

PRINCE EDWARD ISLAND HUMAN RIGHTS PANEL

BETWEEN:

BRAD & DALE WONNACOTT ON BEHALF OF **BENJAMIN WONNACOTT**

VIC DOUSE ON BEHALF OF **JEWEL DOUSE**

CAROLYN BATEMAN ON BEHALF OF **ADAM BATEMAN**

MARGARET MURPHY ON BEHALF OF **MICHAEL MURPHY**

COMPLAINANTS

AND:

THE DEPARTMENT OF SOCIAL SERVICES AND SENIORS

RESPONDENT

DECISION

Hearing Dates: January 30 and 31, 2007; February 1, and April 25, 2007

Panel Members:

Commissioner Lou Ann Thomson, Panel Chair

Commissioner Gerry O'Connell

Commissioner Maurice Rio

Prince Edward Island Human Rights Commission

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CASES CITED

- *Pat Coady on behalf of Jennifer Coady v. Queen's Region Health and the Department of Health and Social Services*, a decision on preliminary matters released November 5th of 2004, Prince Edward Island Human Rights Commission
- *O'Malley v. Simpson- Sears Ltd*, [1985] 2 S.C.R. 536
- *Ayangma v. The French School Board*, [2002] PESCAD 5
- *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657
- *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357
- *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566
- *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143
- *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624
- *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497
- *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employee's Union (B.C.G.S.E.U.) (Meiorin Grievance)*, [1999] 3 S.C.R. 3
- *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868
- *Miele v. Famous Players Inc.*, [2000] 37 C.H.R.R. D/1 (B.C.H.R.T.)
- *R v. Swain*, [1991] 1 S.C.R. 933
- *Central Okanogan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970
- *Irshad (Litigation Guardian of) v. Ontario (Ministry of Health)*, 197 D.L.R. (4th) 103 (Ont. C. A.)

LEGISLATION CITED

- *Prince Edward Island Human Rights Act*, R.S.P.E.I 1988, Cap. H –12
Rehabilitation of Disabled Persons Act, R.S.P.E.I. 1988, Cap. R-12
Welfare Assistance Act, R.S.P.E.I. 1988, Cap. W-3 .
- *Canadian Charter of Rights and Freedoms*, s. 15(1)
- *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, Cap. C-33
- *Age of Majority Act*. R.S.P.E.I. 1988, Cap. A-8

POLICY

- PEI Disability Support Program Policy, Reviewed July 20, 2006

OTHER

- *Understanding Autism for Dummies*, Wiley Publishing Inc.
- *Autism Integration Project*, 2003, prepared by the PEI Department of Health and Social Services

I – INTRODUCTION

- [1] Complaints were filed on behalf of Benjamin Wonnacott, Jewel Douse and Michael Murphy who are severely disabled children, and on behalf of Adam Bateman who is a severely disabled young adult. It is alleged that the Government of Prince Edward Island as represented by the Department of Social Services and Seniors discriminated against all of the Complainants with respect to the manner in which services were provided under the PEI Disability Support Program contrary to *s.1(1)(d)* and *s. 2(1)(b)* of the ***Human Rights Act, R.S.P.E.I 1988, Cap. H -12***, as amended. The grounds of discrimination are age, family status, and physical or mental handicap. It is alleged that the discrimination results from the use of income testing, the use of the Functional Independence Measurement tool (known as the FIM) to assess levels of functioning of disabled individuals, and the capping of benefits.
- [2] The response by the Government of Prince Edward Island as represented by the Department of Social Services and Seniors, which after restructuring replaced the Department of Health and Social Services, is that no obligation exists to provide for the entire financial cost of a disabled person's needs as addressed in the Disability Support Program. Failure to provide for the entire cost of such a need does not amount to discrimination as defined by the ***Human Rights Act***.

(References in this decision to the Department of Health and Social Services relate to time frames before restructuring).

II – FACTS

Disability Support Program

[3] The PEI Disability Support Program [known as the DSP] became fully operative on April 1, 2002. It was approved by the Executive Council and falls under the Ministry of Social Services and Seniors. Provincial acts governing the program are the *Rehabilitation of Disabled Persons Act, R.S.P.E.I. 1988, Cap. R-12* and the *Welfare Assistance Act, R.S.P.E.I. 1988, Cap. W-3*. The DSP replaced the Family Support Program which had provided services to all of the Complainants until May 31, 2002. There was no income testing or capping under the Family Support Program.

[4] The DSP Policy was put into evidence before the Panel by both the Complainants and the Respondent. Some relevant provisions are noted below:

1.1 Program Description

1.1.1 The Prince Edward Island Disability Support Program (hereafter referred to as DSP) is a program designed to assist Islanders who have a qualifying disability to overcome barriers, to attain a satisfactory quality of life, and to strive to achieve financial independence.

1.1.2 The DSP may assist children and youth with disabilities by offering support to them and their parent(s)/guardian(s).

1.1.3 The DSP is a social program with a financial component. The program offers support planning assistance to help develop a plan of action and to help determine supports that are necessary. The program may also provide referrals to other agencies where complimentary services may be obtained.

1.1.4 The financial component of the DSP is not intended to provide a living allowance, for which other programs exist, or to duplicate existing funding sources. The financial component of DSP pertains only to disability-related costs: to fund services and supports necessary to enable an individual with a disability to live as independently as possible or to obtain and maintain competitive employment, or to help a family with extraordinary child-rearing support needs directly related to their child's disability.

1.4.1 The DSP has three components. The objectives of each are as follows:

- a) **Child Disability Supports** – to provide a range of disability related supports and services to families who have children with qualifying disabilities, according to their individual needs, to assist with extraordinary child-rearing support needs directly related to their disability.
- b) **Adult Disability Supports** –To provide a range of disability related supports and services to people with qualifying disabilities according to their individual needs and requirements to help them achieve a higher level of independence.
- c) **Employment and Vocational Supports** –To provide a flexible range of measures that include assessment, training, skills development and pre-employment in an individually-focused program which will result in competitive, long-term employment, or supported employment, if appropriate.

The Policy states further at 8.1.5 as follows:

Supports available under each component are arranged into seven categories of support: Respite; Community Living Supports; Community Participation Supports; Specialized Supports; Technical Aids and Devices; Modifications; and Intensive Behavioral Intervention (IBI). There are guidelines around spending under each category and there are overall ceilings relating to the DSP portion of a support plan (Refer to Appendix C, P.E.I. DSP Rate Guidelines).

Counsel for the Complainants referred to the seven categories of supports as those chosen by the Respondent to be placed in the DSP “basket of services”.

- [5] The Policy contains at pages 28 and 29 a client contribution schedule based on income. Section 10.3 notes that the calculation of income is based on ‘Net Income’ information from the *Notice of Assessment* from the Canada Revenue Agency. The Complainants and the Respondent in their evidence refer to this process as “income testing”. Parents who have disabled and dependant children

under the age of eighteen living with them are income tested. Parents who have disabled and dependant sons or daughters eighteen years of age or older living with them are not income tested.

[6] The primary principles of the DSP under 1.3 include an acknowledgement that the *'dignity and value of the person should not be compromised in the individual's seeking of services'*. The principles also include an acknowledgement that *'Generally, families are open and prepared to help other family members , and service intervention should not erode this traditional practice'*. These principles were brought to the attention of the Panel. There was no dispute by any of the parties as to the importance of the principles, although the Complainants took issue with the manner in which supports were provided.

[7] The DSP focuses on the needs of the individual and/or family rather than on entitlement. For services to be obtained there must be an unmet need. The Policy states at 5.2 that:

A needs assessment is necessary to help the Disability Support Worker and the individual and/or family to determine their needs.

It goes on to say in 5.3.1 that a needs assessment “may” be based on:

- a) results of the DSP Screening Tool;*
- b) discussions with the disabled individual or family; or*
- c) discussions with current service or support providers.*

[8] About one and a half years after the DSP came into operation, Baker Consulting Inc. was retained by the Prince Edward Island Department of Health and Social Services [now the Department of Social Services and Seniors] to evaluate the program. The evaluation was designed to describe strengths and weaknesses of the program at that particular point in time, with a goal of identifying opportunities for improvement. The resulting Baker Report, completed in July of 2003, was tendered into evidence by the Respondent.

