draw out more information when the students attempt to express themselves. They have incredible skill with making language accessible to children with limited background knowledge or understanding of different topics, and often use a combination of ASL, adjusted ASL signs, gesture, mime, drama, and visuals. They provide direct instruction in the areas of understanding and promoting Deaf culture. They have (directly and indirectly) introduced students to Deaf history, storytelling, poetry, norms within the Deaf community, and a variety of technology. They teach our students how to use an ASL-English interpreter, where an interpreter should stand in different situations, and how to politely and firmly advocate for their needs.<sup>61</sup>

[258] I would note here that although the Churchills have taken issue with Ms. Van Geest's proficiency in ASL, within the DHH Classroom educational interpreters are available to provide any necessary support in ASL to close any communication gaps in Ms. Van Geest's lessons. The team teaching model of the DHH Classroom is able to capitalize on the relative strengths of both teachers, and ensure that the needs of students are adequately addressed and their access to education services is meaningful. Obviously, it would be preferable for both teachers to have superior, near-native signing proficiency. Similarly, hiring teachers with native proficiency in ASL would be part of a perfect solution. However, this does not mean that the current level of support is insufficient or unreasonable.

[259] Weighing the evidence presented I cannot conclude that the supports implemented as part of the DHH Classroom this year were unreasonable. In my view, the programming model offered by the DHH Class appears to provide reasonable accommodation for Carter.

### ***2022-2023 School Year: Carter's Grade 6 Year***

[260] This school year had only recently commenced when this complaint proceeded to a hearing. I was not made aware of any significant changes to the teaching methodologies employed within the DHH Classroom.

[261] It does appear that supports were again increased this year through the creation of three new positions within the DHH Classroom. The position title is Teaching and Learning Assistant - Deaf and Hard of Hearing, and I was provided with a job description. Hiring for these positions was underway during the hearing and Tammy Vaters was offered one of these positions.

[262] There was minimal evidence presented with respect to this year. Based on the evidence presented, I cannot conclude that the supports implemented as part of the DHH Classroom this year were unreasonable.

### **DISCUSSION OF THE EXPERT EVIDENCE**

[263] Both the Churchills and the District retained experts to provide evidence in the area of Deaf Education. Both experts are well-respected academics, each with an extensive record of relevant publications. There was no challenge to the qualification of either expert. The Churchills retained Dr. Kristin Snoddon and the District retained Dr. James MacDougall. Each of them provided a written report in advance of the hearing and each produced supplementary reports responding to the written report of the other expert.<sup>62</sup> Both of these expert witnesses testified when the complaint proceeded to a hearing. I found the evidence of both experts useful in understanding the complex issues involving deafness and language acquisition.

[264] Overall my impression is that the expert witnesses agree more than they disagree. I found their evidence assisted my understanding of issues concerning Deaf Education generally, and their opinions informed my understanding of Carter's situation.

[265] Dr. MacDougall's report provides important historical context regarding two divergent conceptualizations of deafness leading to inconsistent approaches to Deaf Education. This context cannot be ignored or we risk promoting a one-size fits all approach which fails to recognize the potential abilities of individual children and the role of parental choice in early interventions responding to deafness – medical or otherwise. Dr. MacDougall refers to this historical context through the lens of what he calls the "Communication Controversy".

There exist two very different conceptualizations of deafness at the present time. The first emphasizes that many deaf people can develop speech and hearing capacities with the assistance of appropriate assistive devices coupled with intensive therapy. The alternate point of view asserts that deaf people have a natural language, sign language (ASL/LSQ/ISL), and positively identify as being members of Deaf culture.<sup>63</sup>

[266] The first approach described by Dr. MacDougall is to conceive deafness as a medical issue which may be corrected by surgery or other medical intervention. Presenting deafness in this fashion may lead parents to explore medical options.

[267] In fact, progress in this area has led to tremendous technological options such as hearing aids and the cochlear implant. These may be combined with supports such as Auditory Verbal

Therapy, Speech Language Pathology, and Occupational Therapy etc. which are intended to enhance the child's abilities to access language through oral/auditory means.

[268] When successful, many children with access to the hearing aid or the cochlear implant can and do acquire an oral/auditory language and achieve good communication through hearing and speech.

[269] Unfortunately, this approach has its drawbacks. Exploring medical options may not be appropriate for all children and even when deemed appropriate for a child they are not always successful and do not produce the intended result. For some children supporting development of competence from a manual/visual approach i.e. sign language, is the only option if the child is going to acquire competence in language.

[270] Conceiving deafness through the lens of Deaf Culture does not rely on medical intervention. This approach simply recognizes that Deaf individuals have a natural language – sign language. Academic study confirms that a young deaf child exposed to a rich signing environment will develop facility in communication using a manual/visual language such as ASL. Studies show many children who acquire ASL as their primary language that can also become bilingual by developing reading and even speech as a second language. A major focus of both conceptualizations of deafness is language development.

[271] All Canadian provinces offer some form of early identification and intervention. Some jurisdictions present parents with the choice of pursuing the option of an oral/auditory path involving medical intervention for the child, or alternatively the option of supporting the child's development of a manual/visual language (ie. Sign language). Parental consent becomes the determining factor for which approach will be pursued. However, some jurisdictions appear to promote an oral/auditory approach where medical options are available citing the efficacy of the cochlear implant.

[272] With respect to the specific context of Carter Churchill – although medical options were fully explored - both experts appear to agree that all professionals involved with Carter had identified at an early stage that the benefit he received from Cochlear Implants was limited to general sound perception and not related to facilitation of communication by speech and hearing alone. As Dr. MacDougall states “the unanimous recommendation of the professionals in the CI program was for Carter to primarily use sign language with speech and hearing to be available as a secondary modality”.<sup>64</sup>

[273] If I can take this one step further – it appears to me that District personnel at its executive level did not appear to have an understanding of deafness consistent with what Dr. MacDougall or Dr. Snoddon describe. As Dr. MacDougall indicated in his testimony, the District's policies

appeared not to recognize ASL as a language but rather it was perceived as if it were a therapy like AVT or SLP. In contrast, the District's roster of ITDHH do appear to understand that ASL is a language, and that it was intensive support in acquiring competence in this language that was needed for students with cochlear implants in the metro region.

[274] In her report, Dr. Snoddon describes that deaf children arriving in the school system frequently exhibit significant delays in language development when compared to hearing children. *Inclusion* by placement of deaf students in a mainstream class may perpetuate a deaf child's deprivation from exposure to language which they can assimilate. Adequate support for the child in language development may be essential to remediate this issue. Delayed language development can result in negative impacts for the child including limited access to school curriculum, exclusion from incidental learning perpetuating gaps in world knowledge and social development, and social isolation from peers presenting a risk of mental health consequences:

Inclusive education is often viewed in terms of disabled children's placement in a regular school. However, this focus on children's physical presence in the classroom frequently overlooks the issues of deaf children's participation and social and academic development. For most deaf learners, the main areas of need relate to language development and communication with peers and teachers. Deaf individuals are at high risk of language deprivation due to chronic lack of full access to a natural language in early childhood. Chronic, ongoing experiences of language deprivation in deaf children appear to disrupt thinking, mood, and behavior, in addition to contributing to lower literacy levels and educational outcomes. Language deprivation also impedes verbal memory organization, mastery of numeracy and literacy, executive function, theory of mind, and sustained attention, all of which are critical for educational attainment. Many deaf children in regular schools lack appropriate supports and are isolated from deaf peers. Exclusion from indirect communication and incidental learning leads to gaps in world knowledge and social and academic skills, and to psychological distress. If there is no or minimal support for deaf learners' sign language acquisition, then students may also lack access to the curriculum. Furthermore, deaf learners in regular school settings may lack support for positive social identity development. One study of seven deaf children with cochlear implants in an inclusive classroom found that children largely failed to engage in spontaneous or sustained peer conversation and instead of asking for information or reciprocal communication, employed "passing" behaviours where children attempted to behave like hearing people. In order to develop a positive social identity and communication skills, deaf children need opportunities for congregation and socialization with other deaf learners.

...

Deaf children in mainstream settings are at risk of communication neglect, or ongoing exclusion from indirect communication and incidental learning. As stated above,

exclusion from indirect communication and incidental learning leads to gaps in world knowledge and social and academic skills, and to psychological distress. This exclusion is part of adverse childhood communication experiences, which have been shown to have long-term impact on deaf individuals' mental, physical, and social health across the lifespan.

...

As stated above, deaf learners who are placed in regular classrooms with no other deaf or signing peers lack support for positive identity development as well as opportunities for communication and incidental learning that support language and social development.<sup>65</sup>

[275] In his responding report, Dr. MacDougall expressed general agreement with each of these concerns.<sup>66</sup>

[276] Both experts appear to agree in their opinions that for students with severe language delays like Carter, early intervention is key. Academic studies support the view that there is a window of opportunity for language acquisition during a child's early years. There is some debate as to when that window of opportunity closes. However, it appears that after a child reaches puberty there are significantly diminishing returns from intervention for language acquisition. Intervention during the pre-school years is best. Intervention during primary grades is better than elementary grades and so on. The longer the delay in intervention the more impacted a child will be in their language development.

## **ISSUES**

- I. Have the Churchills satisfied their burden of proof, establishing *prima facie* that the District discriminated against Carter contrary to section 11 of the Human Rights Act, 2010?
- II. Has the District established that its conduct was otherwise justified or excused by an applicable exception such as section 11(3)(e) which permits otherwise discriminatory conduct where there is a good faith reasons for the alleged denial or discrimination with respect to accommodation [or] services?
- III. What are the appropriate remedies?



## **DISCUSSION AND ANALYSIS**

***Issue 1: Has the Complainant satisfied his burden of proof, establishing prima facie that Respondent discriminated against the Complainant contrary to section 11 of the Human Rights Act, 2010?***

[277] The Churchills bear the burden of proof at this stage. In order to demonstrate a *prima facie* case of discrimination, the Churchills are required provide evidence sufficient to support a finding that:

- (1) Carter has a characteristic protected from discrimination under the *Act*;
- (2) Carter has experienced an adverse impact with respect to education services provided by the District; and,
- (3) Carter's disability was a factor in the adverse impact.

[278] The Churchills are not required to provide proof of an intention to discriminate.

[279] The first element of the test is not in dispute. All of the parties acknowledge that Carter Churchill has a personal characteristic which is protected from discrimination under the *Act*. Carter has cerebral palsy and he is profoundly deaf. It is not in dispute that these constitute disability(ies) within the meaning of s. 9 of the *Act*, and therefore the protections afforded by the legislation are engaged.

