IN THE MATTER OF AN ARBITRATION
UNDER THE *LABOUR RELATIONS CODE*

BETWEEN:

B.C. PUBLIC SCHOOL EMPLOYERS' ASSOCIATION/
SCHOOL DISTRICT NO. 23 (CENTRAL OKANAGAN)
(the "Employer" or the "School District"))

AND:

B.C. TEACHERS' FEDERATION/
CENTRAL OKANAGAN TEACHERS' ASSOCIATION
("COTA" or the "Union")

(Mainstreaming-Integration grievance)

ARBITRATOR: Michael Fleming

COUNSEL: Lindsie Thomson, for the Employer
Patrick Dickie, for the Union

DATE OF HEARING: May 29, 30, July 15,16,17,18, 25, 2019

DATE OF AWARD: September 12, 2019

Nature of Issue

On November 27, 2017, COTA filed a grievance alleging the Employer had breached both Article D.3 (Mainstreaming/Integration) of Schedule A as well as Article A. 24 of the Collective Agreement (Management Rights).

Article D. 3, originally negotiated between COTA and the School District more than 25 years ago, deals with the access to public education programs and necessary related supports for students identified as having exceptional educational needs ("EEN"). That language is specific to this Collective Agreement.

The language of Schedule A, including that in issue in Article D.3 this case, was removed from the Collective Agreement by legislation in 2002, 2004 and again in 2012. In *British Columbia Teachers' Federation v British Columbia* 2016 SCC 49, ("BCTF") the Supreme Court of Canada ultimately found the portions of the legislation that voided class size and composition provisions were unconstitutional which meant the deleted Collective Agreement provisions were to be reincorporated.

The parties disagree about the interpretation and application of Article D.3, the relevant portions of which read as follows:

D.3 MAINSTREAMING/INTEGRATION

D.3.1 Definitions

D.3.1.1 For the purposes of this agreement, students with exceptional educational needs are those identified by the Superintendent or designate, after consultation with the school-based team, in order to assess accurately the students' educational needs and requirements.

D.3.1.2 For the purpose of this Article, "school-based team" shall include:

a. the receiving teacher(s)
b. an administrative officer
c. school and district professional personnel
d. other appropriate personnel

Where appropriate the parent(s) and/or student may augment the school-based team

D.3.2 School-Based Team

D.3.2.1 Each school shall establish a school-based team whose function shall be to:

D.3.2.1.1 consider relevant information pertaining to referred students

D.3.2.1.2 recommend to the Principal

D.3.2.1.2.1 an educational program and placement, including timing;
D.3.2.1.2.2 training programs that may be required;

D.3.2.1.2.3 appropriate additional resources including release time, aides, facilities, or equipment;
D.3.2.1.2.4 which students require an Individual Educational Plan (IEP);
D.3.2.1.2.5 who shall be responsible for preparing the IEP

D.3.2.1.3 provide ongoing assessment and support to the receiving teacher(s).

D.3.3 In making any decision on the placement of a student to be integrated, the factors to be taken into account in this process of consultation will include the student's medical, social, physical and educational needs, the proposed program for the student, the size and composition of the class, and the professional opinion of the employee or employees who may be affected.

D.3.4 The Employer and the Union agree that the mainstreaming/integration /inclusion of students with exceptional educational needs shall occur when the necessary conditions for a positive educational experience exist. Should the Superintendent or designate decide that a student who has been identified by the school-based team does not qualify for additional resources, a full explanation will be provided to the school-based team.

D.3.6 A teacher who has concerns regarding a student with exceptional educational needs, including whether the student meets the criteria of D.3.1, shall refer these concerns to the school-based team in writing.

D.3.10 To ensure that all students receive adequate attention, no more than three (3) Students with exceptional educational needs shall be integrated at the same time into one regular classroom. Where the Superintendent or designate identifies a student with a severe behavioural problem, that student shall be included in the students with exceptional educational needs for the purposes of this clause. No more than one (1) such student shall be assigned to any one regular classroom.

Background

Elements of Article D.3

Article D.3 recognizes the importance of the inclusion of EEN students in public school education programs in the School District and the central role of the school-based team ("SBT") in that endeavour. Article D.3.1.1 provides the Superintendent (or designate) is to identify EEN students after consultation with the SBT. The purpose of that consultation is to ensure a student's educational needs and requirements are accurately assessed in making that determination (Article D. 3.1.1.).

Article D.3.3 provides the factors to be taken into account in that consultation process. Those include the student's medical, social, physical and educational needs, the proposed program for the student, the size and composition of the class and the professional opinion of the employee or employees who may be affected.

Articles 3.1.2 and 3.2 describe what an SBT is and its intended function including the nature of recommendations to be made by a SBT to a Principal (Article D.3.2.1.2).

Article 3.4 provides that if the Superintended (or designate) determines a student who has been identified by a SBT does not qualify for additional resources, a full explanation for that decision is to be provided to the SBT.

Article D.3.10 sets a cap of three EEN students in any class. It also provides that no more than one of those students will be identified as having a severe behavioural problem.

A central issue in this case involves whether Article D. 3.1.1 was properly implemented, the requirements of the consultation process in Article D 3.1.1 and whether those requirements were met by the Employer.

I find it helpful to review the complex history and context of both the Collective Agreement provision in issue as well as the Special Education System that Article D.3 is related to, none of which is particularly controversial.

Features of the Special Educational System

Prior to the 1970's, special needs students were segregated into special needs schools or programs within the public school system. That approach began to be challenged in the 1970's culminating in a fundamental change in the 1980's when the Ministry of Education (the "Ministry") adopted a policy requiring the inclusion of special needs students in the public education system, where possible.

Under that new approach, the role of the Ministry has been to establish policy and the "rules" for inclusion. School districts generally have the authority and varying levels of flexibility, to implement the policy reflecting the particular circumstances of each school district.

A central component of the Ministry's inclusion policy is the Ministry Special Education Manual (the "Manual") which describes the Ministry's special education policy, its rationale and provides a definition of students with special educational needs. The Manual also sets out categories of special needs students and defines an Individual Education Plan ("IEP") which is a plan developed to assist a special needs student to succeed at school. All Ministry designated students are required to have an IEP.