Screening Tool (FIM)

- [9] The DSP Screening Tool or the Functional Independence Measure was generally called the FIM in evidence before the Panel. Counsel for the Respondent in his pre-hearing submissions noted that the FIM was selected in 2001 from a number of alternatives and was still being used as of the dates of the hearing. The tool was developed by the University of Buffalo. It was marketed as an assessment product for Skilled Nursing Rehabilitation Units. Although there was no perfectly suitable tool, the FIM was selected as being the most appropriate Screening Tool. The core of the Screening Tool consists of eighteen questions. This core is patented and cannot be changed. Sections of the FIM other than the eighteen question core can be modified, and a DSP staff team is presently considering options for improvement.
- [10] Thirteen of the eighteen questions in the core part of the FIM relate to functional skills and five of the questions relate to cognitive skills. Points are given for responses to the eighteen questions on a range from one to seven. A score of seven would be recorded where the individual being screened was completely independent in a particular function, and a score of one would be given where the person required total assistance. Scores in between one and seven would reflect the increasing or decreasing degrees of independence of the disabled individuals. The thirteen questions rating functional skills include questions relating to independence for functions such as walking, eating, grooming and bowel and bladder control. The five questions relating to cognitive skills measured comprehension, expression, social interaction, problem solving and memory. The score for functional skills could range from 13 to 91. The score for cognitive skills could range from 5 to 35. The two scores would then be added together for a total score which could range from the lowest level of functioning at 18, to the highest level of functioning at 126. The total score for the thirteen questions pertaining to functional skills is entered under the Scoring Summary of the FIM as the 'Motor Score' and the total score for the five questions pertaining to cognitive skills is entered as the 'Cognitive Score.' The total is shown as a fraction of the highest possible score of 126. That fraction is then converted to a

percentage. For example, a 'Total' score of 63 would be recorded as 63/126, which would indicate a 50% level of functioning.

- [11] The end result of the scoring recorded after a disabled person is assessed using the patented eighteen question core of the FIM Screening tool defines the level of financial support the disabled person will receive. Financial assistance is directly tied to the level of functioning. The DSP at 9.2.2 correlates the percentage level of functioning of the disabled person with ceilings for financial support available. Section 9.2.2 reads:

Funding ceilings are consolidated in Appendix C, P.E.I. DSP Rates. Overall monthly maximums for the DSP portion of the support plan, based on levels of functioning are listed below. To ensure consistency of practice and fairness to the diverse needs of clients, maximum support levels should not be exceeded.

<i>(a) 75% or more functioning (High)</i>	<i>\$ 300.00/month</i>
<i>(b) 51-74% functioning (Moderate)</i>	<i>\$ 700.00/month</i>
<i>(c) 26-50% functioning (Low)</i>	<i>\$ 1,500.00/month</i>
<i>(d) 25% or less functioning (Very Low)</i>	<i>\$ 3,000.00/month</i>

- [12] Bob Creed who gave evidence for the Respondent is the Coordinator East for the Department of Social Services and Seniors. One of his areas of responsibility is to coordinate the DSP. He has been involved with the program since its inception. A goal at that time was to combine the three existing programs then benefiting disabled persons into the DSP. The three programs were the Family Support Program, Employment Assistance for People with Disabilities, and the Social Assistance Program. He described the DSP program as a needs based program, as opposed to the Family Support Program, which had been entitlement based. The Family Support Program was a small program which had covered medical needs, transportation, child care expenses, and necessary medications. Under the Family Support Program, a need would be assessed and filled. Under the DSP, a need can be capped out. For example, the capping out might mean that respite would be unavailable.

[13] Mr. Creed acknowledged that the FIM is not a perfect tool. Like any tool it can be used subjectively and results can portray reporter bias. The Baker Report at page 53 noted that there were no competency standards or certification for proper use of the tool and there was no follow-up supervision after basic training. DSP administrators thus had no way of knowing whether the tool was being properly used. The Report noted:

There appears to be a valid concern that there is broad inconsistency in the use of the screening tool across the province and that material differences in outcomes result for essentially comparable case presentations.

No evidence was brought forward on behalf of the Department to indicate that certification for use of the tool, competency standards or follow-up supervision after basic training are currently in place.

[14] No expert evidence was brought forward by the Respondent with respect to selection of the FIM for use in the DSP.

Income Testing and Caps

[15] Mr. Creed described income testing as being a necessary part of the program. Because the province has finite resources, spending limits must exist. Net income as recorded on a client's federal income tax assessment is used by the DSP to assess the client's contribution.

[16] Financial Assessment as it pertains to eligibility is discussed at page 41 of the Baker Report. The Report relates that during the development phase of the DSP, federal income tax authorities were consulted and it was determined that an income test is appropriate if recipients are to avoid having benefits reported as taxable income. The Report identified as an issue the way the income test for the DSP was designed. The DSP process for calculating "net income" the Report described as being simplistic and reflective of a "charity" model of government assistance with "need" directly correlated to income earned.

[17] That being said, the Baker Report did conclude at 6.3 that the DSP had successfully established itself as a flexible, person-centered, needs-based program independent of income support programming. Access to disability supports had been broadened for Islanders. The Report went on to list in 6.4 a number of gaps in program access and service. Some identified gaps were:

- . *the model used to calculate “net income” which is not an accurate reflection of disability support need;*
- . *lifetime government funding ceilings;*
- . *disability supports for the more severely disabled, particularly children;*
- . *respite*

[18] Bob Creed in his testimony noted that programs evolve and respond and that the DSP, although it has limitations, is a good program. The Government wanted to increase opportunities for Islanders to access disability supports. The three programs replaced by the DSP had limitations. Over the five years of its operation improvements have been made in the DSP. Some of the changes were driven by human rights complaints, but others were not. Some changes were in response to the Baker Report. Some were a natural consequence of DSP staff learning and responding as the new program evolved.

[19] A Ministerial Advisory Committee has been appointed to report to the Minister of Social Services and Seniors on social programs including the DSP. Equipment in good condition, including mobility aids and communication devices, is recycled which increases more cost effective availability. When disabled persons have a recurring need for equipment, there is no longer a client contribution required. The review and appeal process has changed. Changes to lifetime funding ceilings have been implemented. The upper age limit for certain child supports has increased from twelve years of age to eighteen. A notable change was that the age at which the DSP Program defined ‘dependant’ was changed from twenty four to under eighteen.

- [20] Mr. Creed acknowledged that the program can never meet all expectations and mistakes have been made. He has seen DSP workers reduced to tears by some of the circumstances they see and suffering they are unable to alleviate. However, he perceives the difficulties experienced by his Department in administering the program as piling in comparison to what families of disabled persons endure.
- [21] He conceded that disabled persons who were poor or who had a high level of physical disability would benefit most under the DSP.

Benjamin Wonnacott

- [22] Benjamin (Ben) Wonnacott, born September 1, 1996 is a ten year old boy who lives with his parents, Brad and Dale, and his fourteen year old brother James. Ben is autistic. Even as an infant, he had unusual difficulties which left his parents exhausted as they did their best to comfort and care for him. He was diagnosed with autism in the spring of 1999 after his parents had become concerned by his lack of speech development, some unusual behaviors and his lack of ability to engage with others.
- [23] A book of documents relating to the complaint filed by the Wonnacotts on behalf of Ben was put into evidence during their oral testimony. The documents included copies of Ben's FIM screening results, an excerpt from the book Understanding Autism for Dummies , an account of a typical day in Ben's life along with background information, copies of Support Agreements, a summary of the Autism Integration Project and other materials pertaining to the set-up and early evaluation of the DSP.
- [24] In May of 2000 Ben and his family were accepted into a two year Federal /Provincial pilot project for Applied Behavioral Intervention (ABI). The Family Support Program provided a caseworker and assistance in the amount of \$860.00 per month to help meet expenses related to Ben's needs. There was no income testing and there were no ceilings in the program. His mother, a nurse, was unable

to continue working outside the home due to the demands of adequate care and therapy for Benjamin. The intensive intervention associated with the ABI program along with the commitment of Ben's parents was enabling him to learn, to grow and to communicate. The program gave them a sense of hope.