[280] In complaints grounded in disability, the fact that a complainant has a disability is often not in dispute. It is useful to understand that general nature of the disability which is protected from discrimination, but it is also important not to place too much weight on common personal characteristics of a group. For example, the collective grouping of all persons who are d/Deaf or hard of hearing, would include individuals with varying degrees of hearing loss. Similarly, children with profound hearing loss may experience varying degrees of benefit from cochlear implants. It is important to consider the abilities and needs of the individual complainant. Failure to understand the needs of the particular complainant will necessarily and improperly impact the review of accommodations provided.

[281] During his first year of life Carter was diagnosed with a profound hearing loss and he was diagnosed with spastic athetoid cerebral palsy. This means that he was born without access to sound, and his mobility is impacted as is his motor control. He has a wheel chair and requires some assistive technologies such as iPads, slant boards, pencil grips etc. Carter received bilateral

cochlear implants at age 11 months. These were intended to allow him access to sound which would enable him to hear. For Carter, cochlear implants provided less benefit than was hoped. By age 3 it was clear that Carter's primary form of communication was sign language. All of the professionals on Carter's cochlear implant team sent correspondence to the District expressing their opinion that Carter would require support in American Sign Language in order to develop competence in a language. By the time Carter arrived in the regular school system he was exhibiting a severe language delay which was observed by the ITDHHs who were assigned to work with him during pre-school years and school years.

[282] The second and third elements of the test require that the Churchills prove that Carter suffered an adverse impact with respect to the service offered to the public by the District; and that his disability was a factor in that adverse impact.

[283] Just as it is important to identify the needs associated with the personal characteristic of the complainant which is afforded protection under the *Act*, it is important to identify the service which is customarily offered to the public by the respondent. In complaints involving education, the jurisprudence is clear that the *service* at issue is the "general education services" offered to the public. Special education programs are not the *service* at issue, they are the means by which students with exceptionalities access education services more generally. It is meaningful access to the general education services available to the public which Carter is entitled to. In assessing the sufficiency of accommodations offered via the District's special education programs and policies, I must be satisfied that the District has delivered upon the mandate and objectives of the public education system. (*Moore supra*)

[284] For the reasons which will be further discussed below, I do find that the Churchills have established a *prima facie* case that Carter Churchill was discriminated against – in particular during the following school years: Kindergarten (2016-2017); Grade 1 (2017-2018); Grade 2 (2018-2019); and Grade 3 (2019-2020).

[285] Although I find that the District's conduct during these years amounted to discrimination, I must acknowledge that in making this finding I do not reject the approach taken by the District in its entirety. The District most certainly made efforts to accommodate Carter.

[286] With respect to the procedural aspect of the duty to accommodate, in general compliance with policies prescribed by the Department, the District did follow a process for the development of Individual Education Plans which involved consultation with the parents and other professionals. There were a number of individual assessment including psycho-education assessments by local psychologists, as well as an assessment completed by APSEA in Halifax, Nova Scotia.

[287] Where I have found deficiencies in the procedural aspect of the duty to accommodate, my concerns relate to the failure to properly consider all of the relevant information that the District had regarding Carter's needs. More specifically, I find that the District's roster of ITDHH were sounding alarms, raising concerns, and making proposals to address problems in programming for students like Carter and this information did not make its way into the individualized planning for Carter. The parents were deprived of the opportunity to advocate for changes. I conclude there was a failure to comply with the procedural aspect of the duty to accommodate.

[288] With respect to the substantive aspect of the duty to accommodate, I have several concerns. As a general statement with respect to the level of accommodation required to adequately respond to Carter's need – I would say that it was not realistically possible to offer reasonable accommodation while at the same time have Carter placed in a mainstream classroom with hearing students. Carter's severe language delay required intensive intervention. The only solution which appears to adequately address Carter's need was to remove him from the mainstream and offer an alternative setting where he could receive intensive intervention for language development. Only by addressing his severe language delay is there a reasonable prospect that he could have meaningful access to school curriculum. This seems to have been understood by the District's roster of ITDHH and it motivated them to seek changes in programming. There were missed opportunities to explore such options early in Carter's education.

[289] The failure to adequately support Carter's communication needs and language development resulted in him being socially isolated, deprived of opportunities for incidental learning and development of social skills. Although I believe he was cared for by hearing teachers and students alike, there was a tremendous communication divide and Carter suffered as a result. These issues were not addressed until he was placed in the DHH Classroom.

[290] With respect to the Kindergarten year in particular, the level of student assistance was wholly inappropriate. Carter's ISSPs and IEPs contemplated that Carter would have a student assistant who could communicate with him in ASL. Without assessing the ASL proficiency of student assistants in advance of their work with Carter, the District really had no way of knowing whether the level of student assistance would meet Carter's need. Nevertheless District personnel made representations to the Churchills that not only could the student assistance support his personal needs but they could be a bridge for communication with Carter's hearing teacher. The only student assistant whose ASL proficiency was subsequently assessed received a proficiency rating below "survival" – during the assessment she failed to correctly fingerspell her own name, and she failed to produce the correct sign for "school". The Churchills repeatedly raised concerns regarding the level of student assistance provided for Carter. In the evidence presented to the Board of Inquiry, I find examples of instances when these concerns materialized

into real situations where Carter's actual needs were actually not understood or addressed during school days.

[291] Also with respect to the Kindergarten year, the level of support from an ITDHH appears to have been insufficient. The ITDHH assigned to Carter during his Kindergarten year recognized that Carter's language delay meant that supporting him in his language development had to be one of her priorities even if this meant other students would not receive the level of support she wish to provide them. However, her caseload was heavy and she worked with Carter less than 3 hours per week. She acknowledged that based on his need he ought to have been receiving support more regularly at least 3 sessions per week and probably 4-5 sessions per week in order to meet the minimal guidelines of the Department's guidelines contained in the "Criteria for DHH Services – NL." She was not able to provide this level of support due to her caseload. In my view achieving even this standard, if it meant 5 hours per week, would not be sufficient to address Carter's level of language delay.

[292] During Carter's Kindergarten year the roster of ITDHHs began sounding the alarm. They were reaching out to their superiors within the District seeking additional resources and changes to the programming model for students like Carter who had cochlear implants but were exhibiting severe language delays. Their warnings and calls for action were largely ignored.

[293] In Grades 1 and Grade 2, there was a significant increase in the level of support offered to Carter. Carter was provided support from a highly qualified and experienced ITDHH, Sheila MacDonald. In Grade 1 the frequency of this support was increased initially to 2 hours of daily service and later to full time (5 hours) of daily service. Carter was assigned a student assistant who was proficient in ASL, Tammy Vaters. She was also Deaf and had a good understanding of Carter's communication needs. Ms. MacDonald and Ms. Vaters were the only individuals in the school who could communicate with Carter using ASL and he remained socially isolated.

[294] I accept Ms. Vaters' evidence that although she could communicate with Carter, being Deaf herself, she could not effectively bridge the communication gap between Carter and his classroom teacher or the other student in his class. I also accept her evidence that Carter was aware of his social exclusion and he suffered as a result.

[295] I accept the evidence of Ms. MacDonald with respect to Carter's limited access to school curriculum and the general programming offered for Carter. As she states in her Grade 2 year-end report "To say that because Carter has a teacher and a student assistant who know ASL that everything is fine with his learning situation is making everything too simplistic." During Grade 1 she was able to remove Carter from the classroom to a private space from time to time where they could work one-on-one and Carter appears to have benefitted from this. During Grade 2 they had reduced access to a quiet space. In both years the majority of the day Carter was in his

mainstream classroom where instruction in the Grade 1 and Grade 2 curriculum was delivered by the classroom teacher to the class as a whole. Carter had access to a sound field and personal FM system. However, Carter had not yet developed English vocabulary and language skills necessary to comprehend oral instruction of grade level curriculum. Carter remained socially and linguistically isolated, with very limited access to school curriculum.

[296] In Grade 3, Carter continued to receive fulltime support from his student assistant Tammy Vaters. He was assigned to a new ITDHH, Joanne Van Geest. Ms. Van Geest was highly educated and qualified to work as an ITDHH. However, not all students who are d/Deaf or hard of hearing have the same abilities and needs. Carter's primary form of communication was ASL. Ms. Van Geest was ASL proficiency tested and scored in the "survival" level of proficiency. This was not ideal. However, she did leverage the skills she had to try and teach Carter including the ASL skills she possessed. She was supported by Ms. Vaters who assisted Ms. Van Geest with vocabulary and Ms. Vaters even took it upon herself to attempt to explain lessons to Carter – a role that a student assistant ordinarily would not be expected to undertake. Ms. Van Geest testified that she believed she was able to communicate with Carter using ASL. Given Carter's severe language delay, Ms. Van Geest's proficiency was potentially sufficient to facilitate some communication.

[297] I do have concerns that Ms. Van Geest may not have been sufficiently skilled with ASL provide Carter with the vocabulary he needed to understand the school curriculum. Ms. Vaters indicated that she found it difficult to communicate with Ms. Van Geest using ASL and there were misunderstandings and breakdowns in their communication.

[298] On the whole, there was a regression in the level of support provided for Carter this year, and the programming and supports offered to Carter were not responsive to his need for intensive intervention to support language development and to address his severe language delay. Without this it was not reasonable to expect that Carter could access the school curriculum that was "meaningful". Carter's social isolation within a mainstream class persisted.

[299] There were also issues occurring outside of Carter's individual programming, issues of a systemic nature, which had a negative impact on Carter. I am cognizant of the guidance in **Moore** which cautioned Human Rights tribunals not to expand their inquiry beyond the scope of the particular complaint assigned to them. However, the Board of Inquiry must consider all evidence relevant and necessary for the determination of the particular complaint which is referred to the Board. Where I observe evidence of systemic issues I may consider whether these issues impacted the complainant.

[300] In this case, I do observe evidence of systemic issues which persisted during Carter's Kindergarten through Grade 3 school years. These issues relate to the District's approach to education for a cohort of students with cochlear implants who arrived in the school system with

severe language delays. This cohort included Carter Churchill. In my view it is evident that issues in this area were known or certainly ought to have been known to the District. Nevertheless I find the District's response to these issues lacking. I see evidence that problems addressing the needs of this cohort were brought to the attention of District personnel who were in responsible positions within the District bureaucracy and who could have responded by exploring these issues, evaluating options, and implementing change. I see no evidence that this would have imposed a burden upon the District amounting to undue hardship. It was not an issue of lack of resources. The most that can be said is that the District failed to recognize opportunities for efficient reallocation of resources.

[301] I am not in a position to consider or assess the reasons behind the closure of the Newfoundland School for the Deaf. However, the evidence established that when the Newfoundland School for the Deaf was closed in 2010 responsibility was transferred to the District for the education of d/Deaf students, including those with cochlear implants and who were delayed in their development of language competence.