The IEP reflects the goals and objectives for a student with identified special educational needs and includes the student's current functioning, strengths, areas of concern, services to be provided, strategies and goals. It also sets out any adaptations of or modifications to the curriculum to meet the particular circumstances and abilities of a student.

The goal of the Ministry's Special Education policy is inclusion but not necessarily placement of a student in a classroom.

There is no real controversy that the inclusion/integration of special needs students requires considerable support and resources.

The Manual provides criteria to assess and categorize special needs students. Funding to support their educational needs is provided based on the categorization. The Ministry requires school districts to complete a form (Form 1701) categorizing special needs students based on the Ministry criteria. Those categories are divided into two main groups- what are referred to as low and high incidence, which has funding implications.

While students may face more than one challenge, Form 1701 requires that each student be only designated to a single Ministry category.

Over the past twenty years, while the number of special needs students in the School District has remained generally constant at about 10% of the student population, there has been a marked change in the composition of the various Ministry categories. For example, the number of students in the high incidence group has decreased while the low incidence categories have increased. One notable change for example is a dramatic increase in the number of students categorized on the autism spectrum.

The total student population in the School District, which is one of the fastest growing in B.C., is about 21,000. Roughly 2,400 students have been identified under the Ministry criteria as having special educational needs.

Students are identified as having special educational needs in a variety of ways. For example, some are identified through agencies outside of the public education system and may begin Kindergarten with special educational needs having already been identified by a physician or other outside professional. Others are identified in the public education system itself.

The age of identification varies depending on the nature of the special needs and a student's particular circumstances. Some special educational needs may not be manifested or identifiable until a child has been in school for several years. Typically, students with special needs are identified within the public education system by the classroom teacher, who initiates a referral to the SBT. While the SBT is part of Article D.3 of the Collective Agreement, it is not a creation of the Collective Agreement and has been in place since the 1980's, pre-dating collective bargaining. Its role continued during the 15 years the language in Schedule A was removed from the Collective Agreement by legislation.

The SBT is a required part of the Ministry inclusion policy. Its composition is fluid depending on the nature of a particular student's needs. Its core group typically includes school administrators, learning assistance staff, resource staff and school counsellors. The SBT also may include the classroom teacher, external agency professionals and parents.

History of Schedule A of the Collective Agreement

Teachers achieved full collective bargaining rights in 1987 and collective bargaining was initially conducted on a local level between individual school boards and each B.C. Teachers' Federation ("BCTF") local association. That collective bargaining also coincided with the introduction of the Ministry inclusion policy. In that context, while some school districts and local BCTF associations did not negotiate specific collective agreement provisions dealing with the inclusion policy, a number did. As a result, there were different local provisions negotiated around the province between 1987 and 1994 dealing with the ramifications of the policy.

Where collective agreement language was negotiated, it typically reflected the joint commitment to the inclusion policy as well as dealing with concerns regarding teacher training and ensuring resources necessary to support the policy. Those provisions typically placed limits on the number of special needs students in each classroom.

In the case of School District No. 23, the parties first negotiated a Mainstream/Integration provision in the 1988-1990 Collective Agreement. The current language of D.3 was negotiated in the 1992-1994 Collective Agreement. It uses the EEN term, which is not present in most other local agreements.

As noted, under Article D.3.1.1, the determination of whether a student should be identified as EEN is to be made by the Superintendent after consultation with the SBT.

In June1994, province-wide collective bargaining was introduced in the education sector through the *Public Education Labour Relations Act* ("PELRA"). It established a province-wide public school teacher bargaining unit. The BCTF became the exclusive bargaining agent for that unit and B.C. Public School Employers' Association ("BCPSEA) became the bargaining agent for all public school boards in B.C. Under the new regime, collective bargaining was bifurcated between provincial and local matters.

The PELRA designated cost provisions, which included workload and class composition provisions, as matters to be negotiated at the provincial level. Locally negotiated class composition provisions were incorporated into the province-wide Collective Agreement. At the provincial level the parties negotiated K-3 class size provisions and non-enrolling ratios but no additional class composition provisions. That meant the different local class size and composition provisions remained in place.

In 2001, the provincial parties entered into collective bargaining to negotiate a renewal collective agreement. In late January 2002, the provincial government introduced the *Education Services Collective Agreement Act* ("Bill 27") which imposed a new collective agreement on the parties. The government also introduced the *Public Education Flexibility and Choice Act* ("Bill 28") which voided a number of collective agreement provisions including class size and composition provisions.

The legislation established an arbitration process to identify specific collective agreement provisions that had been voided by the legislation, which ultimately resulted in an arbitration award. The BCTF did not participate in that process and challenged it in court.

The arbitration award was overturned by the B.C. Supreme Court: *B.C.T.F. v B.C. Public School Employer's Association* 2004 BCSC 86. The government then enacted the *Educational Services Collective Agreement Amendment Act* ("Bill 19") in 2004 to amend Bill 27 to specifically delete various collective agreement provisions.

The B.C. Supreme Court subsequently found parts of Bill 28 and 19 to be unlawful: *B.C.T.F. v British Columbia* 2011 BCSC 469. The government then enacted the *Education Improvement Act*, ("Bill 22") in 2012, which had the same essential effect as the previous legislation. The BCTF challenged that legislation up to the Supreme Court of Canada.

In anticipation of the possible striking down of the impugned legislation by the Supreme Court, the provincial parties negotiated a letter of understanding (LOU #17) in which the Province agreed to provide the provincial public education system with increased funding at specified

levels, beginning in the 2014/2015 school year, through a special education fund. LOU # 17 also provided that in the event the Collective Agreement provisions at issue were ultimately restored, the parties would bargain based on the restored language.

On November 10, 2016, the Supreme Court of Canada found the legislation that voided class size and composition provisions in the Collective Agreement to be unlawful: *B.C. Teachers' Federation v British Columbia* 2016 supra.

