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Special Education Designations Arbitration Update

BCPSEA v. BCTF

The LoU No. 17 Memorandum of Agreement (MoA) outlined a process in paragraphs 20 (A-C) to have a final and binding determination of the definitions and classifications of special education designations. This process was necessary because, in some cases, the definitions of special education designations defined in the restored language no longer align with current Ministry of Education definitions. This mis-alignment makes it difficult to know which designated students should be considered for the purpose of class composition.

After several days of arbitration and mediation in Fall 2018, final arguments in the arbitration were made on May 14-15, 2019. We will keep you updated as soon as Arbitrator Marguerite Jackson renders her decision.

Restored Class Size and Composition Language does not apply to Alternate School

SD No. 44 (North Vancouver)/BCPSEA v. North Vancouver Teachers' Association/BCTF

Issue

Does a restored class size limit apply to classes in an alternate school? Alternatively, does the restored class composition limit for "regular classrooms" apply to classes in an alternate school?

Significance

In this case, the answers are no. Restored class size and composition limits do not automatically apply to all classes, teachers and schools in a school district. Depending on each district's unique restored language, past practice, and bargaining history, specific programs, schools or classes may not be subject to restored class and composition language.

Relevant Collective Agreement Language

Article D.1 of the district's restored language (Schedule A) provides:

1.a. Class Size Formula (K-12)

The Board shall establish class sizes according to the following limits:

- First year Primary (Kindergarten) 20
- Primary (grades 1-3) 25
- Primary split/ungraded/multi-age/grades 3/4 split 23
- Intermediate split/multi-age (grades 4-7) 27
- Secondary English 28
- Regular classes (grades 4-7) 29
- Regular classes (grades 8-12) 30
- Special Education (Function 3) 10
- LAC groups (secondary) 12

ESL classes 15

...

9. No more than three (3) students with special needs shall be integrated into a single regular classroom. Only one (1) of these may be from a low incidence category or from Category 1.17 (Severe Behaviour).

Facts

In the early 1990s, the district and local teachers' union negotiated class size and composition limits, including a class size limit of 12 students for Learning Assistance Centre (LAC) classes. These classes are provided as part of the timetable in neighbourhood schools where a Learning Assistance Teacher provides additional support to students with mild to moderate learning difficulties who struggle in regular classes.

At the time the class size and composition limits were negotiated, there was no evidence that the parties mutually understood these provisions covered all teachers and classes in the district. In particular, there was no mutual understanding at the table that the class size and composition limits applied to the alternate secondary school that existed at the time (Keith Lynn). Keith Lynn's student population came from other secondary schools and was comprised of students having difficulties in their former schools due to behavioural or emotional issues. The class sizes were small and generally staffed at a ratio of one teacher to 12 or fewer students, but the district's evidence was clear that the school was staffed based on the needs of the school, not because it was subject to the class size limit of 12 for "LAC groups (secondary)."

Mountainside Secondary School is an alternate school established in 2012 to support students struggling with social, emotional, behavioural, or mental health concerns. Mountainside is staffed at a ratio of approximately one teacher for every 15 to 17 students.

Analysis and Decision

While the union recognized that classes at Mountainside are not exactly like LAC classes, it argued that the LAC classes are the most similar to the Mountainside classes and the restored class size and composition limits were intended by the parties to be comprehensive and cover all classes and teachers in the district. In the alternative, the union argued that class composition limits in regular classrooms applied (Article D.1.8 and D.1.9) to Mountainside classes, such that most classes were in breach of the composition limits.

Arbitrator Jackson did not agree with the union's position. Arbitrator Jackson concluded, based on the language of the agreement that, although the class size limits are mandatory, they are not comprehensive and do not necessarily apply to all teachers and classes in the district. Instead, the parties specifically listed the classes that were subject to class size limits.