[302] Following the closure of the NSD, the Department engaged a consultant, Darlene Fewer Jackson, to conduct a review of the education services provided for students who are d/Deaf and hard of hearing. Her report<sup>67</sup> which was finalized in 2011 and updated in 2018 identifies a number of "gaps" in service received by these students within the provincial education service. Some of the "gaps" relate to students with language delays such as Carter.

[303] I am mindful that this report was prepared by the Department not the District. It appears to have been created for internal use by the Department. No evidence was presented confirming that the report was shared with the District when it was completed. However, there was other evidence supporting the conclusion that during Carter's early school years the District was aware that there were serious problems with the programming offered to students with cochlear implants and exhibiting language delays.

[304] As noted above, the District employs a roster of Itinerant Teachers of the Deaf and Hard of Hearing. These specialized teachers generally have post-secondary education at the master's level directly related to issues touching upon the needs of students who are d/Deaf or hard of hearing. Many of the District's ITDHH have decades of experience educating such students. Some of them were previously employed by the Newfoundland School for the Deaf and they are familiar with the teaching methodologies which were used – what worked and what did not. In considering the evidence presented, I observed that the roster of ITDHHs repeatedly raised concerns with District personnel. Some of these issues related directly to the cohort of students with cochlear implants who were exhibiting severe language delays. The ITDHH submitted proposals recommending significant changes in the delivery of education services for this cohort. These proposals were brought to the attention of individuals at the District's executive level. The

proposals were summarily rejected without being adequately evaluated and explored. I consider this issue “systemic” in the sense that it occurred outside of the process for development of Carter’s Individual Education Plans. However, since Carter was one of the cohort of students affected by the District’s failure to act upon these proposals, he was negatively impacted by this systemic issue on an individual level.

[305] There was an attitude or belief within the District that Department policies promoting “inclusive” education mandated the placement of students with exceptionalities in mainstream classes within their community school. To me this appears to be an improperly narrow and incorrect interpretation of these policies. Nevertheless, the practice persisted during Carter’s school years. I find that this systemic issue had a direct impact on Carter and caused delay in implementation of appropriate supports that were responsive to his severe language delay. It was not until the implementation of the DHH Classroom in advance of Carter’s grade 4 year that the systemic issues were addressed and Carter was adequately supported.

[306] I also find that when the roster of ITDHHs raised concerns with their superiors they were discouraged from discussing their concerns with parents. Carter’s ITDHHs were involved in developing his ISSPs and IEPs. I have concerns that they would have been reluctant to discuss their concerns openly during these meetings and that they would not have been able to express their opinions on what changes they supported related to Carter’s programming. No direct evidence was presented on this point and I am reluctant to make inferences or draw conclusions about the state of mind of the ITDHHs during particular meetings where the Churchills were present, and whether the ITDHHs felt pressured by the District. I am however satisfied that the ITDHHs involved with Carter’s education had concerns regarding his programming, and they did not share these concerns with the Churchills in developing plans for Carter. The Churchills were deprived of the opportunity to advocate for the satellite classroom proposal or other similar change.

[307] By the time Carter arrived in the school system, he was exhibiting a severe language delay and he needed intensive support in language acquisition. Both expert witnesses who testified were in agreement that early intervention is critical to properly support a child’s acquisition of competence with a language. The delay in addressing Carter’s need in this area is very concerning and the adverse impact upon him is significant. He is now in Grade 6 and as of the date of the hearing he continued to require intensive support in this area and he remains unable to access grade level curriculum. The degree to which past delay in addressing his needs will continue to affect Carter in the future remains to be seen. However years of opportunity for early intervention have been lost.

[308] It was not until 2019, during Carter’s grade 3 school year that the District acknowledged that there was a need for change in the programming offered to deaf students who relied on ASL

as their primary form of communication. The District's "Proposal for DHH Education – September 2019"<sup>68</sup> states:

- Currently, deaf students are housed in their neighborhood schools and are being supported by itinerant teachers for the deaf and hard of hearing. Assessment data shows that these students have significant language delays and are struggling to meet the demands of the curriculum. In fact, their language delays are impeding their ability to access the curriculum.
- ...
- Research also points out that the social-emotional impact of deaf students learning in isolation, away from their deaf peers must also be considered.
- Our current model of services **does not provide deaf students:**
  - The opportunity to learn their own language,
  - The opportunity to be fully educated in their own language,
  - Full time access to a qualified teacher (DHH),
  - Full access to the curriculum or the classroom's social environment,
  - The opportunity to communicate or interact with deaf peers.

In order for deaf students to successfully access the prescribed curriculum, **every effort must be made in supporting them to become proficient in their own language.** As their language proficiency develops, so too will their success in accessing the curriculum. Developing a deaf child's language prior to beginning school also needs to be addressed.

[bold in original]

[underline added]

[309] In advance of Carter's Grade 4 year the District implemented its proposal to establish a DHH Classroom which was responsive to the needs of students exhibiting severe language delays like Carter. This addressed the systemic issue which had previously persisted in the programming offered to students like Carter, and the implementation of the DHH Classroom provided Carter with a level of accommodation which was both reasonable and responsive to his need. For these reasons, I have found the complaint is not justified with respect to the following school years Grade 4 (2020-2021), Grade 5 (2021-2022) and Grade 6 (2022-2023).

[310] I appreciate that the Churchills have ongoing concerns regarding certain aspects of the supports implemented for the DHH Classroom. They would prefer to make changes which would, in their view, enhance Carter's learning experience. Among other relief requested by the Churchills, they seek to have me dictate the particular supports to be provided for Carter into the future. As will be discussed further in the remedies section of this decision, I do not feel it is appropriate for me to attempt to predict how Carter's abilities and needs may change over time. The District will continue to play an important role in future accommodations for Carter Churchill.



[311] The Churchills also have many concerns regarding systemic issues which they observed within the District. They ask that I direct changes to the District's processes and systems going forward. Although I will decline to order *systemic remedies*, and I will discuss my reasons in greater detail within the remedies section of this decision, this does not mean that systemic issues did not exist. For example, I share many of the Churchills' concerns regarding issues with the District's management of human resources. These concerns relate both to systems for the evaluation of qualifications of District personnel, as well as the allocation and assignment of these human resources.

[312] By the time this case proceeded to a hearing, the District had taken some steps toward ASL proficiency testing of new hires. However, the District's internal allocation of resources, in particular ITDHH resources, relies entirely upon Ms. Alma McNiven's personal familiarity with the ASL skills of ITDHHs. The District attempts to allocate and assign its ITDHHs based on their skill set and the particular needs of students. Not all students who are d/Deaf or hard of hearing have the same needs. Similarly, different ITDHHs have different skills sets. Some are fluent in ASL and have extensive experience using ASL in their teaching. Other ITDHHs have more limited practical ASL skills. The District relies upon Ms. McNiven to know and understand the capabilities of the various ITDHH(s). She testified that she knows them personally and she is familiar with their abilities. I have no reason to doubt this. However, if Ms. McNiven were incapacitated tomorrow the allocation of these critical human resources would be uncertain.<sup>69</sup>

[313] I would also note that, Darlene Fewer Jackson occupied the position of Director of the Deaf and Hard of Hearing Programs and Services prior to Ms. McNiven. Much of the action taken to address the problems in the programming offered to students like Carter in advance of his Grade 4 year, came down to the proactive approach of one individual who was possessed of a wealth of knowledge and experience – Ms. Fewer Jackson. Unless there is some dissemination of this knowledge so that understanding of need for these students is not concentrated in one person – the system is at risk.

[314] There is an inherent risk associated with any system which is vulnerable to a single point of failure. It seems reasonable to conclude that there is a need to put in place a process which is less reliant on the personal familiarity of one individual. Part of the solution would be to implement some objective system or standard for evaluating the ASL proficiency of those persons directly involved on the front lines of the education of students who are d/Deaf or hard of hearing. These are issues for the District to consider and it is not my function to conduct a comprehensive review of the education system of this province. My comments suggesting options for systemic changes are *obiter dicta*.

[315] In the end, my determination in this case is that there were deficiencies in the accommodations implemented for Carter by the District during each of the following school years: Kindergarten (2016-2017); Grade 1 (2017-2018); Grade 2 (2018-2019); and Grade 3 (2019-2020). I find that the accommodations provided during this period were not responsive to his needs and they were therefore not reasonable. The overall result is that the level of accommodation provided was insufficient for Carter to have meaningful access to the education services customarily offered to the public by the District. Therefore the District failed to deliver upon the mandate and objectives of the public education system of this province.

[316] These issues were cause or exacerbated by issues of a systemic nature within the District. I am satisfied that these systemic issues did negatively impacted Carter and delayed the implementation of proper accommodation for his needs. For these reasons I have found the Churchills have established a *prima facie* case of discrimination.

**Issue II: *Has the Respondent established that its conduct was otherwise justified or excused by an applicable exception such as section 11(3)(e) which excuses or justifies otherwise discriminatory conduct where there is a good faith reasons for the alleged denial or discrimination with respect to accommodation [or] services.***

[317] The District's position focused upon the sufficiency of the accommodations it provided, and it asserted that these were sufficient to allow Carter to have meaningful access to education services. It is on this basis that the District opposed the complaint; and the District asked that I dismiss the complaint on the basis that the Churchills have failed to establish a *prima facie* case of discrimination.

[318] In substance, the District's position acknowledges that it treated Carter differently from other students who availed of its education services. The District's position acknowledges that Carter could not avail of the education services that it offers to the public without accommodations – Carter's ability to have meaningful access to this service required accommodation. However, the District takes the position that it did implement proper accommodations, in particular all of those requested by the Churchills.

[319] The District does not advance an argument based upon "undue hardship" (i.e. "that it could not have done anything else reasonable or practical to avoid the negative impact on the individual") (*Moore infra* at para 49), or that its conduct was "justified" within the meaning of an exemption or exclusion recognized by the language of the Act<sup>70</sup>. Such a defence would potentially engage the statutory exemption under section 11 (3) of the Act:

11(3) Subsection (1) does not apply

(e) to other situations where a good faith reason exists for the denial of or discrimination with respect to accommodation, services, facilities or goods.

[320] The District's defence was exclusively based upon a challenge to the first step of my analysis and whether the Churchills had proved a *prima facie* case of discrimination.

[321] Having found that the Churchills did prove *prima facie* discrimination – my analysis would ordinarily move to a second but equally significant question: Whether the Respondent's conduct was justified and therefore non-discriminatory because it could not reasonably be expected to have done anything further to accommodate the complainant without suffering undue hardship

[322] As the District does not rely upon an undue hardship argument or statutory justification for its conduct, I need not consider such defences. I will only say that the evidence presented did not support a finding of undue hardship.

[323] The Churchills have demonstrated a *prima facie* case of discrimination. The District has failed to establish that its conduct was justified. The complaint is justified in part and an appropriate remedy must be ordered.