Following that decision, on March 9, 2017, the provincial parties agreed to a memorandum of agreement (the "MOA"). It recognized their commitment to equitable access and inclusion of, special education needs students in the public education system. The parties also agreed to restore the various deleted class size and composition provisions which were identified in an attached Schedule A.

The MOA was intended to provide the framework for the restoration. It contemplated that, beginning in September 2017, staffing would be subject to the terms of the MOA and comply with the restored Collective Agreement provisions. It also distinguished between school based and district level processes. In that respect it provided that restored school based processes and ancillary provisions including those pertaining to SBTs, were to be implemented by the commencement of the 2017/2018 school year (Paragraph 10 (A)), while recognizing it may take time to transition from existing practices.

It also provided that school based processes that referred to district level processes, or district level processes, were to be implemented as soon as practicable, but no later than January 31, 2018 (Paragraph 10 (B)).

The MOA provided that school districts were to make their best efforts to achieve full compliance with class size and composition provisions by the commencement of the 2017/2018 school year.

Each school district which previously had class size and composition provisions, has its own Schedule A reflecting the restored local language. The relevant portions of Article D. 3 for the School District are set out above.

Following the negotiation of the MOA in early March 2017, the School District and COTA met beginning in mid-March 2017 to discuss to restoration of Schedule A. However, it quickly became apparent they disagreed about its interpretation and application and in particular about the meaning of the EEN category in Article D.3.

The MOA refers to students with special educational needs while Article D.3 refers to EEN students. While the School District provides support services for all Ministry designated students, the initial disagreement between these parties involved the scope of the EEN designation.

Article D.3.10 places a limit of three EEN students in each class. The Union's initial view was the EEN designation was the same as the Ministry special needs designation. However, the Employer's view was that, while that may be the case in other local agreements, Article D.3 was different. The use of the specific EEN term and the parties' practice reflected their agreement the EEN category was to be much smaller than the Ministry special needs designation and only encompass those students with complex educational needs.

The Employer's view was, unlike other local agreements, Article D.3 provides EEN students are to be identified by the Superintendent in consultation with the SBT. There would be no need for that decision or the consultation with the SBT if the EEN designation was simply the same as the Ministry special needs designation.

That difference resulted in the Union filing a grievance on the issue which was ultimately withdrawn on March 09, 2018.

The Evidence

Susan Bauhart, President of COTA began her teaching career in 1976 and has been President of COTA for the past six years. She testified about her experience with the SBT process both as a teacher and a parent of a special needs child. She described the considerable value and assistance provided through the SBT process to support the educational needs of special needs students. She noted that process had been a critical part of the eventual academic success of her son, now a PHD candidate.

Ms. Bauhart testified in her professional experience as a classroom teacher, her role in the SBT process in her school was to refer students to the SBT, attend SBT meetings to describe what she had observed about a student's needs in her classroom and the educational strategies she had used to try to facilitate the student's academic success.

Ms. Bauhart said that following the negotiation of the MOA in early March 2017, she attended an information session by the BCTF regarding the intent of the MOA. She went on to say, to its credit, shortly after the negotiation of the MOA, the School District initiated discussions in mid-March, 2017 with COTA regarding the restoration of the Schedule A language.

Ms. Bauhart testified the provincial parties encouraged local parties to develop a common understanding regarding the implementation of the restored Collective Agreement language. She said COTA recognized that because the restored language had been deleted for several decades it had not evolved. As a result, she said COTA was interested in working with the Employer to at least attempt to find interim measures, recognizing it would be difficult to give full effect to the language by the beginning of the 2017/2018 school year.

As part of the implementation of the restored Collective Agreement language, the School District and COTA established an Agreement in Committee ("AIC") to achieve that objective. The first meetings of the AIC occurred in early March of 2017 which the witnesses generally characterized as "tense".

All the witnesses testified it became apparent very quickly by the March 14, 2017 meeting the parties had very different views regarding the nature and scope of the EEN designation. More specifically, the Union's view was the EEN language was at least unusual and reflected the class composition provision for this Collective Agreement.

The Union's view was the EEN designation was intended to be based on the Ministry's special needs designation (which meant a base of about 2400 students) as well as additional students with educational challenges who were not captured by the Ministry categories but required some additional resources, which the Union witnesses characterized as "grey area" students.

The Employer's view was the EEN designation was much narrower than the Ministry designation and involved a subset of students with complex educational challenges.

Ms. Bauhart testified the EEN issue was the primary focus of the discussions in the initial AIC meetings in the spring of 2017.

Lori Dawson Bedard, first Vice President of COTA, who has considerable experience and training in the Special Needs Education field testified about the implementation process. She said in her years of experience in Special Needs area in the School District, she had never heard of the EEN designation. She went on to say that in 2017/2018, teachers in the field were unfamiliar with the term, its nature or scope.

Bob McEwen, Director of Human Resources for the Employer testified that at the March 14, 2017 AIC meeting, the Employer expressed a commitment to both organize schools in a manner that was educationally sound while implementing the restored Collective Agreement language. He recalled that class size took up a significant portion of the discussion.

He also testified about the school organization process in the School District. In that regard, he said in February and March of each school year, the School District develops a projection of student population. During Spring Break, the Ministry provides funding information for the School District and in early April, the Employer's Human Resources Department meets with each school to discuss and review the student population projections and staffing for the upcoming year.

Mr. McEwen explained Human Resources meets with school Principals and Assistant Superintendents regarding the number of teacher FTEs for each school. That information is then taken back to each school for review and discussion with school staff. Part of the process involves Ministry designations and "special behavioral" students.

On May 1 of each year, teaching positions are posted and teachers are advised of their teaching assignments for the upcoming year. Mr. McEwen said the posting process is completed by the end of June and in September, the Human Resources Department meets with Assistant Superintendents and Principals to review school enrollment. Any additional temporary postings are then made.

Following the March 14, 2017 AIC meeting, the Union and Employer exchanged letters clarifying their respective positions regarding the EEN issue.

Mr. McEwen testified that, based on the information provided by the Union and BCPSEA, he understood the SBT language in Article D. 3 was to be implemented by January 31, 2018.