Second, Mountainside classes were distinct from LAC classes and it was not reasonable to apply the LAC class size limits to them. LAC has a specific meaning, referring to a service supporting students with academic learning challenges at neighbourhood schools. Mountainside does not offer a single class or block of additional support to students in a neighbourhood school; it is an entire secondary school and each class is taught by a teacher responsible for the progress and evaluation of each student in the class. Mountainside's self-paced learning model is also different from LAC classes, which keep students on track in their classes in a neighbourhood school. The students supported by LAC have mild to moderate academic challenges compared to the emotional, social, and behavioural barriers to learning faced by the students referred to Mountainside. There was also no evidence that either party considered class size limits for Keith Lynn — the de facto predecessor of Mountainside — at the time the language was negotiated. In fact, the evidence supported that the staffing at Keith Lynn of one teacher per 12 students pre-dated the class size limits in the collective agreement and was based on educational decisions of management, not the collective

agreement. In short, the district's past practice in staffing Mountainside's predecessor did not create a collective agreement limit on class size.

Finally, Arbitrator Jackson rejected the union's argument that the class composition limits in a "regular classroom" apply to Mountainside classes. All the evidence supported that Mountainside classes were not "regular classrooms" but were created as an alternative to regular classrooms. The class composition language, applied strictly, would have resulted in classes of one to three students, and could not be reasonably interpreted to apply to Mountainside classes.

Conclusion

The restored class size limit established for Learning Assistance Centre (LAC) classes and restored class composition limit did not apply to an alternate school established in 2012, after the language was removed from the collective agreement.

BCPSEA Reference A-08-2019; Arbitrator Jackson, April 24, 2019

TTOCs Have Right to Access Provincial Extended Health Benefit Plan

BCPSEA v. BCTF

Issue

Are Teachers Teaching on Call (TTOCs) entitled to access the provincial extended health benefits plan as a class regardless of their hours of work?

Significance

Yes, all TTOCs are entitled to participate in the provincial extended health plan and cannot be restricted under the collective agreement based on their hours of work.

Facts

The collective agreement language providing TTOCs with the right to access benefits was first imposed by the Agreement in Committee on July 30, 1998, which later became Article B.2.4 of the Provincial Collective Agreement:

Effective July 1, 1998, Teachers on Call shall be eligible, subject to plan limitation, to participate in the benefits plans in the Collective Agreement, provided that they pay the full cost of benefit premiums.

In the 2011 round of bargaining, the provincial parties established a committee to explore the standardization of benefits for teachers. A standard provincial Extended Health Benefits (EHB) plan was agreed to by the parties and the provincial government represented by the Ministry of Education in June 2012. During collective bargaining in 2012, the parties agreed to the language of Article B.11.3.

Districts' plans varied in the extent to which TTOCs were permitted to participate. Some districts provided full access for TTOCs in the EHB plan, some districts allowed TTOCs to access the plan as long as they met minimum hours, and some districts did not provide the option of participation to TTOCs.

Relevant Collective Agreement Language

Article B.11.3 of the Provincial Collective Agreement states:

Teachers Teaching On Call shall have access to the Provincial Extended Health Benefit Plan. TTOCs accessing the Plan shall pay 100 per cent (100%) of the premium costs.

Analysis and Decision

Arbitrator Korbin agreed with the parties that the phrase "shall have access to the provincial EHB plan" is not clear on its face. However, she found there was no conclusive evidence of a mutual

intention in the bargaining evidence to support either party's interpretation of the provision. Arbitrator Korbin ultimately concluded that, based on the language, including the absence of the phrase "subject to plan limitation," which existed in the AiC version of the language, a continued limitation on TTOCs' access to benefits based on minimum hours thresholds could not be sustained. "Access" in the collective agreement meant that TTOCs are entitled to access benefits as a class, without limitations based on hours of work.

Conclusion

BCPSEA is working with Morneau Shepell to mitigate the impact on districts of the requirement to make extended health benefits available to TTOCs. Districts should contact their BCPSEA labour relations liaison to discuss the decision further, including any management right to set availability requirements for TTOCs to remain on their roster.

BCPSEA Reference No. A-03-2019; Arbitrator Korbin, March 6, 2019

How to Calculate Class Size "Floors" When Making Best Efforts to Restore Language

SD No. 61 (Greater Victoria)/BCPSEA v. Greater Victoria Teachers' Union/BCTF

Issue

How are the class size "floors" under Section 22(D) of the Memorandum of Agreement re: LOU No. 17 (the "MOA") calculated?