**Issue III      *What are the appropriate remedies?***

[324] The following 18 remedies are requested by the Churchills on Carter's behalf:

- Request 1.**      The District should be ordered to provide full time, qualified Teacher(s) of the Deaf with minimum superior level ASL as long as he is in the public school system.
- Request 2.**      The District shall ensure that the proficiency of any candidates will be determined by independent American Sign Language Proficiency Interview (ASLPI) testing prior to hiring.
- Request 3.**      The District shall take any and all proactive measures to ensure that required resources are available to ensure these accommodations are observed and maintained. Such proactive measures shall include but not be limited to proactive recruitment, training and retention of new Teacher of the Deaf resources, particularly those individuals such as Children of Deaf Adults

(CODAS), active recruitment of appropriate resources outside the province if necessary, beyond just making a simple online job posting, and active recruitment within the Deaf community for potential candidates to obtain a Bachelor of Education. Such individuals would inherently have the language capabilities to support Carter who requires access to American Sign Language.

- Request 4.** The District shall not use interpreters as a replacement for qualified Teachers of the Deaf and Hard of Hearing in accordance with the position of the World Federation of the Deaf in its position paper on Inclusive Education on the roles of qualified Teachers of the Deaf and interpreters. Such qualified Teachers of the Deaf shall have high levels of ASL proficiency as proscribed.
- Request 5.** The District shall continue to provide Carter with an education in an inclusive setting with his Deaf peers in an ASL Immersion Classroom environment, free from social isolation as long as he is in the public school system.
- Request 6.** The District shall create the position of Language Acquisition Support Worker recruiting culturally Deaf individuals as a resource to assist in improving Carter's proficiency in ASL. This support to become a permanently available support as opposed to a support that is introduced and then later removed at a later date in future.
- Request 7.** The District shall provide a full time student assistant with native signing abilities.
- Request 8.** The District shall provide a tutor(s) during both the school year and summer break until such time as Carter Churchill is learning curriculum at grade level and language deficiencies are addressed. Assigned tutor(s) to be subject to the same ASL proficiency as the Teacher of the Deaf and Hard Hearing (DHH).
- Request 9.** The District must recognize that the damage done to Carter Churchill's prospects for future academic and life success has been substantial and considerable effort will need to be made to mitigate or remediate the damage already done and have Carter in a position that he would be in if the discrimination had not occurred, recognizing that the negative impacts to a solid foundation in first language are irreparable given his current age and ability to acquire first language.
- Request 10.** There shall be a declaration that the Respondent has failed to provide non-discriminatory access to an education equitable to that of hearing children and discrimination on the basis he is Deaf.

- Request 11.** The District shall make a public apology to Carter Churchill from the Chief Executive Officer of the NL English School District for its failure to provide Carter Churchill with equitable access to an education, discrimination and denial of his human rights. The public apology will help to address the indignity of being completely socially isolated for multiple years while a student at Beachy Cove Elementary as well as deprived of the education that he was legally entitled to receive.
- Request 12.** The Complainants shall be immediately both appointed to the Steering Committee on Deaf and Hard of Hearing Education as parent representatives for Deaf children as well as its working group, as well as any successor committees and working groups. While the Department of Education and Early Childhood Development controls this steering committee, this fact will shortly become moot as the Department and District are merging into a single entity.
- Request 13.** There shall be financial compensation of \$100,000 paid to the Complainant by the District, which is commensurate not only with the extent of the negative, irreparable damage to the future opportunities of Carter Churchill but also to address the indignity of being subjected to a school environment where discrimination, ignorance and indifference to the specialized needs of a vulnerable Deaf child were endemic and known but the District continued to maintain the narrative that the school environment was inclusive. The financial compensation should take into consideration his age and future financial needs that will be difficult to meet with limited education and most likely no prospects of a high school diploma given that he has been pushed to Grade 6, has yet to acquire his first language and cannot even read.
- Request 14.** The District shall reimburse the Churchills for all legal costs incurred while defending their Deaf son's right to an education. The Churchills should not be placed in position of financial hardship by fighting the discriminatory acts of the District; such financial hardship would essentially be punitive to the Churchills and would likely discourage others from similarly attempting to challenge human rights violations which is contrary to the public good. The Churchills gave evidence that their legal expenses are currently in excess of \$100,000, with an offset of \$29,082 from the GoFundMe campaign.
- Request 15.** The District shall reimburse the Churchills for the costs of all ASL courses completed by the Churchills at their own expense, approximately \$7,000, in the absence of similar support as highlighted in the June 2011 report.
- Request 16.** The District shall reimburse the Churchills for \$2,000 in private tutoring in both Summer 2018 and Summer 2019 by the Churchills to help with first language acquisition of ASL.

**Request 17.** The Department shall develop and implement a formal ASL curriculum in equivalence to English and French curriculums.

**Request 18.** The District shall ensure that all District staff and executive level personnel in decision making positions for Deaf education, including executive level positions, have the necessary education, background and sensitivity training, including specifically language deprivation, in order to make educated and well thought out decisions through a truly inclusive lens with respect to Deaf children who use ASL.

[325] The Commission does not take a position with respect to the particular remedies requested by the Churchills. However the Commission does urge the Board of Inquiry to exercise its discretion to issue preventative remedies which it considers in the public interest and reflect “the magnitude of every child’s right to education, free from discrimination”.

[326] The Respondent opposes the remedies sought and in many respects I agree with the Respondent’s submissions. Many of the remedies requested are not appropriate or are beyond the scope of my jurisdiction.

[327] The remedial powers of the Board of Inquiry are set out in section 39(1)(b) and 39(2) of the Act and they are expressed with broad expansive language in keeping with the objective of promoting Human Rights:

39. (1) A board of inquiry

(b) may, where it finds that a complaint is justified in whole or in part, order the person against whom the finding was made to do one or more of the following:

- (i) to stop the contravention complained of,
- (ii) to refrain in future from committing the same or a similar contravention,
- (iii) to make available to the person discriminated against the rights, opportunities or privileges he or she was denied contrary to this Act,
- (iv) to provide compensation to the person discriminated against, including compensation for all or a part of wages or

- income lost or expenses incurred because of the discriminatory action, and
- (v) to take whatever other action the board considers appropriate.

(2) A board of inquiry may make whatever order as to costs that it considers appropriate.

[328] With respect to **Request 1, Request 2, Request 5, Request 7, & Request 8**, the Churchills are requesting that I make very specific preventative orders in an effort to predict what form of accommodation Carter will require going forward and requiring the District to provide these specific forms of accommodation so long as Carter is enrolled in the public education system. The predictive and preventative relief requested could arguably fall within the scope of the Board of Inquiry's authority under section 39(1)(b)(i),(ii),(iii) or (v).

[329] In my view, the current level of accommodation provided by the District via the implementation of the DHH Classroom is a reasonable response to Carter's current needs and therefore there is no ongoing contravention of the *Act*. The Churchills seek to make some changes which would, in their view, enhance Carter's learning experience. The Churchills also seek to require that some of the current level of supports remain in place. They seek to have me dictate the nature of services to be provided going forward.

[330] I decline to do so for three reasons. First – I am satisfied that the implementation of the DHH Classroom is a reasonable response to Carter's current needs and therefore there is no ongoing contravention of the *Act*. I have no authority to intervene in an education plan which does not violate the *Act*. Second – Carter's current programming is reasonable and this is what the law requires of the District. The law does not require the District to identify and implement a perfect solution, and the law does not require the District to implement the complainant's preferred solution. Third – Carter's situation is complex and I expect his needs will change over time. I am not in a position to predict what level of supports he will required throughout the remainder of his education.

[331] In my view, the District must be afforded some degree of latitude and deference in its implementation of accommodations. I appreciate that it will be very difficult for the Churchills to accept this outcome. The District's failure to provide reasonable accommodation for Carter during his early school years has caused much damage to the Churchills' confidence in the District. However, the District is now appropriately addressing Carter's situation. It is reasonable to expect that the District will continue to do so in keeping with the principles laid out in this decision. The failure to do so for Carter, or other students will likely see the District returned

before another Board of Inquiry. It is also my intention to fix general damages in such a fashion as to account for the deterrent purpose of that remedy.

[332] Although I decline to order the specific and predictive remedies requested by the Churchills, I must provide some direction so as to ensure the District will, in the future, refrain from committing the same or a similar contravention of the *Act* as occurred within Carter's programming prior to Grade 4.

[333] I will make an Order pursuant to section 39(1)(b)(ii) of the *Act* requiring that until such time as Carter Churchill is no longer enrolled as a student of the District, the District shall provide reasonable accommodation for Carter Churchill such that:

- a. Carter Churchill is to be supported in the development of competence in American Sign Language;
- b. Carter Churchill is to be supported in accessing and being evaluated upon school curriculum via American Sign Language
- c. Carter Churchill is to be supported in the area of communication related to his safety and personal needs via American Sign Language; and,
- d. Carter Churchill is to be supported such that he is not isolated from peers who are able to communicate with him.

AND, the District must take all reasonable steps necessary to provide such accommodation up to the point of undue hardship.

[334] With respect to **Request 3, Request 4, Request 6, Request 7, & Request 18**, the Churchills are requesting that I intervene to require implementation of broad sweeping changes to the manner in which the District delivers education services. The Churchills seek to have me require changes to the evaluation of teachers, hiring practices, allocation of resources, creation of new positions, and qualifications of personnel within the District's executive.

[335] I recognize that the Board may, in appropriate circumstances, make an Order under 39(1)(b)(v) to require a respondent to take whatever other action the Board considers appropriate. However, the remedies requested are in the nature of systemic relief. Notwithstanding that I have found evidence of systemic issues and that such issues impacted Carter (grounding in part his individual human rights complaint), it is not within my jurisdiction to conduct a general review of the District's system for the delivery of education services. This



was not within the scope of my inquiry and I do not have sufficient evidence upon which I might determine what changes are required.

[336] With respect to **Request 9**, and **Request 10**, the Churchills are requesting an express acknowledgment and declaratory relief recognizing that the District discriminated against Carter and that this has particular and irreparable consequences for Carter. In their post-hearing brief the Churchills urge me to issue declaratory relief:

... without an explicit declaration from the Adjudicator that the programming during any given year fell short of proper accommodation, the District may continue to provide equivalent programming to other Deaf children. Carter Churchill, by virtue of the human rights Complaint filed on his behalf, has become a test case for the standard of Deaf education in this province.

[337] The scope of authority to make orders under section 39(1)(b)(v) is very broad, but it is an authority to make orders that “compel [the respondent] to take whatever other action the board considers appropriate”. Declaratory relief is a particular judicial remedy. I was not directed to any authority by which I may grant declaratory relief *per se*. I do find it appropriate to state in clear and unequivocal language my finding that:

The Newfoundland and Labrador English School District failed to provide reasonable accommodation for Carter Churchill and discriminated against Carter Churchill during each of the following school years: Kindergarten (2016-2017); Grade 1 (2017-2018); Grade 2 (2018-2019); and Grade 3 (2019-2020).