In the next AIC meeting on April 4, 2017, the parties had some discussions regarding the role of the SBT. Ms. Bauhart acknowledged that in that meeting, COTA indicated the restored SBT language was to be fully implemented by January 31, 2018 and that the period prior to that time was a transition period. She also said COTA expected implementation steps would be taken prior to January 31, 2018.

Dr. Peter Molloy, Director of Instruction, Student Support Services for the School District testified in that meeting, he shared his understanding of the actual operation of SBTs with the Union.

Mr. McEwen testified at that time, Article D.3.1.1 was not seen by the parties as being an issue. Rather, their focus was the EEN issue. He recalled that Kevin Kaardal, the Superintendent of the School District indicated he expected SBTs could be able to identify new students for EEN referrals by the beginning of the 2017/2018 school year.

The witnesses generally agreed that in the April 4, 2017 meeting, the parties decided to each undertake their own investigation and research into the pre-2002 practice in respect to the EEN designation and whether the cap of three EEN students in each class in Article D. 3.10 was a “hard” or “soft” one.

On April 17, 2017, Ms. Bauhart wrote to Mr. Kaardal, regarding COTA’s views of the requirements of the MOA. That letter stated in part that the Employer was expected, when making decisions about class size, to consider the Ministry categories and criteria and apply them on a without prejudice basis.

Mr. McEwen testified Mr. Kaardal asked Dr. Molloy, to review the students who had been receiving assistance from the Student Support Services department and compile a list of those that should be designated as EEN. He went on to say, as part of that exercise, Dr. Molloy spoke to the Student Support Service Consultants who were working with the most complex students in the School District.

Dr. Molloy said that he spoke to Ron Rubadeau, the former Superintendent prior to 2002 regarding the EEN designation process and criteria used at that time. With the benefit of those discussions he developed criteria to be used in the new EEN designation process.

Mr. McEwen said the EEN list was developed to assist in the school organization process which was occurring in April/May of 2017. Mr. McEwen went on to say he used the list to determine if there would be more than three EEN students in any classrooms. He agreed that list was not provided to the schools until the spring of 2018.

On April 24, 2017, the Employer responded to Ms. Bauhart’s April 17, 2017 letter indicating the Employer did not agree with utilizing the Ministry designation as the basis for Article D.3.10 as this Collective Agreement has its own particular, unique language; i.e. the EEN designation.

The next AIC meeting occurred on April 25, 2017. All the witnesses agreed that was an extremely busy time for management and excluded staff in the School District.

In her evidence Ms. Bauhart agreed in that meeting, the Employer provided the Union with the criteria to be used for the EEN designation. Those criteria are not part of the Collective Agreement.

Mr. McEwen said in the meeting the Employer also provided the Union with a body of information relating to the school organization process that was underway, including the number of Ministry designated and EEN students, primarily to demonstrate to COTA the Employer was making its best efforts to implement and comply with the restored language in Article D.3.

Ms. Dawson Bedard testified the information provided by the Employer included the EEN criteria and indicated the number of EEN designated students were a fraction of the Ministry designated students in the School District. She said in her many years of experience in the School District, she had never before encountered the criteria relied upon by the Employer in the EEN designation process.

She went on to say, in the meeting, the Employer indicated the criteria were based on discussions with Mr. Rubadeau. Ms. Dawson Bedard agreed the Employer suggested the parties set aside the EEN issue to allow a provincial joint committee charged with dealing with issues relating to the implementation of restored language an opportunity to provide some guidance on the EEN issue. However, that did not occur.

Mr. McEwen testified he spent considerable time researching the issue of whether the cap of three EEN students in Article D. 3.10 was a hard or soft one. He said through those efforts he uncovered numerous examples in the 1999/2000 and 2000-2001 school years where classes had more than three EEN students. He clearly recalled sharing that information with COTA.

The next AIC meeting occurred on May 2, 2017, the main focus of which was the school organizations. The parties agreed to defer discussions about the SBT process to the May 9, 2017 meeting.

Ms. Bauhart testified by that time, the implications of the parties' differing views on the EEN issue were apparent. That divergence meant a significant difference of about 2400 students as opposed to several hundred.

Ms. Bauhart agreed that, at that time, both parties were hopeful the issue could be resolved by an arbitration in the fall of 2017.

Mr. McEwen recalled that in the May 2, 2017 meeting, COTA representatives were very upset about the implications of the Employer's position regarding the EEN issue.

The next AIC meeting occurred on May 9, 2017, the main focus of which was the EEN issue. Discussions on the SBT process were deferred to the May 18, 2017 meeting.

On May 16, 2017, the Union filed its EEN grievance which was referred to arbitration in June, 2017.

In the May 18, 2017 AIC meeting, Mr. McEwen provided two pages from the Ministry Manual dealing with SBTs as well as several relevant portions of Article D.3 to assist in the parties' discussions regarding the SBT process.

The witnesses agreed the SBT discussions related to information to be provided to teachers receiving EEN students, participation in the SBT including parental involvement, and the role of Learning Assistance teachers. Those discussions were comprehensive but did not include any discussion about the consultation process under Article D.3.1.1.

Mr. McEwen noted the School District provides all necessary available resources to support the educational needs of the 2400 Ministry designated students and saw the EEN category as only involving the most complex students.

Mr. McEwen said the Employer did not believe the consultation process in D.3.1.1 was in issue because the EEN identification process was very straightforward; i.e. teachers would refer students to the SBT, which would determine if a referral to the Superintendent should be made and that the Superintendent would make the decision.

Mr. McEwen testified it was his belief at the time the consultation was not an issue because not only was the process straightforward but if the Union's position on the scope of the EEN category prevailed at arbitration, no consultation between the Superintendent and SBTs would

be necessary as the Ministry designation would be essentially synonymous with the EEN category.

At the next AIC meeting on May 30, 2017, COTA provided the Employer with a one page draft summary of the SBT process. Ms. Bauhart testified the Union was interested in developing a joint communication to be sent to the schools explaining key changes to the SBT process.