[25] A final report on the Federal/Provincial pilot project, entitled the Autism Integration Project, was prepared by the Department of Health and Social Services. Goals of the project had been to improve the level of integrated service, to reduce dependency on out of province expertise, to reduce the need for long term interventions and services for children, and to reduce stress in families of children with autism. Stresses for families noted in the final report were seen to be the high annual cost of accessing out of province experts, assuming the role of employer of in-home intervention workers, and the uncertain future after the funding for the two year pilot project ended.

[26] One specific "learning" noted in the report was that successful recruitment and retention of in-home intervention workers was a critical factor to the success of an autism program based on Applied Behaviour Analysis (ABA). Another "learning" was that in order for any program for disabled children to be successful there must be significant involvement from parents. The parents needed to be strongly active in identifying needs and facilitating action.

[27] When the Disability Support Program replaced the Family Support Program in 2002, the Wonnacott's experience was that they were adversely affected financially, and treatment for their son's autism was altered. It was necessary for Mrs. Wonnacott to return to work, and to work more than one job to earn the money needed to assist with expenses related to Ben's disability. Without her working outside the home, there would be insufficient funds to cover the costs of autism treatment. However, working more to cover costs meant time was taken away from Ben's care and programming. The Wonnacott's called it a "catch – 22". They were tired and financially compromised. Never did the Wonnacotts

indicate in their testimony that they expected the DSP Program to cover all costs for their son.

[28] The Wonnacotts testified to the impact of autism on Ben and his family in every aspect of their lives, including his growth and development, his schooling, his relationships with friends and extended family members, his own safety and the safety of others with whom he is in contact, and his physical health. He cannot learn to function as other children do. Programs and tools to assist Ben in his learning are expensive and time consuming for his parents. For example, they must hire and train therapists to work with him.

[29] Ben had had his first real haircut recently. In the past his mother would cut first one side and then the other as Ben was sleeping. Ben does not appreciate danger to himself or others. He would be at risk of running in traffic if he were not supervised. On one occasion Ben set the family car in motion. When his brother James tried to come to the rescue, the car rolled over James and his leg was broken. One parent must be with Ben at all times other than when he is in school.

[30] At school, the transition from the earlier grades to grade four has been difficult for Ben. On occasion he presents as a flight risk. He has not developed the skills for communicating which are natural to his classmates. Yet he is progressing, as displayed when he recently went to assist a child he saw being bullied in the schoolyard. The Wonnacotts are considering some home schooling for him. They believe it can be a good option for autistic children given certain circumstances.

[31] The Wonnacotts testified that the FIM Screening Tool does not accurately measure Ben's level of functioning. Although his score for functional skills is relatively high, his autism adversely affects his use of these motor skills. Although his cognitive scores are low, his total score is elevated due to the higher motor scores. As a result Ben was regularly placed in the DSP category with a maximum support level of \$1500.00 per month.

[32] In 2003 the Wonnacotts cashed in RRSPs to provide for Ben's needs. The money was considered as income and this negatively impacted the financial support available for Ben's needs. In 2005 the Wonnacotts worked more and earned more to support their family and to provide for Ben's extraordinary needs. The results of income testing and capping were that the family was entitled that year to only \$11.00 for Ben's needs during the months he was in school. In Ben's background information the situation is described as follows:

"We are tired – we have no money. I (Dale) work 3 jobs and we split ourselves to ensure Ben is with one of us at all times. The DSP has dropped our support to \$11.00 per month during school months. The effort and time to document for \$11.00/ month and meet with our caseworker can be better used on our son and not missing work. ... The irony is that the DSP has created a catch – 22 in our lives. Due to the means testing for funds and supports, we would need to stop working to receive what funding is available. This would mean that we would have more time to spend working with Ben and his programs, [but] the funding would cover only a fraction of the true cost of treatment. If we work more to cover all the costs ourselves, we will not have time to care for Ben and perform the RDI program.

[33] The RDI is a Relationship Development Intervention program. Understanding Autism for Dummies describes the program as an intervention which concentrates on helping autistic children enjoy sharing experiences with others. The children are taught to be flexible in their social interactions and to develop emotional connectedness. It builds on basic skills learned in ABA (Applied Behavioral Analysis) and is recognized in the province of Alberta as the "best practice" intervention for autism. His parents wrote in their background information on Ben:

We hope that Ben will have a good quality of life, one that will allow him to have a job, make friends, find someone to love and maybe have a family. All we can do is try and believe that this is possible. With RDI we feel it is possible, and that hope is enough to keep us working towards that goal.

Jewel Douse

[34] Jewel Douse was born in Ottawa on March 19, 1993. Her older sister Ashley was five at the time. Jewel lives with her parents Vic and Colleen and her sister Ashley. The Douses described Jewel in her early years as a beautiful happy child who met all the usual milestones on time. Between three and one half and four and one half years of age she began to regress socially. The family moved home to P.E.I. in February of 1997 and the regression continued. In the fall of 1997 Jewel's pediatrician diagnosed her with autism spectrum disorder and a seizure disorder. The book of documents put into evidence by the Douses during their testimony contained background information on Jewel and an account of a typical day in her life, along with copies of DSP support agreements including FIM testing results. Photographs contained in the book of documents portrayed Jewel as an engaging and happy child in her early years. After the pervasive progression of her autism and seizure disorder, photographs portrayed a very different little girl.

[35] At the time of diagnosis the Douses were told about Applied Behavioural Analysis by their pediatrician. Island families with autistic children had brought American behavioural specialists here in 1997 to set up programs for their children. The pediatrician said that Jewel would need forty hours of ABA therapy to achieve the best outcome. The Family Support Program supplied twenty hours per week at that time. There was no income testing. The Douses found and hired therapists and saw Jewel respond and grow from the first day. Until grade three, Jewel continued with ABA programming at home, and with the help of Teaching Assistants worked on using the skills learned at home in the regular classroom at school.

- [36] Jewel's health deteriorated while she was in grade three. She was plagued by increasing grand mal seizures, numerous food and chemical sensitivities and a low white blood cell count. In January and February she was rarely well enough to attend school. The Douses along with their doctor decided in March of 2003 that Jewel would be better off at home as she was not thriving in the school system at that time. Just before that decision, there was an incident where she suffered bruising when untrained staff at school were putting on her snowsuit for outdoor recess. A downside to the decision of her doctor and parents to keep her at home was that Jewel was not receiving the tutoring assistance offered in school, and the Douses did not qualify for DSP assistance with ABA therapy at home because she was not a preschooler.
- [37] In 2004 the Douses at their own expense hired an ABA specialist from out of province to consult with them and to create a program for Jewel.
- [38] The year 2005 was a difficult year for Jewel with her seizures occurring up to thirty five times a month. Her health did stabilize enough to enable her to return to school shortly before Christmas of 2006. The Douses say the ideal would be for Jewel to benefit from twenty hours of assisted training in the school setting and to have twenty hours of therapy at home. They believe she would learn new skills in her secure home environment. The skills could then be used with assistance in the school setting. The Douses have not been able to hire a new home tutor due to lack of funds. Jewel's mother does as much ABA therapy with her as she can.
- [39] Jewel cannot be left alone and she is unable to appreciate danger in her environment. She is fascinated by the yellow line in the middle of the road in front of the Douse residence. She is able to scale fences and requires two adults to supervise her when she is taken out into the community at large. She is unpredictable and a flight risk. She rarely sleeps for more than a three hour stretch so her parents sleep in a bedroom at the foot of the stairs in the hope that they would hear her should she try to leave the house at night. In 2003 she developed an interest in opening the window of her second story bedroom, removing the

screen, sitting on the window sill and dangling her feet outside. The Douses replaced windows on the second floor so the risky behaviour could not continue. This used most of the DSP lifetime allotment for home modification.