[338] With respect to the issue of the impacts upon Carter Churchill, I will make further reference to these in my decision on general damages.

[339] With respect to **Request 11**, the Churchills are requesting that I order the District’s Chief Executive Officer to issue a public apology. I decline to make such an order for substantially the same reasons set out in ***Bill v Allandale Place Condominium Corporation***, 2020 CanLII 83875 (NL HRC):

94. With respect to the issue of an apology the Respondent is opposed to apologizing and asserts that an apology “*implies some personal motive by an entire Board against an individual with whom we have no relationship*”. No it does not. An apology confirms and acknowledges that Mr. Bill’s rights were violated, and they were violated by the by-laws which the APCC adopted. The *Act* expressly recognizes that discrimination does not require an intent to discriminate. In my

view an apology is the minimum form of redress one can expect from having your rights violated. However, there is a significant body of caselaw which suggests that a disingenuous and forced apology, compelled from an unwilling respondent is worthless and does not serve the cause of promoting human rights. It also raises concerns of freedom of thought, belief, opinion and expression protected under section 2(b) of the Canadian Charter of Rights and Freedoms.

**Reference:** *Graham v. Shear Logic Hairstyling*, 80 C.H.R.R. D/304, 2014 CarswellNS 1083 at para 97.  
*XY v. Ontario (Government and Consumer Services)*, 2012 HRTO 726, 2012 CarswellOnt 17736 at para 285-287.  
*Stevenson v. Canadian Security Intelligence Service*, 2003 FCT 341, 2003 CFPI 431, 2003 CarswellNat 919 at para 30.

95. There are many cases where respondents deny that their conduct was discriminatory but are willing to apologize in the event their position is found to be incorrect. This was the case in *Maharajh v Atlantic Offshore Medical Services Limited* and in that case an apology was ordered. I would encourage any respondent whose conduct is found to violate the human rights of another, to consider offering an apology but I will not compel them to do so. No apology will be ordered in this case.

**Reference:** *Maharajh v Atlantic Offshore Medical Services Limited*, 2020 CanLII 49888 (NL HRC).

[340] In my view, an apology is the minimum form of redress one can expect from having your rights violated. However, an apology will only further the goals and objectives of human rights if it is genuine, offered voluntarily and with sincerity. An apology compelled by force of law is of no value. I would encourage any respondent whose conduct is found to violate the Human Rights of another, to consider offering an apology but I will not compel them to do so.

[341] With respect to **Request 12**, and **Request 17**, the Churchills are requesting that the Churchills be immediately appointed to the Department's Steering Committee on Deaf and Hard of Hearing Education. The Churchills also seek an order requiring the Department to develop and implement a formal ASL curriculum in equivalence to English and French curriculums. The Department is not a party to these proceedings and I have no jurisdiction to grant the relief requested here.

[342] With respect to **Request 13**, the Churchills are requesting monetary compensation in general damages in an amount sufficient to compensate Carter for the impact discrimination has had upon him. In my view it is appropriate to make such an Order under section 39(1)(b)(iv).

[343] This Board of Inquiry has considered the issue of the assessment of general damages in Human Rights complaints on a number of occasions. Most recently in *Sears v Memorial University Of Newfoundland*, 2022 CanLII 82025 (NL HRC), the Board of Inquiry recognized the following principles relevant to the assessment of general damages:

- Complainants are entitled to an award of general damages to compensate for the loss of the right to be free from discrimination;
- Complainants are entitled to monetary compensation in general damages sufficient to compensate them for the impact that discrimination has had upon the complainant;
- Awards should focus on the impact of discrimination on the complainant. No evidence of malice is required, although the existence of an intention to discriminate may impact on the seriousness of the violation and the harm suffered by the complainant;
- In assessing the appropriate quantum of general damages the Board of Inquiry may consider a number of factors relevant to the impact of discrimination on the complainant which may include:
  - Any humiliation experienced by the complainant
  - Any hurt feelings experienced by the complainant
  - A complainant's loss of self-respect
  - A complainant's loss of dignity
  - A complainant's loss of self-esteem
  - A complainant's loss of confidence
  - The experience of victimization

- Vulnerability of the complainant
- The seriousness, frequency and duration of the discriminatory treatment.
- There are no fixed “ranges” of general damages;
- There is no “ceiling” on general damages;
- The award should not be so low as to trivialize the violation or amount to a “license fee’ to discriminate; and
- The award should be in line with prior awards and consistent with human rights jurisprudence.

[344] I would add to this list the following guidance from the Nova Scotia Court of Appeal in ***Disability Rights Coalition v. Nova Scotia (Attorney General)***, 2021 NSCA 70 (CanLII):

- The award may provide redress for the harm suffered by the discriminatory conduct, which may be economic, sociological (impacting an entire family) or emotional;
- The award may be significantly higher where the complainant is particularly vulnerable;
- The award may ensure that a message is delivered to the [Respondents] and others that human rights must be respected;
- The award should not appear to be so small as to constitute a minor cost of doing business, such as to encourage risk taking;
- The award must deter discrimination but not to punish;
- The award must not be inadequate or it will have the unintended but very real effect of perpetuating aspects of discriminatory conduct; and
- Failing to take into account the deterrent impact of any damage award is an error of law.

[345] In ***Sears*** the Board of Inquiry reviewed a number of its prior decisions with respect to the quantum:

[73] In ***S.R. v. Newfoundland and Labrador***, 2018 CanLII 116135 (NL HRC) the violation of the complainant's rights had a severe psychological impact on him. He described the humiliation he has experienced, the loss of dignity and the loss of respect. He testified that he felt "de-humanized". There was evidence that others witnessed a big change in the complainant. He withdrew socially and he became a different person. The

complainant in that case experienced a loss of self-worth. As of the hearing he still suffered from flashbacks. \$30,000 were awarded in general damages.

[74] In ***Maharajh v. Atlantic Offshore Medical Services Limited***, 2020 CanLII 49888 (NL HRC) the complainant was denied employment because he had a disability and had disclosed to the prospective employer that he used medical marijuana prescribed by his physician. He testified to feeling stress, sadness and embarrassment from the incident. He described that he had told family and friends of his new job opportunity. When he was not hired the complainant had to explain to his family and friends that he had been disqualified by the position. He was awarded \$7500 in general damages.

[75] In ***Malone v. Dave Gulliver's Cabs Limited***, 2016 CanLII 152826 (NL HRC) the complainant was denied service by taxi drivers because she has a visual impairment and was travelling with her Guide Dog. The drivers were rude and they drove away without taking steps to ensure the complainant had alternate transportation to her destination. The Complainant in that case described the importance of access to safe and reliable transportation in her experience as a person with a visual impairment. She also testified about how she was treated and how it made her feel. She was shocked and offended. She felt vulnerable. She worried the drivers could identify her but she could not identify them. She worried because she regularly relied upon taxi services and called them to her home. She was awarded \$5000 in general damages. In hindsight this amount now appears too low.

[76] In ***Fennelly v. J. Co Holdings Inc.***, 2020 CanLII 80311 (NL HRC) the adjudicator compared the circumstances as being akin to those found in ***Proulx v. Quebec*** with the long-term implications for the Complainant considered to be more severe than those discussed in ***Malone v. Dave Gulliver's Cabs Limited*** where the denial of transportation was short term and did not impact the individual's livelihood. General damages in the amount of \$6,500.00 were awarded.

[77] In ***Philpott v. City Tire and Auto Centre Limited***, 2020 CanLII 99196 (NL HRC) The evidence supported a finding that the complainant suffered loss of dignity, self respect, hurt feelings and mental distress. He was made to feel that he did something wrong by being off sick, he kept on struggling with this in his mind and whether he did do something wrong. His confidence was impacted by this as well as his normal living. He felt stressed and worried about loss of income, being able to meet their bills and whether he would find other employment, his evidence was that for years afterwards this was troubling for him. General damages of \$7,000.00 were ordered.

[78] In ***Zachary Bill v. Allandale Place Condominium Corporation*** 2020 CanLII 83875 (NL HRC) there was no evidence that the respondent's conduct, albeit discriminatory, had a significant impact upon the Complainant's dignity, his sense of self-worth or self-respect. However, he had been required to move out of his home and this was distressing and frustrating. He had been impacted, inconvenienced, and disappointed. His rights were violated and general damages in the amount of \$4000 were ordered.

[79] In ***Tulk v. Peddle***, 2022 CanLII 14053 (NL HRC) the Complainant established that she had become pregnant, and that the Respondent had failed to provide any suitable options for reasonable accommodation in her employment. The Respondent denied that she had terminated the Complainant's employment or advised her to look for work elsewhere. \$10,000 in general damages were awarded.

[80] ...

[81] To address the impact on Mr. Sears' dignity and sense of self-worth I am ordering general damages be paid to Mr. Sears forthwith in the amount of \$10,000. I believe this is necessary and in keeping with the principles in ***Heinz*** and ***S.R.*** referenced above as well as consistency with prior awards as described in ***Zachary Bill***.

[346] In each of these cases, the complainants were adults, who were less vulnerable than Carter Churchill who is a child with disabilities that make it difficult for him to advocate on his own behalf. In most of these cases the duration of the discriminatory conduct was brief in comparison to Carter's situation which extended over multiple years. Nevertheless the general damage award in each of these cases was not insignificant. More often than not when a person experiences discrimination there is an impact upon their sense of identity and self-worth. The impact can be immediate, severe, and long lasting even when the impugned conduct is relatively brief and measured in days, minutes, or a single painful interaction. When discrimination persists over years, the effects can be even more significant.

[347] I have also considered the guidance offered by decisions from other jurisdictions.

[348] In ***Disability Rights Coalition v. Nova Scotia (Attorney General)***, 2021 NSCA 70 (CanLII) the court reviewed the complaints of two individuals who suffered discrimination in the context of housing opportunities generally available through the province's social services. The nature of the discriminatory conduct for both was serious and prolonged, one individual was unnecessarily institutionalized for 14 years and the other for 7 years. The second complainant was particularly vulnerable. The court also considered deterrence to be a major factor in its assessment of general damages.

[349] One complainant was 50 years of age at the time of her death. She lived with a mild to moderate intellectual disability. She had been institutionalized in a Nova Scotia Hospital for approximately 14 years when it was not necessary. The Province's conduct towards that complainant had a significant and lasting impact on her. She was eligible to be discharged from the Nova Scotia Hospital in 2002 but languished there for the next 13 or 14 years. She was capable of living a productive life in the community but was denied that opportunity. Her mental and physical well-being deteriorated while she was institutionalized. The complainant was denied any opportunity for something resembling a normal life. The court described the impact of the Province's discriminatory conduct as "soul-destroying." Such conduct must be met with a substantial damage award to compensate the complainant and to have a deterrent effect to prevent others being treated in a similar manner. The Court of Appeal determined the appropriate award of general damages in relation to the first complainant's unnecessary retention at the Nova Scotia Hospital at **\$300,000.00**.