The Employer expressed some doubt about the utility of creating an entirely new document preferring instead to simply rely on the express language of Article D.3.

Ms. Bauhart recalled the Employer as being particularly reluctant to include part of the Union's draft which discussed possible reasons for an EEN referral, which the Employer disagreed with. Ms. Bauhart recalled the Union was increasingly concerned as it was almost the end of the school year and the Union was keen to have information about the SBT process sent to schools before the end of the school year.

At the next AIC meeting on June 13, 2017, the Union provided a revised draft of a joint communication to schools, which the parties discussed but were unable to reach an agreement on. They also discussed elements of the SBT process. Ms. Dawson Bedard recalled in the meeting, she suggested a standardized form be developed for teacher referrals to SBTs and the parties discussed that idea.

Ms. Bauhart agreed the Union accepted the utility of a standardized referral form for the EEN process. She acknowledged that in the meeting Mr. McEwen indicated the Employer's intention was to "bridge" the existing SBT practices and the restored Collective Agreement language.

At the final AIC meeting on June 27, 2017, the EEN issue was discussed but no agreement was reached. The Employer was also not prepared to accept part of the Union's draft communication to schools regarding the SBT process which contained the same language the Employer had previously objected to.

Ms. Bauhart agreed that the Union's focus at that time was on ensuring information about the SBT process and what the EEN designation meant be provided to schools and not about the consultative process in D.3.1.1.

Mr. McEwen testified no AIC meetings were scheduled over the summer as the Employer's view was the unresolved EEN issue had prevented the parties from making progress and further meetings would be unlikely to be any more productive until that issue was resolved. Mr. McEwen said the Employer was aware the EEN grievance had been referred to arbitration and there had been discussions about it possibly being expedited.

Mr. McEwen said that over the summer he met with Dr. Molloy, Mr. Kaardal and Kyle Cormier, Assistant Director, Human Resources, to discuss the SBT process and develop a communication for schools explaining it.

Mr. McEwen testified that he understood COTA's position at that time to be that if the Superintendent was going to make the EEN determinations, the Union would take steps to ensure all Ministry designated students were referred to SBTs. As a result, the Employer believed it was important to plan for the associated workload demands from a potential 2400 referrals.

Mr. McEwen said that in early September he provided the Union with a draft communication to schools regarding the SBT process and requested a meeting to discuss it, before it was sent to school Principals for their input. On October 4, 2017 he met with COTA to discuss it. He recalled that in the meeting he expressed the view the EEN issue and contents of the communication were intertwined. He also recalled the Union raised concerns regarding the pre-referral process for teachers in the draft and expressed the view the Union's draft should be accepted. However, the Employer believed its draft more accurately reflected the fact the function of SBTs is broader than the language of Article D.3.

Mr. McEwen testified COTA indicated it wanted the reference to the Superintendent consulting with SBTs during the EEN identification process, removed from the draft.

He said at that meeting, Ms. Bauhart indicated that if the Employer issued the proposed draft, COTA would advise its members to refer all Ministry designated students to SBTs. She agreed she made that point to COTA members in a subsequent staff meeting; however, she said SBTs act independently of COTA.

Mr. McEwen recalled the Employer reiterated the view SBTs were able to refer students to the Superintendent for consideration.

Mr. McEwen testified that following the October 4, 2017 meeting the Employer sent a draft communication to school Principals for their input and on October 16, 2017, Mr. McEwen sent the Union a revised draft with several changes he believed to be responsive to some of the concerns raised by the Union.

The parties met on October 17, 2017 to discuss that draft. In that meeting, the Union made several suggestions for changes, which Mr. McEwen accepted. The Union also raised a concern the draft did not expressly reference Articles D.3.3 or D.3.9.

Mr. McEwen then sent a revised draft reflecting several of the suggestions made by the Union, including an express reference to Articles D.3.3.and D.3.9. Ms. Bauhart agreed the Employer was attempting to bridge the gap between the parties' views. However, the Union did not see those changes as being adequate and suggested each party send their own communication to the schools.

Mr. McEwen said he was disappointed by that development as he had hoped it would be possible to issue a joint document to limit confusion in the field.

On October 17, 2017, the Employer sent a revised draft and a draft SBT referral form to school Principals for their review and comment.

Ms. Dawson Bedard recalled that a short time later, COTA met with its members who were SBT chairs and Learning Assistance Teachers. At that meeting COTA discussed the EEN issue including the Union's view the EEN category encompassed all Ministry designated students.

On November 14, 2017, the Union wrote to the Employer requesting an updated EEN list identifying the number of EEN students in each school and the classes they were enrolled in.

On November 27, 2017, the Union filed this grievance. Ms. Bauhart testified the Union had concluded the parties were unable to resolve the SBT process issues which she believed should have been in place at the commencement of the 2017/2018 school year.

On December 6, 2017, the Employer responded to the Union's November 14, 2017 letter. Mr. McEwen testified the Employer did not provide the requested EEN list as the Employer was reluctant to do so given the outstanding EEN grievance which had been referred to arbitration.

On December 7, 2017, the Employer sent a revised draft communication regarding the SBT process to the Union, and school Principals. The Union did not find the revisions to be adequate.

Mr. McEwen testified that while the Union had indicated its intention to encourage its members to refer all Ministry designated students to SBTs, the School District had received no EEN referrals from any SBTs.

On December 11, 2017 the Union wrote to the Employer inquiring if the Superintendent was consulting with SBTs regarding the EEN process and, if not, why not.

On December 19, 2017, the Employer provided its response to the Union's grievance. Mr. McEwen testified the Employer attached a copy of the communication sent to the schools regarding the EEN designation process. That letter reiterated that SBTs could refer students to the Superintendent for consideration at any time.

Mr. McEwen said the Employer's position was, while there had been no referrals from SBTs by that time, there was a process in place.

By letter dated December 19, 2017, the Union wrote to advise the Employer had misunderstood the point of the grievance which the Union characterized as being to ensure the Superintendent consulted with SBTs to make the EEN determination.