[40] The Douses believe that the FIM Screening Tool does not accurately assess Jewel's level of functioning. Her physical score gives her a higher overall score although her autism actually results in her mobility impacting on her overall functioning in a negative way. Her mother describes it as Jewel having the "energy and lack of fear of a toddler" in a teenage body. Her score in 2004 was 63/126 which capped her maximum monthly support at \$1500.00.

[41] After the diagnosis of Jewel's autism and seizures, her mother chose to stay home to meet the multiplicity of demands necessary for her care. Vic Douse works overtime to earn enough to support his family and to provide for Jewel's special needs. The current DSP screening has discouraged the family from participating in the DSP at the present time. In the account of life with Jewel provided by the Douses, Colleen Douse writes:

This family is now physically, emotional(ly) and financially exhausted and the DSP was reduced to such a miniscule level as to make the work of documenting over \$2000 of expenses and receipts each month, not worth the effort when they would only cover about \$200 of it.

The Douses gave no indication in their testimony that they expected the DSP Program to cover all costs for their daughter.

[42] Colleen Douse writes:

In short caring for Jewel is difficult, stressful and exhausting, but she is a beautiful child with an infectious giggle who tries very hard to succeed, and we are very proud of how far she has come and know that she will continue to grow and learn.

Adam Bateman

- [43] Adam Bateman is a young adult who suffers from severe autism and is significantly physically and mentally disabled. At the time of this hearing he was almost twenty five years of age. When he was a day old he stopped breathing twice and due in part to medical problems was kept in hospital until he was two weeks of age. As an infant he slept no more than an hour at a time and it was almost impossible for his parents to comfort him. At the age of three months he was so unresponsive to the world around him that doctors thought he might be blind and deaf. One specialist thought he might have mild cerebral palsy as well. His parents knew by the time he was eighteen months of age that he was autistic although he was not officially diagnosed until he was almost five years old. His autism affects his communication, his sensory responses, his physical functioning and his behaviours. His social isolation is extreme, and he cannot be left alone except for the briefest periods of time. His mother describes Adam in her written account as being locked “*inside a body that is not functioning. He has a bright mind in spite of all his deficiencies. Learning new facts is one place where Adam can shine*”.
- [44] Background information on Adam and an account of a typical day in his life as contained in the book of documents filed during Carolyn Bateman’s testimony portray through words and pictures the richness of Adam’s life despite his profound disabilities.
- [45] Adam is totally dependant on others for care and lives with his parents. Because he is over the age of eighteen his parents are not income tested. Adam’s DSP assessment dated April 25, 2005 notes in his summary of needs that he has many needs directly related to his autism. The DSP assists him with his needs to the maximum of the \$3000.00 monthly. His cognitive score along with his low score for motor function in the FIM screening tool place him as qualifying for that maximum level of support. Needs not covered by the \$3000.00 are listed as unmet needs.

- [46] On July 4, 2002 Carolyn Bateman filed a Human Rights Complaint on behalf of her son alleging that the Respondent discriminated against him on the grounds of age, physical or mental disability, marital status, and source of income. There was agreement reached with the Government on all issues other than with respect to life time caps and the monthly maximum of \$3000.00 resulting in an annual ceiling of \$36000.00. One result of the agreement reached is that since 2003 the net income of Adam's parents has not been used to determine client contribution. Adam's own contribution is assessed as being \$2.00 and the DSP provides \$2998.00 per month to him.
- [47] Adam graduated with honours from high school with the help of his trained teaching assistant, a communication device and his laptop. He presently attends UPEI and was recently allowed to take a multiple choice exam which he passed. He loves to go to movies and he loves to be around others his own age. He has a vocabulary of about twelve words. One of his newest words is "come". He uses that word to call his Special Skills dog.
- [48] Carolyn Bateman has been a tireless advocate not only for her son but for the autistic and disabled community at large. She testified before the Panel of having appeared before the Senate Committee on autism on December 7, 2006. She was a representative for the Stars for Life Foundation for Autism which she co-founded. In her presentation to the Senate Committee, she noted P.E.I. as being the only province in Canada where IBI/ABA therapy was income tested. She told the Senate Committee it was her belief that funding Caps leave seriously disabled persons without a future.
- [49] Ms. Bateman placed before the Panel an itemized account of the cost of meeting needs related to Adam's disability. Annual costs were \$57,555.00. Projected costs for 2007 were \$65,693.00. Since Adam's family provides food, lodging, clothing and other day to day incidentals, the annual cost did not reflect an amount for these expenses.

[50] His mother wrote:

...he wants to be given a chance to do and experience the same things in life his non disabled peers do. Like have a friend, a job, live outside his family home and know when his parents aren't around anymore that he will be living some where safe and happy with a sense of self worth and have a sense of community and belonging.

Michael Murphy

[51] Michael Murphy was born on May 16, 1991. He was born with a rare condition, Opitz C syndrome, and is globally mentally and physically disabled. He was not expected to live for very long. He is visually impaired. He has no speech. He requires assistance with all activities and requires constant supervision. He lives with his parents, Margaret and Greg, and his sister Laura who is eleven months younger. Michael's mother told the Panel that the only respite for her and for Michael's father is when they go to their work places. Laura's first year of respite was when she was in grade six and attended a different school than her brother.

[52] Margaret Murphy gave evidence of the family's on-going efforts to achieve quality of life for Michael in the face of overwhelming obstacles. Professionals said Michael would never walk and he can. He walks with assistance and is presently losing some ability, but he can walk. He has even ridden a bike. When he reached kindergarten age, the local kindergarten was reluctant to take him. His mother persuaded them to try for thirty days and the result exceeded her expectations. After the thirty day trial the kindergarten kept him gladly. The book of documents submitted by the Murphys contains background information and an account of a typical day in Michael's life. The Murphys provided numerous pictures taken throughout Michael's fifteen years. In the pictures, Michael often had a big smile on his face. Margaret Murphy showed the Panel a short video of the special recognition Michael received from his classmates at his grade six graduation. His presence in the school system had touched his classmates and his teacher who grew to know him, to appreciate him, and to admire his courage.

- [53] Due to the severity of Michael's disability both mental and physical, he receives the \$3000.00 maximum support under the DSP. Because of maximum monthly funding ceilings, some of Michael's needs are unmet. The DSP provides only certain levels of funding for his mobility needs. He has outgrown his present wheel chair and there is concern that he will develop pressure sores from the way he sits in it. The chair is hard for caregivers to handle. The castors dig into outdoor surfaces and it is difficult to maneuver the chair in small spaces.
- [54] At a young age Michael used his lifetime amount for home renovation for construction of a wheel chair ramp. In the Murphy's present home, the bathroom door is not wide enough to accommodate his wheel chair and his father is the only one strong enough to carry Michael in and out of the bathroom and to lift him in and out of the tub.
- [55] Transportation in the family van is another area of concern for the Murphys. Michael's safety as well as the safety of other occupants in the vehicle is compromised. He does not fit the restraint system. A DSP lifetime cap exists for vehicle modifications.
- [56] Margaret Murphy appreciates the efforts workers have made over the years to provide assistance to meet Michael's needs. She sees the \$3000.00 per month maximum as discriminating against Michael. All of his needs are not met. The lifetime caps for home and vehicle modifications and the cap on support available for assistive devices discriminates against him as well. He requires an assistive device which would help to provide consistent toileting for him.
- [57] At the end of a typical day, Margaret Murphy writes:

It is 2100 hr. and all the lights are going off. We tell Laura and Michael that we love them and we will see them in the morning. Let's hope Michael has a good night's sleep. Tomorrow comes quick, especially when your day starts at 0500 hrs.