[350] A second complainant was 49 years of age. He lived with a severe intellectual disability and cyclical mood disorder. In January 2010, he was hospitalized at Emerald Hall to regulate his medication. By July 2010, he did not require hospitalization and could return to a placement in the community. However, he remained unnecessarily institutionalized for a further 7 years. The Province's offensive treatment of the second complainant was serious and of long duration, although it was not as long as the first complainant, it was certainly protracted. The court acknowledged that it was more difficult to articulate the impact on the second complainant because of his inability to verbalize. However the court inferred from other evidence that his institutionalization resulted in a loss of his dignity and confidence. The second complainant was very vulnerable, even more so than first complainant. The court of appeal determined the appropriate award of general damages in relation to the second complainant's unnecessary retention at the Nova Scotia Hospital and to have a deterrent effect on the Province was **\$200,000.00**.

[351] In ***RB v Keewatin-Patricia District School Board*** 2013 HRT0 1436, [273] the complainant was denied a meaningful education when his Educational Assistant support was cut in half in Grade 2, and when a communication ban denied his mother the opportunity to meet with the complainant's teachers and Educational Assistant in order to ensure that his needs were met. During Grade 2 and Grade 3, the complainant was excluded from school without appropriate educational instruction for a number of months. During the exclusion, the complainant was provided with instruction from an itinerant teacher three hours per week in the public library. The respondent failed to consider less drastic measures when it excluded the complainant from school and made his return conditional on the resolution of the human rights Application. In light of the complainant's young age (eight years old at the time of the exclusion), his vulnerability because of his cognitive disabilities, the lengthy period of the exclusion, the impact of the exclusion, the inadequacy of the instruction provided during the exclusion, and the anxiety which

he experienced as a result of his challenges at school and the expulsion, the Ontario Human Rights Tribunal found that the complainant was is entitled to a “significant award of compensation for injury to his dignity, feelings and self-respect” and ordered general damages in the amount of **\$35,000.00**.

[352] In ***LB v Toronto District School Board*** 2015 HRT0 1622, the complainant, a 17-year old boy who was diagnosed with multiple learning and mental health disabilities, alleged that the Toronto District School Board failed to accommodate his disabilities to the point of undue hardship. This caused his mother to remove him from public school and enroll him in private boarding school. The Tribunal noted that awards typically reflect and recognize the applicant's particular experience in response to the discrimination, and that compensation will be high where the effects are particularly serious. Evidence from LB's mother confirmed that LB struggled with significant anxiety and emotional difficulties during the time that he was a resident pupil of the collegiate which had a negative impact on relationships with his mother and peers. The Tribunal awarded **\$35,000.00** for injury to the complainant's dignity, feelings and self-respect resulting from the school boards failure to provide appropriate accommodations during his Grade 9 school year: September 2012 to April 2013. Thereafter, the impact on the Complainant was largely mitigated by the actions of LB's parents who enrolled him in a private school that year, and in each year thereafter.

[353] In ***LB supra***, the Tribunal dismissed the complainant's claim for special damages in the amount of **\$144,559.42, with interest** (reimbursement of the cost of private schooling paid by LB's parents for grades 9-12). The Tribunal held that the School Board made an offer to provide appropriate accommodation for the 2013-2014 school year, which the parents refused. On Judicial Review of this issue, the Ontario Superior Court of Justice held the decision to deny the entire claim for special damages was unreasonable. The case was referred back to the Tribunal for Adjudication of the issue of the quantum of the costs associated with funding L.B.'s enrolment in private schooling during the Grade 9 2012-2013 school year (***L.B. v Toronto District School Board et al.***, 2017 ONSC 2301 (CanLII)).

[354] In ***DB v. Toronto District School Board***, 2021 HRT0 991 (CanLII), the Tribunal held that the respondent school board discriminated against the 6 year old complainant (8 years old when the matter was decided) when it offered the child a placement in a Developmental Disability Intensive Support Program (“DDISP”) without addressing how it was going accommodate the applicant's disability needs arising from his identification as a student with ASD, who was non-verbal and who had clearly established safety needs. In particular, the Tribunal held that respondent's actions and in particular its limited and patchy participation in the accommodation process – not informing the applicant about certain programming and support options that might have been acceptable such as potential access to a pilot project for the provision of ABA by therapists in a school setting, although not in the regular classroom; or the potential support of



an appropriately qualified Special Needs Assistant on a 1:1; or the involvement of the ASD Team – contributed to the determination that there had been a breach of the Code by the respondent. This was not addressed until the board reached out to the child’s mother in 2020, and again in 2021. By that point, the child had been enrolled in a private school and the mother declined the board’s offer. Although these proposals may have reasonable they did not mitigate or eliminate the breach of the code in 2019 and as such the complainant was entitled to a remedy related to that year. The Tribunal emphasized that the matter relates to a child’s education, and determined that an appropriate award as compensation for injury to dignity, feelings, and self-respect would be **\$20,000.00**.

[355] In ***BM v Cambridge (City)*** 2010 HRT0 1104 (Canlii), the complainant was 10 years old and diagnosed with Asperger’s Syndrome. He had been a camper for many years at a summer day camp operated by the respondent city. The respondent refused to allow him to attend the camp in 2008 unless he was accompanied by one of their inclusion facilitators, and the respondent would only provide this support for 2 of the 9 weeks of the summer program. The Tribunal held that the respondent had discriminated against the child by not allowing him to attend camp without an inclusion facilitator in the remaining weeks of the summer camp and failing to provide one beyond two weeks. The Tribunal awarded **\$12,000.00** in general damages to compensate for the loss of dignity and injury to feelings and self-respect, particularly in “light of [the complainant's] vulnerability as a disabled child.”

[356] In ***Moore v. B.C. (Ministry of Education) and School District No. 44***, 2005 BCHRT 580 (CanLII), the complainant Jeffrey Moore was a student of average or above average intelligence. However, he had dyslexia, a severe learning disability which has affected his ability to read throughout his education. The Tribunal found that Jeffrey could not get sufficient services within the school district after the closure of a “Diagnostic Centre” in 1994. There was a finding of systemic discrimination based on the underfunding of Severe Learning Disabilities programs and the closure of the “Diagnostic Centre” where intensive supports had previously been available. The Tribunal found that there was general agreement among the experts about the significant, negative long-term consequences for students with unremediated learning disabilities. The experts also agreed that children with reading disabilities should be identified early and provided with intensive supports. In some respects there is a strong analogy which can be made between the case of Jeffrey Moore and that of Carter Churchill. However, the case is distinguishable on its facts because Jeffrey’s parents were able to mitigate and avoid many of the likely negative long-term consequences for Jeffrey by removing him from the public school system and enrolling him in a private school with appropriate supports. Jeffery continued in his private schooling from grades 4 – 12. Such an option was not available for Carter Churchill. The impact on Jeffrey Moore was largely mitigated by the actions of his parents, nevertheless, the Tribunal held that it was appropriate to award for general damages in the amount of **\$10,000.00, and that his parents be reimbursed for the cost associated with Jeffrey’s attendance in private schools over 9 years.**

[357] I find the caselaw useful but there is no direct analog for Carter's situation

[358] Carter was physically present in school during his Kindergarten – Grade 3 years; but he was also isolated and largely excluded from social interactions as well as opportunities for incidental learning. He was provided some accommodations which were reasonable for some purposes, but also some of which fell well short of Carter's need in other areas. Over a period of 4 years, Carter was denied meaningful access to education services which the District customarily offers to the public.

[359] Carter is a particularly vulnerable child. He was only 5 years old when he began to experience the adverse consequences of discrimination. He is non-verbal, and his primary form of communication is via sign language. His age and language delay meant that he had a very limited ability to advocate for his own needs. There was evidence that especially during the Kindergarten year he was not provided with adequate student assistant support such that his very basic communication of needs were not supported. I accept that there were times when he was cold or in physical discomfort and his needs were not understood or addressed while he was at school.

[360] Although there were changes to the level of student assistant support provided for Carter for Grades 1-3, I accept the evidence of Tammy Vaters when she describes the social and emotional impact on Carter flowing from his continued isolation. He was physically present but in many ways he was socially excluded. She describes that from her observation Carter wanted to be involved and he was aware of, and impacted by, this exclusion.

[361] The evidence of both expert witnesses confirmed that exclusion from indirect communication and incidental learning leads to gaps in world knowledge and social and academic skills, and to psychological distress. This exclusion is part of the adverse childhood communication experiences, which have been shown to have long-term impact on deaf individuals' mental, physical, and social health across the lifespan.

[362] I am particularly concerned by the Districts' failure to adequately support Carter in the area of language development generally, and in particular its failure to respond to the concerns raised by its roster of ITDHH. These teachers were sounding the alarm with respect to the programming being offered to students with severe language delays such as Carter. At times they explicitly framed this as a Human Rights issue. They made specific proposals for changes to the programming offered to these students. Their proposals were dismissed summarily without being properly explored or evaluated by the District. This meant years of delay in providing intensive supports to address the language delays experienced by this cohort. The expert evidence presented emphasized the critical importance of early intervention in language

acquisition – the impact on these students and Carter in particular may be long lasting or permanent. Years of opportunity have been lost. Carter will be entering junior high and high school in the near future. It is unlikely that there remains time to fully address his language delay and he will continue to experience disadvantage flowing directly from these years of missed opportunity. With each year he fell further and further behind. It appears there is a strong probability that negative consequences will persist into his adult years.

[363] The Churchills seek an order that the District pay compensation in the form of general damages in the amount of \$100,000.00. They say this figure is appropriate and consistent with prior jurisprudence. The District objects to the figure proposed by the Churchills and suggest that an award of \$20,000.00 in line with ***DB v. Toronto District School Board*** is more appropriate. If the discriminatory conduct in this case had been remedied after Carter’s Kindergarten year; if for example the proposal made by the ITDHHs in advance of Carter’s Grade 1 year had been implemented – general damages might be limited to the \$20,000-\$35,000 range in line with ***RB v Keewatin-Patricia District School Board, LB v Toronto District School Board, and DB v. Toronto District School Board***. This did not occur, and the delay is attributed to a systemic issue that persisted within the District and delayed appropriate accommodation for Carter for an additional 3 years.

[364] In my view the impact upon Carter has been and will continue to be considerably more significant and long lasting than that experienced by the complainants in ***RB v Keewatin-Patricia District School Board, DB v. Toronto District School Board, or LB v Toronto District School Board*** although perhaps not as severe as the experience of the complainants in ***Disability Rights Coalition v. Nova Scotia (Attorney General)***.