On January 16, 2018, the Union wrote to the Employer reiterating its request for an updated EEN list and requesting clarification regarding who EEN referrals were to be sent to in the School District. That letter stated in part that COTA intended to advise its staff representatives and Learning Assistance Teachers that SBTs could refer students to the Superintendent for identification as EEN.

Mr. McEwen testified he was surprised by at least part of the letter as he believed the SBT process was very clear; i.e. teachers would refer a student to an SBT who would assess and refer students to the Superintendent, who would make the EEN determination. He said he had discussed that process with the Union on a number of occasions. Ms. Bauhart testified that while the Employer and Union had discussed the process, and it was clear, that information was not being shared with teachers in the field. She went on to say it was COTA's view that the reason teachers were not making EEN referrals to SBTs was because they lacked necessary information.

Ms. Bauhart also said the Union's position at that time was the Superintendent was required to consult with SBTs regarding all 2400 Ministry designated students. However, she acknowledged the Union did not expect that was likely to occur given the amount of time and resources it would involve.

On January 22, 2018, the Union filed a grievance with each school essentially mirroring its November 27, 2017 grievance. Ms. Bauhart testified the Union took that step out of frustration as it did not believe the Employer was communicating necessary information about the SBT

process, particularly to teachers, which was creating confusion in the field, and the process was supposed to be fully implemented by January 31, 2018 at the latest.

The Employer objected to the filing of those individual grievances.

On January 28, 2018, the Union wrote to each school principal attaching the restored Article D. 3 language and asking to speak to them about the issue. Ms. Bauhart said the Union took that step in its efforts to ensure the process was implemented by January 31, 2018, as much as possible.

On January 29, 2018, Mr. McEwen wrote to the Union proposing, on a without prejudice basis, the Union agree to accept the 103 students identified by the Employer as meeting the EEN criteria, without the need for consultation with SBTs. Mr. McEwen testified his intention was to move the process forward by at least creating a base of EEN students which could then be supplemented by additional referrals from SBTs. He said the Employer was interested in finding a means of implementing Article D.3 by January 31, 2018.

Mr. McEwen went on to note upon restoration of the SBT language, there was no EEN list in place and the issue was how one was to be developed. He said the parties' difference on the EEN issue made that very difficult. Mr. McEwen testified the Superintendent would only become aware of struggling students through SBT referrals. He went on to say, his understanding at that time was that SBTs would initiate a referral and the Superintendent would consult with them prior to making a decision. Mr. McEwen noted it would be impossible for the Superintendent to review the circumstances of all 21,000 students in the School District in order to determine which ones should be identified as EEN. Mr. McEwen reiterated that his belief at the time was that COTA intended to have all 2400 Ministry designated students referred for identification as EEN.

On February 01, 2018, the Union responded to the Employer's January 29, 2018 proposal raising several questions about it. Those included whether the Employer was seeking to resolve either outstanding grievance on the basis of the proposal, what was meant by "without prejudice", whether the proposal was limited to one year or was ongoing and reiterating the Union's request for the updated EEN list.

Ms. Bauhart testified at that time the Union had not seen the Employer's EEN list, was unaware of how it had been developed, and was not prepared to accept the Employer's proposal without more information. Ms. Bauhart said the Union was concerned that Article D.3.1.1 required consultation, which had not occurred.

On February 02, 2018, Mr. McEwen responded advising the Employer had not consulted SBTs in respect to the 103 students on the Employer's EEN list. Mr. McEwen also advised the Union the proposal was intended to be a one-time agreement and was not intended to resolve either grievance but rather was intended to expedite the process of identifying the 103 EEN students without the need to consult.

That correspondence went on to advise the Employer would be prepared to share the EEN list with the Union once a confidentiality agreement regarding the list had been agreed to by the parties. The email also acknowledged Article D.3 required consultation between the Superintendent and SBTs in the EEN designation process.

On March 9, 2018, the Union withdrew its EEN grievance scheduled for hearing on March 12, 2018. Ms. Dawson Bedard testified the withdrawl followed the Employer's production of documents regarding the past practice relating to the EEN issue.

Mr. McEwen testified the Employer was keen to move the EEN process forward as Spring Break was approaching. On March 15, 2018 he again wrote to the COTA asking if it was prepared to accept the Employer's earlier proposal. On March 16, 2018, the Union responded saying in order to make an informed decision, it required the EEN list, student grades, classes, Ministry designations, the criteria used to develop the list, the nature of consultations with SBTs being considered for other students and whether the Employer intended to expand the list over the course of the year.

Mr. McEwen said he was surprised by the detailed nature of the information requested as he had assumed the Union would be keen to have students identified as quickly as possible.

Shortly after the Union withdrew its grievance on March 9, 2018, several EEN referrals were received by the School District from one SBT which Mr. Lalonde and Mr. Kaardal reviewed.

Mr. McEwen and Ms. Bauhart met on April 6, 2018 to discuss the Employer's January 29, 2018 proposal. On April 8, 2018 Mr. McEwen wrote another email to the Union asking if it was prepared to agree to the Employer's proposal and Ms. Bauhart responded saying the Union was drafting a response.

On April 17, 2018, the Union wrote to the Employer stating the Employer had not engaged in any meaningful consultations with SBTs as required by the restored language, which constituted a breach of the Collective Agreement. The letter went on to advise COTA was prepared to consider the Employer's proposal but first required the previously requested information.

Mr. McEwen testified he was surprised by the letter as he believed it was in the Union's interest to accept the students identified as meeting the EEN criteria in order to push the process ahead. He said the Union had made it clear to the Employer it intended to have all 2400 Ministry designated students referred to SBTs but there had been virtually no referrals and the 103 names on the list simply represented the first step in the process.

He said he concluded the Union intended to litigate the issue and by that time, the Employer had a list of identified EEN students that SBTs had not been consulted about. As the Union was not prepared to waive the consultation requirement it was imperative the Employer proceed with consultation.

Mr. Lalonde testified that in April 2018, Mr. Kaardal asked him to re-examine students in the Ministry "H" category, of which six had been identified as EEN. That re-examination resulted in approximately 100 additional students being added to the EEN list.