III – ISSUES

[58] The issues to be determined by the panel are:

- A. *Does the use of the DSP Screening Tool, called the Functional Independence Measure or FIM, discriminate against mentally disabled as compared to physically disabled persons?*
- B. *Does the income testing of parents with disabled children under the age of eighteen discriminate against those children on the basis of age and family status?*
- C. *(i) Do ceilings on the monthly funding available for supports under the DSP discriminate against severely disabled persons?*
(ii) Do lifetime caps on home and vehicle modifications discriminate against lifelong severely disabled persons?

IV – ANALYSIS

[59] The *Prince Edward Island Human Rights Act R.S.P,E.I. 1988, Cap. H-12* provides that:

- 2. (1) *No person shall discriminate*
 - (a) *against any individual or class of individuals with respect to enjoyment of accommodation, services and facilities to which members of the public have access; or*
 - (b) *with respect to the manner in which accommodations, services and facilities, to which members of the public have access, are provided to any individual or class of individuals.*

In *Pat Coady on behalf of Jennifer Coady v. Queen's Region Health and the Department of Health and Social Services*, a decision on preliminary matters released November 5th of 2004, a Prince Edward Island Human Rights Panel determined that the DSP is a service under *section 2* of the *Act*. The decision recognized that services provided by governments including social services, financial assistance programs, provincial social assistance benefits, and Worker's Compensation have been consistently held as coming under the protection of human rights legislation. The Panel found that eligibility requirements did not diminish the "public" nature of the service, but were rather "*a method to ensure the impartial and universal application of services*". This Panel accepts this line of reasoning, applies the *Coady* decision and holds that the DSP is a service under the *Human Rights Act, supra*.

[60] The **Act** defines a number of prohibited grounds of discrimination as follows:

1 (1)(d) "discrimination" means discrimination in relation to age, colour, creed, ethnic or national origin, family status, physical or mental handicap, political belief, race, religion, sex, sexual orientation, or source of income of any individual or class of individuals;

[61] The only ground defined by the **Act** is physical or mental handicap. The definition is:

1 (1)(l) "physical or mental handicap" means a previous or existing disability, infirmity, malformation or disfigurement, whether of a physical or mental nature, that is caused by injury, birth defect or illness, and includes but is not limited to epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, muteness or speech impediment, or physical reliance on a guide dog, wheelchair or other remedial device;

[62] It is not disputed that the Complainants are disabled. The grounds of discrimination alleged are age, family status and mental or physical disability. It is alleged that the discrimination results from the manner in which services under the DSP are being provided to the Complainants. The provision of services is

argued to be discriminatory due to the use of the DSP Screening Tool, income testing and funding caps.

[63] The burden of proof is on the complainants to prove on a balance of probabilities that the Respondent discriminated against them in contravention of the ***Prince Edward Island Human Rights Act***. The Supreme Court of Canada stated in ***O'Malley v. Simpson- Sears Ltd, [1985] 2 S.C.R. 536*** that in dispute resolution using the judicial process it is an essential element that one party or the other be assigned the burden of proof. At paragraph 28 ***O'Malley*** describes the requirements of a *prima facie* case as follows:

A prima facie case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer.

The Supreme Court of Prince Edward Island in ***Ayangma v. The French School Board 2002 PEICAD 5*** has held that discrimination can exist without intent. Paragraph 36 of the decision states:

Only rarely is there concrete evidence of discrimination even when the allegation is of direct discrimination as opposed to adverse effect or systemic discrimination. As well, the proof of an intent to discriminate is not required because even where an individual has the best of intentions he or she may still be found to have contravened provincial human rights legislation. If the distinction is the proximate cause of the complainant not receiving the same treatment as those who do not share his personal characteristics, a case for discrimination will be made out. Proof is frequently found in circumstantial evidence and the reasonable inferences to be extracted from this evidence.

[64] The Panel concludes that once a complainant demonstrates that he or she has been discriminated against under a prohibited ground contained in the ***Prince Edward Island Human Rights Act***, a *prima facie* case will have been established. This is the framework for our decision- making.

- [65] In the analysis of whether or not a *prima facie* case has been established by the complainants, guidance from Supreme Court of Canada decisions considering s. **15(1)** of the *Canadian Charter of Rights and Freedoms* is of assistance. Supreme Court decisions have applied the principles used in analyzing cases of discrimination under the *Charter* to the area of human rights law, and the Panel will consider those principles which it considers to be applicable to its decision making. It is recognized that *Charter* decisions examine the effects of discriminatory legislation, while decisions under the *Human Rights Act* look at discriminatory practices as they affect individuals.
- [66] Proper analysis of human rights complaints often requires a comparison to show differential treatment. To analyze the complaints before us appropriate comparator groups will be considered. The Supreme Court of Canada has spoken to the selection, appropriateness, construction and use of comparator groups in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657. *Auton* adopted lines of reasoning on comparator groups contained in *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357 and *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566.
- [67] Guidance for the Panel on the meaning of and test for finding discrimination are also contained in *Charter* cases. *Battlefords, supra* applied the definition of discrimination contained in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at pp. 173-75 where it was stated:

What does discrimination mean? The question has arisen most commonly in a consideration of the Human Rights Acts and the general concept of discrimination under those enactments has been fairly well settled. There is little difficulty, drawing upon the cases in this Court, in isolating an acceptable definition I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of

association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

Other guiding principles contained in **Charter** case law and applicable to our analysis will be considered and referenced in context.

- [68] After a *prima facie* case of discrimination has been made out by the complainants, the burden shifts to the Respondent to show that accommodation is not possible without undue hardship. Undue hardship is commented on as follows in **British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employee's Union (B.C.G.S.E.U.) (Meiorin Grievance)**, [1999] 3 S.C.R.3 at paragraph 62:

When referring to the concept of "undue hardship", it is important to recall the words of Sopinka J .who observed in Central Okanogan School District No. 23 v. Renaud, [1992] 2 S.C.R. 970, at p.984, that "the use of the term 'undue' infers that some hardship is acceptable; it is only undue hardship that satisfies the test". ... Yet the standard, if it is to be justified under the human rights legislation, must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship.

- [69] In **British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)** [1999] 3 S.C.R. 868 at paragraph 41 the court states:

While in some circumstances excessive cost may justify a refusal to accommodate those with disabilities, one must be wary of putting too low a value on accommodating the disabled. It is all too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment.I do not assert that cost is always irrelevant to accommodation. I do assert, however, that impressionistic evidence of increased expense will not generally suffice. Government agencies perform many expensive services for the public that they serve.

- [70] As noted in **Miele v. Famous Players Inc.**, [2000] 37 C.H.R.R. D/1 (B.C.H.R.T.) the nature of the evidence required must be objective, real, direct, and in the case

of costs, quantifiable. Objective evidence can include financial statements and budgets, scientific data, expert opinion, and detailed information about the activity and the requested accommodation.

[71] Costs must be shown to be related to the accommodation and so substantial that they would alter the essential nature of the enterprise, or so significant they would substantially affect its viability.

First Issue

[72] *A. Does the use of the DSP Screening Tool , called the Functional Independence Measure or FIM, discriminate against mentally disabled persons as compared to physically disabled persons?*

[73] It is not disputed that both Benjamin Wonnacott and Jewel Douse suffer from autism. It is not disputed that autism is a mental disability. The parents of Benjamin Wonnacott and Jewel Douse gave credible and compelling evidence on the impact of their children's autism. Autism affects their children in every aspect of their young lives including growth and development, schooling, relationships with friends and immediate and extended family members, their physical and emotional safety and on occasion the safety of others, and in varying degrees their physical health.

[74] Benjamin Wonnacott and Jewel Douse cannot learn to function as other children do. Programs and tools to assist them with their learning are expensive and time consuming for their parents. For example, the parents must hire and train therapists to work with their children. The time and money required impacts on the availability of resources for siblings in both families. Although both children have good motor skills and general mobility, their lack of impulse control and lack of appreciation of risk to life and limb require intensive supervision by their parents or other responsible and trained persons. Their autism in the opinion of

the Panel often makes their relatively high levels of physical functioning in many ways a liability. The constant need for vigilance and supervision is evident. The demands of caring for and teaching children with autism permeate these two family units and give rise to extraordinary child-rearing support needs.