Significance

To make best efforts to restore class composition language, districts must re-organize classes to the class size "floors" described in Section 22(D) of the MOA, calculated based on unadjusted maximum class sizes. The "maximum class size" under Section 22(D) does not shift up and down according to the presence of certain students ("click down" provisions) or time of year ("flex or fudge factor" provisions) or other collective agreement language. The decision preserves the intent of Section 22(D) to set a clear and achievable limit to which districts are required to reorganize classes when making best efforts to restore class size and composition language.

Relevant Collective Agreement Language

Section 22 of the MOA provides:

School Districts will make best efforts to achieve full compliance with the collective agreement provisions regarding class size and composition for the commencement of the 2017/2018 school year and thereafter. Best efforts shall include:

...

- D. Reorganizing the existing classes within the school to meet any class composition language, where doing so will not result in a reduction in a maximum class size by more than:
- five students in grades K-3;
 - four students for secondary shop or lab classes where the local class size limits are below 30, and;
 - six students in all other grades.

These class size reductions shall not preclude a Superintendent from approving a smaller class.

Note: For the following School Districts, class sizes for K-1 split classes will not be reduced below 14 students:

- School District 10 (Arrow Lakes)
- School District 35 (Langley)
- School District 49 (Central Coast)
- School District 67 (Okanagan-Skaha)
- School District 74 (Gold Trail)
- School District 82 (Coast Mountains)
- School District 85 (Vancouver Island North)

The district's restored language set maximum class sizes for specific subjects and programs in Article D.1.1 (Schedule A). Like many districts, the district also had "click down" language that required the maximum class size to be reduced where designated students are present in a class, as follows:

D.1.3 When students with special needs are integrated into a regular class, that class shall be smaller than the class size limit and the flexibility factor will not apply.

The district and union agreed that the requirement that a class with students with special needs "shall be smaller" meant that the class will have one less student than the class size limit in Article D.1.1.

Decision

The union alleged that the district had not made best efforts to restore class size and composition language under the MoA. While the parties were able to resolve many of the issues in dispute in mediation, two interpretive issues remained to be resolved by Arbitrator Peltz:

1. Are the class size floors under Section 22(D) of the MoA based on the unadjusted class size maximum, or a class size adjusted due to other restored provisions (such as "click down" or "flex factor" language)?
2. What is the floor for Grade 3/4 combined classes under Section 22(D) of the MoA and the district's restored language?

With respect to the first question, the union argued that the class size maximum should be reduced by the click down provision before calculating the class size "floors" under Section 22(D). Under this approach, the floor would be lower due to the application of click down and other provisions adjusting the maximum class size. The district argued that the union's interpretation was contrary to the provincial parties' mutual intention to create a uniform threshold to which districts would be required to reorganize classes in restoring the language. It would have required districts to reorganize classes to a moving "floor" up until September 30 each school year, as students with special needs moved in and out of classes.

Arbitrator Peltz agreed with BCPSEA that the clear mutual intent of Section 22(D) was to avoid classes becoming too small, while achieving as much compliance as best efforts can produce, given the complexity of the restored language in the province and the lengthy passage of time since the language was removed by government. He stated (at para. 71):

I find in paragraph 22(D) a clear and express intent to limit reduction of maximum class size by a defined, fixed number of students. As the Employer said, the language calls for a uniform reduction whereas the Union position would result in shifting reductions. Leaving aside the matter of operational feasibility, the plain and ordinary language specifies uniform reductions.

With respect to the second question, the parties agreed that the answer to the second question is that Grade 3/4 combined classes are included in the “other grades” category in Section 22(D), with a maximum class size reduction of six (6) students.

Conclusion

The maximum class size referred to in Section 22(D) of the MoA is the unadjusted class size limit in local restored language, not a class size adjusted due to provisions like click down or flex factor language.

BCPSEA Reference No. A-05-2019 (Award); Arbitrator Peltz, March 11, 2019