Mr. McEwen advised the Union the Employer intended to consult with SBTs regarding the names on the EEN list. To that end, on April 20, 2018 and April 24, 2018, the Employer sent documents explaining the SBT process for identifying EEN students to school Principals.

Mr. McEwen said each school was sent a package for each of its students on the list. That package included a document describing the steps for SBTs which noted in part SBTs could refer a student for identification as EEN at any time and the decision would be made by the Superintendent after consultation with the SBT. Also included was a memo, a power point

presentation and a document for each school identifying EEN and special behavioural students at that school.

One of the included documents was entitled "Considerations in Identifying Exceptional Needs Students" which provided the EEN criteria. It read in part as follows:

Exceptional Education Needs Identification (D.3.10)

In making a determination on whether to identify a student as having "exceptional educational needs" for the purposes of Article D.3, the Superintendent or designate will take into account the information and input provided through the SBT consultation and may identify that student as one with exceptional educational needs if the student meets most or all of the following criteria:

a. has a learning disability (or disabilities) which significantly interfere(s) with their learning program or the learning of others

b. requires ongoing specialist intervention beyond the school team

c. requires a significant amount of additional support in that particular classroom

d. requires a significant amount of modification and adaptation to their learning program

e. has severe self-regulation challenges that significantly interfere with his/her learning program and the learning of others

This consultation will involve considering the recommendations of the school based team made under D.3.2, the views of the school based team relating to the factors under D.3.3 and the following:

- *the severity of impact of the student's needs on the teacher's workload in the specific class in question, given the resources allocated*

- *the intensity, frequency, complexity and duration of the student's needs in that particular class*

That document also provides three criteria for Severe Behaviour identification as being frequency, intensity and duration going on to state *"… a student must display chronic or excessive deviate behaviour, which seriously interferes with his learning or the learning of others. A "severe behaviour" identification will require data and this should be referred to the Superintendent or designate for review and decision on a "severe behaviour" identification.*

Ms. Dawson Bedard agreed those criteria were essentially the same as those shared with the Union in the April 25, 2017 AIC meeting.

The memo in the package of documents also directed the school Principals to share the two documents relating the criteria and SBT process with SBTs.

There were a total of 209 names identified as meeting the criteria.

On April 24, 2018, Mr. McEwen and Mr. Lalonde met with school administrative staff to review the package. They both recalled in the meeting asking that a response from SBTs regarding whether they agreed with the names on the EEN list or not, be provided to Mr. Lalonde within two weeks. Mr. Lalonde said the SBTs responded to him by email within that time frame.

On May 1, 2018, the Employer wrote to the Union advising the Employer had sent the package of information to the schools and that the Employer intended to provide the Union with a list of EEN students once the names had been confirmed by each school. The letter also advised the Employer would continue to use its communication document to inform the schools about the process, which had been provided to the Union in December of 2017.

On May 29, 2018, the Union responded reiterating a number of concerns regarding the SBT process. The letter went on to report the Union intended to advise teachers to refer student names to SBTs and of the Union’s expectation of prompt consultation by the Superintendent with SBTs.

Ms. Bauhart acknowledged the School District was attempting to comply with Article D.3.

It is evident that in May and early June 2018, SBTs responded to the EEN list, generally agreeing with the names on it.

Mr. McEwen testified that while the School District received several referrals from SBTs in March 2018, there was a “flurry” of referrals at the end of June 2018.

Mr. McEwen recalled providing the Union with an updated EEN list on June 18, 2018, although Ms. Bauhart testified she did not recall seeing that list.

Mr. Lalonde testified the EEN referrals in late June were received by Mr. Kaardal who then forwarded them to Mr. Lalonde who reviewed them, made recommendations and drafted letters to be sent to the referring SBTs, over Mr. Kaardal’s signature. When Dr. Molloy returned in early July 2018 from a medical leave, he reviewed the EEN referrals while Mr. Lalonde dealt with the Severe Behavioural referrals. Both of them made recommendations to Mr. Kaardal on each referral.

Dr. Molloy said Mr. Kaardal accepted Dr. Molloy’s recommendations in every case.

Ms. Dawson Bedard acknowledged that a relatively large number of SBTs made EEN referrals in June 2018 and that the School District requested information from SBTs in order to attempt to accurately assess the educational needs of each referred student. She agreed SBTs have student records and files and are the main source of insight into a student’s needs. She also acknowledged that, providing accurate information is conveyed to the Superintendent, it is immaterial if a form is used to collect that information.

Ms. Dawson Bedard also acknowledged that in the referral process instituted at that time, if the Superintendent determined an EEN designation was not warranted, that decision could be reconsidered if additional information was provided by the SBT. She agreed the June 2018 letters sent to the SBTs by the School District appeared to list the types of information to be provided for the purposes of reconsideration. However, she noted that some of the Employer's letters did not do so.

Ms. Dawson Bedard said it was apparent from the June of 2018 referrals there was a variety of supporting information provided and there were obvious inconsistencies in that information.

Dr. Molloy testified that his reviews of EEN referrals typically took about four to five hours. He went on to say it was simply not feasible for the Superintendent or designate to have face to face meetings with each SBT to discuss each referral.

Mr. Lalonde testified that as the process evolved, he found during his reviews of the referrals he was repeatedly recording the same information. As a result, to streamline the process, he developed a checklist for cases where a decision a student did not meet the criteria had been made, to indicate the type of information that may be helpful for an SBT to provide on reconsideration.

In his evidence, Mr. Lalonde reviewed the types of information typically suggested to support a reconsideration noting all but one form would normally be on the student's file, which the SBT would have access to.

Mr. Lalonde went on to say that, while not necessary, it was helpful for the designation process for as much information about the student as possible be provided by the SBTs. He said the Employer's intention in describing possible types of information that could support a reconsideration was that the SBTs have options to ensure appropriate assessments could be made.

Mr. Lalonde testified the possibility for reconsideration and additional information to support it component in denial letters was initially added in about July 2018 after the Employer had received the large number of EEN referrals in June of 2018. Dr. Molloy had a similar recollection.