[75] The FIM score obtained from the eighteen question core of the tool defines the level of financial support a disabled person will receive. Monthly maximums as they relate to the level of functioning resulting from screening with the FIM are listed in the DSP. The Panel will analyze the implications for the mentally disabled as compared to the physically disabled. The DSP states:

S. 9.2.2 *Funding ceilings are consolidated in Appendix C, P.E.I. DSP Rates. Overall monthly maximums for the DSP portion of the support plan, based on levels of functioning are listed below. To ensure consistency of practice and fairness to the diverse needs of clients, maximum support levels should not be exceeded.*

(a) 75% or more functioning (High) \$ 300.00/month
(b) 51-74% functioning (Moderate) \$ 700.00/month
(c) 26-50% functioning (Low) \$ 1,500.00/month
(d) 25% or less functioning (Very Low)
\$ 3,000.00/month

When using the FIM eighteen question core to assess an individual's level of functioning, persons with the highest degree of physical disability and the least degree of cognitive disability would score 13 for motor function and 35 for cognitive function for a total score of 48. Persons with the least degree of physical disability and the highest degree of cognitive disability would score 13 for motor function and 35 for cognitive functioning for a total score of 96. The scores would convert in round numbers to a 38% functioning level and a 76% functioning level. The 38% level of functioning would entitle the most highly physically disabled person to a maximum monthly support of \$1500.00. The 76% level of functioning would entitle the most highly mentally disabled person to a maximum monthly support of \$300.00. The Panel finds that the core section of the screening tool is weighted in favour of physical disability as compared to mental disability.

[76] The Complainants Benjamin Wonnacott and Jewel Douse are cognitively or mentally disabled individuals accessing supports under the DSP. The comparator group put forward by counsel for the Complainants would consist of individuals with motor or physical disabilities who are accessing supports and services under the DSP. The Panel finds that the comparator group is like the two Complainants in all ways save for members of the comparator group being physically rather than mentally disabled.

[77] In *Battlefords, supra* the head note contains the following comment:

It is appropriate in the circumstances of this case to compare the benefits received by the mentally disabled with those received by the physically disabled. Human rights law frequently distinguishes between physical and mental disability. A second broad factor that should influence a purposive approach is the particular historical disadvantage faced by persons with mental disabilities.

In *R v. Swain, [1991] 1 S.C.R. 933* at 994, Lamer C.J. stated:

There is no question but that the mentally ill in our society have suffered from historical disadvantage, have been negatively stereotyped and are generally subject to social prejudice.

[78] Additionally, an important principle from *Auton, supra* at paragraph 28 is:

to ensure that when governments choose to enact benefits or burdens, they do so on a non-discriminatory basis.

The principle was referred to in the context of the *Charter of Rights*, noting that the primary goal of *s. 15(1)* is to combat discrimination and ameliorate the position of disadvantaged groups within society. The Panel finds the principle applicable to human rights law. By discriminating against mentally disabled persons as compared to physically disabled persons, the Respondent offends this principle.

[79] The Panel finds that the Respondent discriminated against the Complainants Benjamin Wonnacott and Jewel Douse on the ground of mental disability with

respect to the manner in which services were provided under the *Human Rights Act, supra* contrary to s.1(1)(d) and s.2(1)(b). Delivery of services was tied to level of functioning. The FIM screening tool used to assess their level of functioning placed the mentally disabled Complainants at a level higher of functioning than warranted by all of the needs and circumstances of their disabilities and lives. Discrimination resulted from the differential treatment afforded to the Complainants as a result of the use of the FIM screening tool. The physically disabled comparator group would not have received such differential treatment since the FIM screening tool was not weighted against them. Differential treatment is considered by the Supreme Court of Canada in *Law, supra*. At paragraph 53 it is noted that ‘*human dignity is harmed when individuals are marginalized, ignored or devalued*’. *Law* says that human dignity is concerned with physical and psychological integrity and empowerment and is harmed by unfair treatment. Benjamin Wonnacott and Jewel Douse are thus members of a group of mentally disabled people who are arbitrarily discriminated against in a way that is inconsistent with the overall scheme of the DSP Policy. It denies their fundamental human dignity.

[80] The Complainants having made out a *prima facie* case of discrimination, the burden now shifts to the Respondent to show that accommodation is not possible without undue hardship. The Supreme Court of Canada in *Central Okanagan School District No. 23 v. Renaud, [1992] 2 S.C.R. 970* has noted that use of the term ‘*undue*’ infers that some hardship is acceptable. Factors relating to ‘*the unique capabilities and inherent worth and dignity of every individual*’ must be accommodated up to the point of undue hardship.

[81] The Panel found Bob Creed, who gave evidence for the Respondent, to be a credible, forthright and knowledgeable witness. He described the DSP as a valuable and evolving program. He valued the compassion and commitment of DSP workers. He also presented fiscal responsibility as being necessary in the management of the program. He recognized and acknowledged that the FIM is not a perfect assessment tool and that reporter bias is possible. He was aware of

the difficulties inherent in the core section of the FIM with respect to weighting in favour of the physically disabled, but noted that because that section was patented it could not be modified.

[82] Mr. Creed testified that during the transition in 2001/2002 the DSP operated as a grant program with funding in the amount of one point five million dollars. The following year the program was given full budget with funding and staff from the previous programs being allocated to the DSP. The budget has increased each year. The current budget for 2006/2007 is eight million, one hundred thousand dollars. The Panel considers the overall budget amount to be a matter of public record.

[83] Although the Panel finds there is a genuine desire on the part of DSP management and staff to see the program evolve to meet the static and changing needs of disabled Islanders in the face of increasing costs and budgetary restraints, no quantifiable evidence was brought forward by the Respondent with respect to costs of accommodation. In particular costs for accommodation which would address the effect of the screening of mentally disabled individuals using the FIM was not brought forward. As stated in *Ayangma, supra* contravention of human rights legislation can occur even with the best of intentions. Courts have held that impressionistic evidence of costs is generally not sufficient (*British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), supra*).

[84] No financial statements, internal program budgets, expert opinion or any detailed information involving accommodation with respect to the mental disabilities of the two minor Complainants or others like them was put into evidence. Costs would need to be shown to be so substantial that they would alter the essential nature of the operation of the DSP program, or so significant that they would substantially affect its viability. There was an insufficiency of any objective, real, or direct evidence to demonstrate undue hardship. The Panel therefore concludes that the Respondent has failed to satisfy the burden of showing that

accommodation was not possible without undue hardship. No defense was put forward and no reasonable explanation was given.

Conclusion on the First Issue:

Use of the FIM Screening Tool in the delivery of services under the DSP discriminated against Benjamin Wonnacott and Jewel Douse on the ground of mental disability.

Second Issue

[85] *B. Does the income testing of parents with disabled children under the age of eighteen discriminate against those children on the basis of age and family status?*

[86] There is no dispute that Michael Murphy, Jewel Douse and Benjamin Wonnacott are disabled and are dependant on their parents. They live with and are supported by their parents, they have qualified to receive services and supports under the DSP, and they are under the age of eighteen. It is alleged that the Respondent discriminated against these three Complainants with respect to the manner in which services were provided under the DSP contrary to *s. 1(1)(d)* and *s. 2(1)(b)* of the *Human Rights Act, supra*. Income testing is incorporated into the manner of delivery of services to these three Complainants. The alleged grounds of discrimination are age and family status.

[87] The DSP program uses income testing when calculating the Department's portion of financial contribution in its provision of supports and services to clients. Bob Creed in his testimony for the Respondent directed the attention of the Panel to page 41 of the Baker Report. The Report notes that federal income tax authorities were consulted during the development phase of the DSP. It was determined that

income testing was appropriate if recipients were to avoid having benefits reported as taxable income. The program uses “net income” for the testing.