[365] I struggle to conceive of a complainant more vulnerable than Carter Churchill. I am concerned by the potential long-term, perhaps permanent, impact upon Carter’s future prospects for independence. I am concerned by how his exclusion, social isolation and language deprivation have impacted his sense of identity and self-worth as well as his concept of the world around him. I worry about the potential long term impacts on his mental health. I am also concerned by the fact that the District does not acknowledge the systemic issues which contributed to the discrimination experienced by Carter. If my decision is going to prompt change in the practices and approaches taken by the District, I must take into account the purpose of deterrence in assessing an appropriate award for general damages. The award for general damages must compensate Carter for his loss of the right to be free from discrimination. An elevated award for general damages consistent with these concerns does not make the award inconsistent with prior awards and Human Rights jurisprudence.

[366] In my view, it would be appropriate to order \$35,000 in general damages in relation to Carter’s Kindergarten year when supports for Carter were particularly deficient and it would be

appropriate to order \$20,000 for each year thereafter until the District implemented the DHH Classroom during Carter's Grade 4 year. This produces a figure of \$95,000.

[367] We must recognize that the facts of this case are unlike the situation in **Moore** and **LB** where the parents were able to effect early and substantial mitigation of the impact on their children by enrolling them in a private school where their needs could be addressed outside the public school system. That option was not available for the Churchills – if it were, they would be entitled to be reimbursed for such expense until such time as the District was in a position to offer reasonable accommodation. In an effort to mitigate the impact upon Carter the Churchills did pay the cost of private ASL tutoring during the summer of 2018 and 2019. I expect they will continue their efforts and may incur additional future expense related to tutoring for Carter. This does not justify a reduction of the award for general damages.

[368] In my view, a general damage award of \$95,000.00 achieves the purposes of both compensation and deterrence while not being punitive or disproportionate from prior awards. The resulting award is not so low as to trivialize the violation or amount to a "license fee" to discriminate or delay implementation of reasonable accommodation.

[369] I order that the District pay compensation in the form of general damages in the amount of \$95,000.00 payable to the Churchills and to be used for the benefit of Carter Churchill as determined in the absolute discretion of the Churchills.

[370] With respect to **Request 14**, the Churchills seek an order for cost. In my view it is appropriate to make an Order under section 39(2) of the *Act* and that the Churchills must be partially indemnified for legal costs in the amount of \$50,000.00.

[371] Section 39(2) of the *Act* allows the Board of Inquiry considerable discretion to "make whatever order as to costs that it considers appropriate."

[372] In prior decisions of the Board of Inquiry where costs have been awarded, cost were ordered to be in accordance with Rule 55 of the *Rules of the Supreme Court, 1986* SNL1986 c42 Schedule D which governs costs in proceedings before the Supreme Court of Newfoundland and Labrador (**Chidley v. Clowe's Ambulance Service**, 2010 CanLII 151246 (NL HRC); **Tulk v Peddle**, 2022 CanLII 14053 (NL HRC) at para 65).

[373] Assessing costs, using the scale of costs set out in Rule 55 as a guide seems to be a reasonable approach. Rule 55 offers considerable guidance with respect to the proper exercise of discretion in making an order for costs. I do have some concerns as to whether it is appropriate to transfer responsibility for the assessment of costs to a taxing master whose jurisdiction is ordinarily confined to the assessment of costs in proceedings before the Supreme Court. If the

Board of Inquiry determines that costs are appropriate, it may be preferable for the Board of Inquiry to also determine the amount of costs to be paid and to provide reasons for its decision.

[374] Any cost award should be consistent with the law of costs generally, and the Board of Inquiry is required to provide sufficient written reasons for any such award in order to comply with section 39(4) of the *Act* and the *principles of natural justice and procedural fairness*. The assessment of an appropriate cost award is an exercise of discretion. Discretion must be exercised judiciously and not arbitrarily.

[375] The parties must be allowed the opportunity to present evidence and to make submissions related to the issue of costs. They have done so in this case and I have considered their positions.

[376] The Churchills seek full indemnification or *solicitor and own client costs*. I agree with counsel for the District, such an order is generally reserved for situations where the conduct of an opposing party is found to be reprehensible, thoroughly unreasonable, or an abuse of process. Even though I have rejected many of the District's arguments and this resulted in a decision favorable to the Churchills, this does not mean that the District's arguments were not valuable and worthy of consideration. Just as a complainant has the right to have their complaint heard, so does the respondent have the right to have its position and legal arguments considered.

[377] In my view, from the point this case was referred to the Board of Inquiry the parties moved forward with the complaint expeditiously, adopted timelines, and agreed to procedures which tended to shorten the proceeding and avoided unnecessarily lengthening the duration of the proceeding. The early production of documents, and affidavits, and limiting the in-person hearing to cross examination and supplementing the affidavit and documentary record struck an appropriate balance which allowed for a fair and efficient adjudication of the merits of the case.

[378] A cost award which represents partial indemnification is appropriate. Given the amounts claimed and recovered, the complexity, difficulty, novelty and importance of the issues, a reasonable costs award would be consistent with column 5 of the scale of costs as the appropriate guide.

[379] This case involved issues which have not been decisively determined before. The issues have significant complexity, difficulty, and novelty. Counsel for the Churchills describes it as a "test case for the standard of Deaf education in this province." The importance of the issues must be considered. The remedies requested include claims for a significant monetary award.

[380] Rule 55 of the *Rules of the Supreme Court, 1986* recognizes that these are all factors relevant to the proper exercise of discretion awarding costs. A reasonable cost award may be a

lump sum in lieu of, or in addition to, any amount taxed in accordance with the scale of costs set out in the appendix to Rule 55:

#### **Costs in discretion of Court**

**55.02.** (1) Notwithstanding the provisions of rules 55.02 to 55.14, the costs of any party, the amount thereof, the party by whom, or the fund or estate or portion of an estate out of which they are to be paid, are in the discretion of the Court, and the Court may

- (a) award a gross sum in lieu of, or a sum in addition to any taxed costs;
- (b) allow a percentage of the taxed costs or allow taxed costs from or up to a specific stage of a proceeding; or
- (c) direct whether or not any costs are to be set off.

#### **Party and party costs**

**55.04.** (2) ... the costs between parties, unless otherwise ordered, shall be determined by a taxing officer according to Column 3 of the Scale of Costs in the Appendix to this Rule.

(3) The Court may award costs to be taxed in accordance with any column or combination of columns under the Scale of Costs in the Appendix to this Rule.

- (4) In exercising its discretion under this Rule, the Court may consider
  - (a) the amounts claimed and the amounts recovered;
  - (b) the importance of the issues;
  - (c) the complexity, difficulty or novelty of the issues;
  - (d) the manner in which the proceeding was conducted, including any conduct that tended to shorten or unnecessarily lengthen the duration of the proceeding;
  - (e) the failure by a party to admit anything that should have been admitted;
  - (f) the proportion of the services rendered prior to the date the amendment to this paragraph introducing a Scale of Costs where costs are taxed according to a column or combination of columns came into force;

(g) seniority at the bar of counsel; and

(h) any other relevant matter.

[381] The Human Rights complaint process involves procedures that are different from those involved in proceedings before the Supreme Court of Newfoundland and Labrador. There are differences in pleadings which in this case included the complaint itself and amendment thereto as well as a substantial rebuttal to the equally substantial reply. There are costs associated with the mediation process. Complaints are heavily case managed and there were 8 pre-hearing conferences required for this matter. There were multiple volumes of documentary disclosure. Substantial affidavits were produced in advance of the hearing. There were pre and post hearing legal briefs. Many of these procedures do have equivalents in Supreme Court processes but some do not. The hearing itself required 9 full days. The Churchills had the assistance of one solicitor and an articling clerk during the hearing. This does not appear to be unreasonable as the District was represented by a team of three solicitors. Using the scale of costs in the appendix to Rule 55 I calculate a range of 365.5-485.5 units with each unit corresponding to \$100.00 providing a range of costs of \$36,560.00 - \$48,550.00 exclusive of disbursements<sup>71</sup>. The most significant disbursement would be the fee associated with the Churchills' expert who prepared two reports and testified at the hearing. Such a disbursement would be reasonable.

[382] The Churchills presented evidence that as of the date of the hearing they had paid legal expenses in the amount of \$40,891.00, further invoice of \$20,300.00 remained unpaid, they advised that an additional further expense of \$35,000.00 was anticipated and which I infer was primarily related to their solicitor's fees associated with the 9 day hearing. The Churchills total expense related to legal fees and disbursements was expected to be \$98,891.00. In order to fund this expense they had obtained significant community support in the amount of \$26,000.00 through an online funding website "GoFundMe." The expense to the Churchills was therefore estimated to be \$72,891.00.

[383] In his post-hearing brief, counsel for the Churchills represented that the Churchills total legal expenses following the hearing exceeded \$100,000.00 and that the amount offset from the GoFundMe campaign was \$29,092.00. The expense to the Churchills was therefore \$70,918.00.

[384] Costs must be reasonable but the assessment of reasonable costs is not via the application of a purely mathematical formula. Costs under the *Rules of the Supreme Court, 1986* may be in accordance with the schedule of costs, lump sum, or a combination of both. I would fix costs in the amount of \$50,000.00 in this case which represents partial indemnification. I've used Rule 55 as a guide. My approach is generally consistent with column 5 of the schedule of costs and also recognizes that some aspects of the complaint process have no direct counterpart

in Supreme Court proceedings. The cost award provides partial indemnification for legal expenses and reasonable disbursements.

[385] With respect to **Request 16**, the Churchills are requesting an order for monetary compensation such that Churchills' be reimbursed for expenses related to private tutoring in the amount of \$2,000.00. In my view it is appropriate to make such an Order under section 39(1)(b)(iv). The expense was incurred for the benefit of Carter and related to the need that was not appropriately addressed by the District.

[386] I order that the District pay compensation in the form of special damages in the amount of \$2,000.00 payable to the Churchills.

[387] With respect to **Request 15**, the Churchills are requesting reimbursement for expenses in the amount of \$7,000.00 related to courses in ASL which they themselves completed. I decline to do so for the following reason.

[388] Although I accept that this expense was incurred for the benefit of Carter, the Churchills have not established that this is part of the education services for Carter that the District ought to have funded. It appears this expense is one that the Churchills incurred so they could better communicate with Carter and to support Carter. Unlike reimbursement for expenses related to summer tutoring for Carter, I cannot conclude or infer that the expense related to ASL courses completed by the Churchills are "expenses incurred because of the discriminatory action." I expect the Churchills would have sought to enhance their own ASL skills whether or not Carter had been properly accommodated.