[88] Bob Creed described income testing as a practice which helped to maintain fiscal responsibility in the DSP program. The Government is entitled to allocate finite resources when it chooses to assist vulnerable groups, and in the case at hand income testing is a component of the provision of DSP services. The Panel recognizes and accepts that income testing is a component of many programs and is a generally accepted and useful practice.

[89] However, the Supreme Court of Canada as noted in *Auton, supra* at paragraph 41 states:

This Court has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner.

[90] The Supreme Court of Prince Edward Island in *Ayangma v. The French School Board 2002 PEICAD 5* at paragraph 5 states that discrimination can exist without intent:

Only rarely is there concrete evidence of discrimination even when the allegation is of direct discrimination as opposed to adverse effect or systemic discrimination. As well, the proof of an intent to discriminate is not required because even where an individual has the best of intentions he or she may still be found to have contravened provincial human rights legislation. If the distinction is the proximate cause of the complainant not receiving the same treatment as those who do not share his personal characteristics, a case for discrimination will be made out. Proof is frequently found in circumstantial evidence and the inferences to be extracted from this evidence.

On all of the evidence before us, we find no intention on the part of the Respondent to discriminate. However all of the evidence and the inferences to be drawn from it will be considered by the Panel in our analysis.

- [91] The issue before us is whether the Michael Murphy, Jewel Douse and Benjamin Wonnacott are being discriminated against on the grounds of age and family status because their parents are income tested. The comparator group put forward by Counsel for the Complainants is a group composed of adults accessing the DSP. We do not find the proposed comparator group to be appropriate.
- [92] The Panel would define the comparator group more tightly for the purpose of our analysis. The comparator group would consist of disabled individuals accessing the DSP who are eighteen years of age or older, who reside with their parents, and who are dependant on them for care and financial support. The comparator group mirrors the characteristics of the Complainants relevant to the benefit sought except for age, which is a ground raised as a basis for the discrimination. The comparator also aligns with others potentially entitled to the benefit. In our view this comparator group complies with the propositions on comparator groups as laid out in *Auton, supra* at paragraphs 51 to 54.
- [93] The parents of the Complainants are income tested to determine client contribution and the parents of the comparator group are not. The end result is that members of the comparator group are deemed to have an income of \$2.00 and client contribution is this amount. (The \$2.00 amount is the lowest level of client contribution listed in the contribution schedule at pages 28 and 29 of the DSP Policy). The parents of the Complainants are income tested and client contribution is attributed based on adjusted net income levels contained in the client contribution schedule at pages 28 and 29 of the DSP Policy. The families pay full or partial costs for benefits thus shouldering a burden not imposed on the families of the comparator group.
- [94] When considering the purpose of the DSP and the overall needs it seeks to meet, the Panel finds this to be differential treatment of the Complainants, for it is they who in the end are deprived of the same level of supports and services available to the comparator group. The Complainants are being denied the same level of benefits accorded to others in the same situation, save for age. The differential

treatment offends their human dignity and amounts to discrimination. *Law, supra*, a leading case on the meaning of human dignity, as considered during analysis of the first issue applies to this second issue as well. The denial of an equal level of benefits is unfair to these Complainants, and their physical and psychological integrity is harmed. Their fundamental human dignity is denied.

[95] The Complainants having made out a *prima facie* case of discrimination on the basis of age, the burden now shifts to the Respondent to show that accommodation is not possible without undue hardship. The Supreme Court of Canada in *Central Okanogan School District No. 23 v. Renaud, supra* has noted that use of the term ‘*undue*’ infers that some hardship is acceptable. Factors relating to ‘*the unique capabilities and inherent worth and dignity of every individual*’ must be accommodated up to the point of undue hardship.

[96] The Respondent argued that ‘parents are responsible, in all aspects, for their minor children’. He cites the *Custody Jurisdiction and Enforcement Act, R.S.P.E.I. 1988, Cap. C-33 , s.3(2)* as codifying their being legally and thus financially responsible for their children. The purposes of the *Act* are clearly stated in *s. 2*. The purposes would have no application to the DSP, and the Panel finds the *Act* is not relevant to the issue before us.

[97] The Respondent cites the *Age of Majority Act, R.S.P.E.I. Cap. A-8* as stating that a person is a minor until his or her eighteenth birthday, at which time he or she becomes an adult. He argues that income testing of a minor’s parents is therefore not discriminatory and, in fact, to consider minors to be independent of their parents would be contrary to the codified law of the Province. *Section 2* of the *Age of Majority Act* states that the age of majority as defined in *s. 1* applies to any law in respect of which the Legislature has jurisdiction. However, the DSP has been held in *Coady, supra* to be a ‘service’ under *s. 2* of the *Human Rights Act*, and must comply with rights protections. This Panel regards the DSP and its Policy as being subordinate to the *Rehabilitation of Disabled Persons Act, supra* and the *Welfare Assistance Act, supra*. The *Human Rights Act* at *s. 1(2)* states:

This Act shall be deemed to prevail over all other laws of this province and such laws shall be read as being subject to this Act.

We find that section 2(2) of the *Human Rights Act*, which provides an exception for age discrimination when set out in legislation, does not insulate Government from age discrimination in the DSP. In our opinion, it would be inconceivable to consider that Provincial subordinate services or policies be interpreted so as to allow differential treatment of disabled children. We also consider the principle contained in *Battlefords, supra* to be relevant. The Supreme Court of Canada noted at page 15 of that decision as follows:

The Court has consistently held that human rights legislation is “fundamental” or “quasi-constitutional” and as such should be interpreted in a broad and purposive manner.

Accordingly, we find that the *Age of Majority Act* does not apply to the case at hand.

[98] Again as in the analysis of the first issue, the Panel finds there is a genuine desire on the part of DSP management and staff to see the program evolve to meet the static and changing needs of disabled Islanders in the face of increasing costs and budgetary restraints. However as noted in *Ayangma, supra* contravention of human rights legislation can occur even with the best of intentions. No quantifiable evidence was brought forward by the Respondent with respect to costs of accommodation. In particular the costs of accommodation which would address the effect of the differential treatment of the Complainants was not brought forward.

[99] No financial statements, internal program budgets, expert opinion or any detailed information involving accommodation with respect to these three minor Complainants or others like them was put into evidence. Costs would need to be shown to be so substantial that they would alter the essential nature of the operation of the DSP program, or so significant that they would substantially affect its viability. There was insufficient objective, real, or direct evidence to

demonstrate undue hardship. The Panel therefore concludes that the Respondent has failed to satisfy the burden of showing that accommodation was not possible without undue hardship. No defense or reasonable explanation was put forward.

Conclusion on the Second Issue:

The use of income testing in the delivery of services under the DSP discriminates against Michael Murphy, Jewel Douse and Benjamin Wonnacott on the ground of age.

Third Issue

[100] C. (i) *Do ceilings on monthly funding available for supports under the DSP discriminate against severely disabled persons who are left with unmet needs?*

(ii) *Do lifetime caps on home and vehicle modifications discriminate against lifelong severely disabled persons?*

(i) Overall Monthly Maximums

[101] As noted previously, the funding ceilings established in the DSP Policy as they relate to level of functioning are defined in Section 9.2.2. The ceiling for the maximum monthly amount for disabled individuals with the lowest level of functioning (25% or less) is capped at \$3000.00.

[102] Adam Bateman and Michael Murphy are severely mentally and physically disabled individuals. They both qualify for the maximum monthly amount of \$3000.00 as defined in the DSP Policy.

[103] Although Adam receives the maximum monthly support, the amount does not meet all his needs for services contained in what has been referred to before us as

the DSP 'basket of services'. Adam's DSP assessment from 2005 describes those needs capped out by the monthly maximum as 'unmet needs'. The assessment notes that the needs related to his autism are high. Carolyn Bateman's detailed account of the costs associated with meeting the needs related to Adam's disability substantially exceeds the \$36,000.00 annual amount available from the DSP Program. The costs of meeting all of Adam's needs related to his disability are itemized by Carolyn Bateman as totaling \$57,555.00 during the year of 2006.

[104] All of Michael Murphy's needs are not covered by the \$3000.00 monthly maximum either. Due to the profound nature of his disability, the Panel is satisfied on all of the evidence that needs related to Michael's disability, such as respite, are capped out. His wheel chair is too small for him but a new one is not an option at this time because lump sum payments for technical aids and assistive devices are amortized and are considered in the calculation of monthly costs. The overall monthly ceiling applies. An assistive device which would allow Michael to press a button when he needs toileting would be amortized as well. This essentially means some needs are subject to a waiting period.

[105] The question for the Panel is whether capping the monthly amount for supports at a maximum of \$3000.00 is discriminatory. It is argued on behalf of the Complainants that the caps placed in the DSP Program are arbitrary and result in discrimination against them. The caps impact delivery of services to them, and the alleged ground of discrimination is mental or physical disability.

[106] The DSP Policy in its general program description, in its statement of principles and objectives, and in the description of its emphasis does not promise to cover all needs of disabled persons who qualify for supports. That resources are limited is recognized in the Policy, and caps or ceilings are clearly set out. Objectives of the Program include providing a range of services, and in the provision of such services 'to assist' and 'to help' disabled individuals. The wording of the DSP Policy would support evidence put forward by the Respondent that the intention of the DSP was never to cover all costs.

[107] In *Auton, supra* the benefit claimed was funding for all medically required services. The Court found at paragraph 35 that the legislative scheme examined in that case did not promise that any Canadian would be funded for all medically required treatment. Although this Panel is not examining a legislative scheme, we would apply a similar type of reasoning to our assessment of the capping of services under the DSP Policy. We do not find on the face of it that the Policy promises to cover all needs for disabled Islanders who qualify. Failure to provide for all unmet needs is not discriminatory. Legislators, and in this case public officials responsible to them, are entitled to deference in allotting finite resources among vulnerable groups. (see *Auton, supra* at paragraph 14).

[108] *Auton* at paragraph 41 notes that policy objectives and provisions cannot “single out a disadvantaged group for inferior treatment”, although a choice not to provide a particular benefit “absent demonstration of discriminatory purpose” would not offend the principle. It is further stated:

This Court has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner.

[109] In summary, the Panel finds after careful consideration as follows. The DSP Program does not promise that all needs will be met. The Program is intended to assist disabled Islanders. Finite resources require that limits be set, and Legislators are entitled to deference in allotting finite resources to vulnerable groups. We find no discriminatory purpose in the capping of the amount available monthly for supports and services. We do not find that Adam Bateman and Michael Murphy have been singled out for inferior or less advantageous treatment on the ground of mental or physical disability. Considering the overall purpose of the program and the needs it seeks to meet, differential treatment has not been shown. They have been granted the highest level of support available and their human dignity has not been harmed.

[110] Counsel for the Complainants chose participants of the AIDS/HIV Program and the Cystic Fibrosis Program as a comparator group. The benefit provided by these programs is all medication required to treat HIV/AIDS or cystic fibrosis. There are no caps.

[111] The Panel refers for guidance to the criteria for comparator groups in *Auton, supra* at paragraphs 51 to 54. The difficulty presented by the chosen comparator group is that the benefits sought under the DSP Program do not align with the benefit sought under the AIDS/HIV Program or the Cystic Fibrosis Program. Both of these Programs are small and provide the medications to treat specific diseases. Benefits sought under the DSP are broad and are provided to support needs which relate to a number of disabilities. The DSP serves a relatively large number of Islanders. Theoretically, a person who qualified for the HIV/AIDS Program or the Cystic Fibrosis Program might apply and qualify for benefits available under the DSP as well.

[112] For all of the above reasons, we conclude that a *prima facie* case of discrimination has not been made out by the Complainants.

(ii) Lifetime Ceilings on Home and Vehicle Modifications

[113] Lifetime maximums on home and vehicle modifications are contained in Section 8.7.1. of the DSP Policy. The section reads as follows:

Various modifications may be cost-shared with individuals and/or families to help meet unmet needs. A modification is defined as a change, alteration in structure and/or an addition that is affixed to a structure. The following modifications can be covered:

- a) Home modifications to a life-time maximum of \$2000.00 of primary residence. An applicant may be requested to provide verification of ownership of residence;*
- b) Vehicle modifications to a life-time maximum of \$2000.00 of primary vehicle. An applicant may be*

requested to provide verification of ownership of vehicle; and

c) Modification to a place of employment to a maximum of \$3000.00, notwithstanding section 9.9.6.

[114] Michael Murphy and Jewel Douse have serious lifelong disabilities. Michael Murphy has used the lifetime maximums for home and vehicle modifications available to him in his early years. Jewel Douse has used almost the entire amount available for home modifications when second story windows were replaced for her safety. It is argued on their behalf that they are being treated the same as less disabled individuals or persons with short term disabilities when they are not the same. Discrimination can result from persons being treated the same when they are not the same. *Irshad (Litigation Guardian of) v. Ontario (Ministry of Health), 197 D.L.R. (4th) 103 (Ont. C. A.)* at paragraph 114 states:

Equality may mean that a law must treat everyone in the same way. Equality may, however, demand that one individual or group be treated differently from others.

It is alleged that the caps result in some individuals receiving sufficient support and others receiving insufficient support. *Irshad* was a case determining a *s. 15 Charter* issue. Paragraph 114 reflected on *Law, supra*. We do not find that the purpose or effect of the lifetime ceilings is to impose a disadvantage or to withhold a benefit based on factors that would undermine the human dignity of the Complainants.

[115] The analysis and case law applied to the question of discrimination resulting from monthly maximums is relevant to lifetime ceilings on modifications and will not be repeated here. We consider the lifetime ceilings for home and vehicle modifications separately only because the Complainants chose different comparators.

[116] The comparator group chosen in relation to lifetime ceilings is made up of other individuals accessing the DSP Program for home and/or vehicle modifications. The comparator group mirrors the characteristics of the Complainants other than

in degree of disability. The comparator group would be composed of individuals with short term disabilities or disabilities requiring only one home and/or one vehicle modification. It is argued that the lifetime ceilings would therefore fully meet all of the needs of the comparator group. The difficulty with this reasoning is that individuals with short term disabilities or with one time modification needs could only be identified over the span of a lifetime. Individuals with short term disabilities could later become severely or chronically disabled. They too would then be subject to lifetime caps.

[117] The Panel notes that ‘lifetime government ceiling funds’ were identified in the Baker Report as a problematic area. Bob Creed in his evidence for the Respondent indicated that changes to lifetime funding ceilings have been implemented. The Panel acknowledges that the amount available for modifications is very small indeed considering the needs of Michael Murphy and Jewel Douse. However, as noted above, courts have consistently held that Legislators are entitled to deference in the allocation of resources to vulnerable groups.

[118] That being said, we do not find that Jewel Douse and Michael Murphy have been singled out for inferior or less advantageous treatment on the ground of mental or physical disability. The DSP does not promise that all needs will be met. It is a program in place to assist disabled Islanders. Considering the overall purpose of the Program, differential treatment has not been shown. The Complainants are entitled to access the same lifetime amount of assistance as other participants. Their human dignity has not been harmed. A *prima facie* case of discrimination has not been made out by the Complainants.

Conclusion on the Third Issue:

The Complainants have not proven on a balance of probabilities that the Respondent discriminated against them in delivery of services in contravention of *sections 1(1)(d) and 2(1)(b)* of the *Prince Edward Island Human Rights Act* by

the use of monthly maximums for support, or by the use of lifetime ceilings for home and vehicle modifications.

V- DAMAGES

The Panel directs the Clerk to contact the Parties to schedule a time as soon as practicable for a hearing to determine damages.

Dated this 26th day of June, 2007

Signed: Lou Ann Thomson
Lou Ann Thomson, Panel Chair

Signed: Gerry O'Connell
Gerry O'Connell, Member

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