## **ORDER**

[389] For the reasons outlined in this decision there shall be an order as follow:

**WHEREAS** The Newfoundland and Labrador English School District ("District") failed to provide reasonable accommodation for Carter Churchill and discriminated against Carter Churchill during each of the following school years: Kindergarten (2016-2017); Grade 1 (2017-2018); Grade 2 (2018-2019); and Grade 3 (2019-2020).

### **IT IS HEREBY ORDERED THAT:**

1. Pursuant to section 39(1)(b)(ii) of the *Human Rights Act, 2010* until such time as Carter Churchill is no longer enrolled as a student of the District,



the District shall provide reasonable accommodation for Carter Churchill such that:

- a. Carter Churchill is to be supported in the development of competence in American Sign Language;
- b. Carter Churchill is to be supported in accessing and being evaluated upon school curriculum via American Sign Language;
- c. Carter Churchill is to be supported in the area of communication related to his safety and personal needs via American Sign Language; and,
- d. Carter Churchill is to be supported such that he is not isolated from peers who are able to communicate with him.

AND, the District must take all reasonable steps necessary to provide such accommodation up to the point of undue hardship.

2. Pursuant section 39(1)(b)(iv) of the *Human Rights Act, 2010* the District shall pay to Kimberly Churchill and Todd Churchill compensation for general damages the amount of \$95,000.00.
3. Pursuant section 39(1)(b)(iv) of the *Human Rights Act, 2010* the District shall pay to Kimberly Churchill and Todd Churchill compensation for special damages in the amount of \$2,000.00.
4. Pursuant to section 39(2) of the *Human Rights Act, 2010* the District shall pay to Kimberly Churchill and Todd Churchill costs in the amount of \$50,000.00.

[390] A separate and formal order shall be issued and provided to the parties together with this decision.

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C. Brodie Gallant  
**CHIEF ADJUDICATOR**

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<sup>1</sup> <https://cad.ca/our-work/terminology/>

<sup>2</sup> Pre-Hearing Brief of the District at para 188; See Also Post Hearing Brief of the District at para 130 “[T]he District has not claimed that it was unable to accommodate Carter as a result of undue hardship. To the contrary, the District has argued that it has responded to all of the complainant’s reasonable requests for accommodation, and that these reasonable requests were met”.

<sup>3</sup> Department’s Book of Documents – Tab 9(b).

<sup>4</sup> Department’s Book of Documents – Tab 9(b).

<sup>5</sup> Department’s Book of Documents – Tab 9(a).

<sup>6</sup> Affidavit of Kimberly Churchill sworn June 30, 2022 – Tab 5.

<sup>7</sup> Complainant’s Book of Documents – Vol 1 – Tab K.

<sup>8</sup> Complainant’s Book of Documents – Vol 1 – Tab L.

<sup>9</sup> Complainant’s Book of Documents – Vol 1 – Tab M.

<sup>10</sup> Transcript – Examination of Bonnie Woodland – September 2, 2022 page 49 -51.

<sup>11</sup> Affidavit of Kimberly Churchill sworn June 30, 2022 – Tab 7.

<sup>12</sup> Commission Record - Respondent’s Book of Documents Tab 2(a).

<sup>13</sup> Affidavit of Kimberly Churchill sworn June 30, 2022 – Tab 7.

<sup>14</sup> Complainant’s Book of Documents – Vol 1 – Tab P

<sup>15</sup> “... Although not central to the Tribunal’s decision, it also found that certain adaptations to the classroom, such as the provision of a special desk, physical assistance and extra supervision from educational assistants were reasonable, but that it would not be reasonably possible to accommodate Emily’s particular safety needs without radically altering the classroom or establishing a very isolating level of adult supervision.”

<sup>16</sup> Affidavit of Tina Halleran affirmed July 28, 2022.

<sup>17</sup> Complainant’s Book of Documents – Vol 1 – Tab S.

<sup>18</sup> Complainant’s Book of Documents – Vol 1 – Tab T.

<sup>19</sup> Transcript – Examination of Bonnie Woodland – September 2, 2022 pages 127-130).

<sup>20</sup> Transcript – Examination of Shane Porter – August 30, 2022 page 153 line 19.

<sup>21</sup> The parties have requested that I anonymize the identities of the Student Assistants involved in Carter’s Kindergarten year. I shall refer to them as First, Second, Third Student Assistant etc. based on the chronology of when they became involved in Carter’s education.

<sup>22</sup> Affidavit of Todd Churchill sworn June 27, 2022 – Tab 1.

<sup>23</sup> Respondents Book of Rebuttal Documents/Cross Examination Documents – Tab 3.

<sup>24</sup> Complainant’s Book of Documents – Vol 1 – Tab Z.

<sup>25</sup> Complainant’s Book of Documents – Vol 4 – Tab G.

<sup>26</sup> Affidavit of Kimberly Churchill sworn June 30, 2022 - Tab 38.

<sup>27</sup> Transcript – Examination of Bernie Ottenheimer – September 8, 2022 page 303-306.

<sup>28</sup> Affidavit of Lucy Warren affirmed July 29, 2022 at para 10; see also Transcript – Examination of Lucy Warren – September 6, 2022 pages 30-40.

<sup>29</sup> Transcript – Examination of Darlene Fewer Jackson – September 7, 2022 – at page 219-225, 229-230.

<sup>30</sup> Department’s Book of Documents – Tab 9(a).

<sup>31</sup> Respondents Book of Rebuttal Documents/Cross Examination Documents – Tab 4.

<sup>32</sup> It is important to note the subtle but significant distinction in being instructed in a language (being taught vocabulary, grammar, and syntax of the language itself), and receiving instruction with a language (being taught school curriculum eg. Math, Science, Health, Social Studies using a language such as ASL as the means for delivering instruction on a topic).

<sup>33</sup> Affidavit of Sheila MacDonald affirmed August 12, 2022.

<sup>34</sup> Affidavit of Sheila MacDonald affirmed August 12, 2022.

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<sup>35</sup> Transcript – Examination of Tammy Vaters – September 1, 2022 page 9-11.

<sup>36</sup> Transcript – Examination of Tammy Vaters – September 1, 2022 page 37.

<sup>37</sup> Transcript – Examination of Tammy Vaters – September 1, 2022 page 35.

<sup>38</sup> Respondent’s Supplemental Book of Documents – Vol 1 – Tab 2(b).

<sup>39</sup> Transcript – Evidence of Sheila MacDonald – August 31, 2022 page 32.

<sup>40</sup> Complainant’s Book of Documents – Volume 2 – Tab L.

<sup>41</sup> Complainant’s Book of Documents – Volume 2 – Tab L.

<sup>42</sup> Complainant’s Book of Documents – Vol 4 – Tab N.

<sup>43</sup> Respondent’s Supplemental Book of Documents – Vol 1 – Tab 2(c).

<sup>44</sup> Affidavit of Joanne Van Geest affirmed July 26, 2022.

<sup>45</sup> Respondent’s Supplemental Book of Documents – Vol 1 – Tab 2(d).

<sup>46</sup> Affidavit of Joanne Van Geest, affirmed July 26, 2022 at Tab 1.

<sup>47</sup> Transcript – Examination of Joanne Van Geest – August 31, 2022 at pages 114 – 117.

<sup>48</sup> Transcript – Examination of Tammy Vaters – September 1, 2022 at page 28-29

<sup>49</sup> Transcript – Examination of Tammy Vaters – September 1, 2022 at page 30-31

<sup>50</sup> Transcript – Examination of Darlene Fewer Jackson – September 7, 2022 – Page 220-221.

<sup>51</sup> Transcript – Examination of Darlene Fewer Jackson – September 7, 2022 – Page 229-230.

<sup>52</sup> Complainant’s Book of Documents – Volume 3 – Tab A.

<sup>53</sup> This classroom was referred to variously as an “ASL Immersion Classroom” and as a “DHH Classroom”. I will use the term DHH Classroom in this decision as it appears to be the more accurate term. The educators and professionals involved in the development of this pilot project describe that unlike a true immersion class where only one language is used (such a French immersion class where only French is spoken so as to immerse the students in a second language) both ASL and English are used within the DHH Class. . Although the use of ASL is clearly a prominent feature of the teaching methods used in the DHH class and ASL is used in the delivery of most in class instruction, the class is not limited to the exclusive use of ASL and a combination of teaching methods are employed in the DHH class specific to the needs and educational objectives of the students in the class. The use of English for reading and writing for example is necessary since ASL is a visual language with no direct written counterpart.

<sup>54</sup> Affidavit of Gillian Lahoda affirmed July 28, 2022.

<sup>55</sup> Affidavit of Gillian Lahoda affirmed July 28, 2022.

<sup>56</sup> Transcript – Examination of Gillian Lahoda – August 31, 2022 at pages 159-165.

<sup>57</sup> Transcript – Examination of Gillian Lahoda – August 31, 2022 at page 180-181.

<sup>58</sup> Transcript – Examination of Alma McNiven – September 7, 2022 page 79-85.

<sup>59</sup> Affidavit of Joanne Van Geest affirmed July 26, 2022.

<sup>60</sup> Affidavit of Gillian Lahoda affirmed July 28, 2022.

<sup>61</sup> Affidavit of Gillian Lahoda affirmed July 28, 2022.

<sup>62</sup> Expert Report of Dr. James MacDougall, PhD. dated January 2022; Expert Report of Dr. Kristin Snoddon, PhD. dated January 4, 2022; Responding Report of Dr. Kristin Snoddon, PhD. dated February 23, 2022; Rebuttal Report of Dr. James MacDougall, PhD. dated July 22, 2022.

<sup>63</sup> Expert Report of Dr. James MacDougal dated January 2022 at page 8.

<sup>64</sup> Expert Report of Dr. James MacDougall, PhD. dated January 2022 at page 5.

<sup>65</sup> Expert Report of Dr. Kristin Snoddon, PhD. dated January 4, 2022.

<sup>66</sup> Rebuttal Report of Dr. James Macdougall, PhD. dated July 22, 2022.

<sup>67</sup> Supplemental Documents of the Department of Education – TAB 2 - *A Review of Services for Deaf and Hard of Hearing Students in Newfoundland and Labrador, June 2011 (updated 2018)*.

<sup>68</sup> Complainant’s Book of Documents – Volume 3 – Tab A.

<sup>69</sup> Transcript – Examination of Alma McNiven – September 7, 2022 page 96-107.

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<sup>70</sup> Pre-Hearing Brief of the District at para 188; See Also Post Hearing Brief of the District at para 130 “[T]he District has not claimed that it was unable to accommodate Carter as a result of undue hardship. To the contrary, the District has argued that it has responded to all of the complainants reasonable requests for accommodation, and that these reasonable requests were met”.

<sup>71</sup> The upper end of this range reflects 2 counsel for the full 9 day hearing. The lower end of the range allows for second counsel only on the first day.