It is apparent there were several hundred referrals in June 2018 in addition to the students earlier identified through the Employer's EEN list. Some of those referrals were approved initially, some on reconsideration. The majority were not accepted by the School District.

Mr. Lalonde candidly agreed it would have been preferable had the Employer, at the inception of the process, expressly specified the type of information and documents to be provided by SBTs. However, he said it was a new process and as it evolved the Employer made adjustments and improvements to it as necessary.

Ms. Bauhart recalled that prior to September 2018, Mr. McEwen suggested she meet with two Assistant Superintendents to discuss Ms. Bauhart's suggestion to use the classroom review process that occurred in September in the schools, to also deal with the identification of EEN students. Ms. Bauhart agreed to that meeting and one was arranged.

Ms. Dawson Bedard testified on September 4, 2018, the Employer provided COTA with a draft EEN referral form. She agreed COTA has advocated for the development of such a form as a means of ensuring consistency throughout the School District.

Mr. Lalonde testified he developed the form over the summer. He said the June 2018 SBT referrals provided a variety of types of supporting information. He said his intention in developing the form was to assist the SBTs in determining how to best support an EEN referral.

On October 3, 2018 the parties met to review the draft referral form and Ms. Dawson Bedard raised some specific concerns. She agreed the Employer revised the form to address at least several of the Union's concerns. She testified she had been pleased by the Employer's willingness to accommodate the Union and in particular to address the Union's primary concern regarding the form.

The form which was finalized on November 26, 2018.

Ms. Bauhart testified the Union became concerned about the amount of work required for SBTs to assemble a referral package.

Mr. Lalonde testified about several avenues in place for the School District to respond to requests for additional resources for students, which are not limited to Ministry designated or EEN students. He went on to say he could not recall any occasion where he had not provided an explanation when he had been unable to accommodate a request for additional resources for a student.

Dr. Molloy testified about the functioning and role of the Student Support Services department which includes Learning Assistance Teachers, Speech and Language Pathologists, Physiotherapists and Occupational Therapists, School Psychologists, Counsellors, Consultants and Certified Educational Assistants. Dr. Molloy noted the department has roughly doubled in size since 2001.

He said requests for support resources generally originate from SBTs or Student Support Services staff in the field. He said the two existing referral forms for such requests are accessible to District staff which includes School Counsellors. He noted SBTs are "teacher driven", have been in place for many years and have become increasingly sophisticated over the years.

Dr. Molloy also explained that requests for additional resources are not limited to Ministry designated or EEN students but are "teacher driven".

He testified the file review process referenced in Article D. 3.2.1.1 began in 2004 and continues. He went on to say his department provides all the services referenced in Articles D.3.2.1.2.2 and D 3.2.1.2.3. He also noted the "receiving teacher" referenced in Article D.3.2.1.3 is different today than in 2001 when students often came into the School District from segregated special needs programs. He agreed when a new student arrives in a class the classroom teacher is the receiving teacher for the purposes of that provision.

Dr. Molloy noted the IEPs referenced in Article D.3.2.1.2.4 have been and continue to be performed by staff in his department

Dr. Molloy said his department typically meets in May of each year to review students who have been receiving services, determines if those services are to be maintained and calculates the likely resource requirements.

He went on to say during a school year, there are several avenues through which requests for additional resources, such as Certified Educational Assistants for example, can be accommodated. The first is school reviews during which efficiencies and resources of a school are assessed and potential available resources from the District for any additional required resources are identified.

The second involves reviews of the circumstances of individual students. The third is that each Assistant Superintendent has a "hot spot" fund to deal with unanticipated or emergent issues.

Dr. Molloy said requests for additional services typically originate from a school Principal or an SBT. He went on to say, while the School District has no policy on the issue, his department's practice is to provide an explanation if such a request is denied.

Dr. Molloy also noted that classroom teachers are able to directly request assistance from staff such as Vision/Hearing professionals or Speech/Language Pathologists for example.

Positions of the Parties

The Union

The Union submits the arbitral approach to collective agreement interpretation is well-established. In that regard, the parties' intention is to be found in the plain and ordinary meaning of the language they have chosen: see for example *Ottawa (City) v Civic Institute of Professional Personnel of Ottawa-Carlton* (2000) O.L.A.A. No. 300 (Wexler) ("Ottawa City") at para 70.

The Union goes on to say that class size and composition provisions, such as in this Collective Agreement, are important, beneficial provisions and express language is required to restrict them: *Vancouver School District No. 39 v Vancouver Teachers' Federation* (1999) B.C.C.A.A. No. 467 (Jackson) ("Vancouver School District") at para 9.

While recognizing such provisions are a benefit to teachers in terms of workload, the Union says they also contribute to creating a positive educational environment, which is beneficial to students as well.

The Union submits the legal requirements for consultation are well-established.

The Union argues in *International Forest Products Ltd. V United Steelworkers of America, Local 1-2171* (2005) B.C.C.A.A.A. No. 72 ("International Forest Products"), Arbitrator Hall observed consultation is viewed by arbitrators as being a substantive right, characterized by parties having an active role in discussing, expressing opinions, making their views known to each other and having those views considered by the other party. It involves an opportunity to have a say with an expectation of a response: para 55.

The Union argues consultation requires there to also be an opportunity to present alternatives to a proposed course of action: see for example *Canadian Broadcasting Corporation Corp v*

Communications, Energy and Paperworkers' Union of Canada (1977) C.L.A.D. No. 554 (Knopf) ("CBC").

The Union adds consultation also involves a bilateral interaction between parties informed of each other's position, each of whom have the opportunity to give and receive information: *Ottawa City*; *School District No. 39 (Vancouver) v International Assn of Machinists and Aerospace Workers, Local Lodge 692* (2016) B.C.C.A.A.A. No. 25 (Hall) ("IAM")" at para 49; *Lakeland College Faculty Association v Lakeland College* (1998) AJ No. 741 (ACA).

The Union goes on to submit that, the Oxford English Dictionary defines 'consult' as meaning "to confer about, deliberate upon, debate, discuss and consider a matter".

The Union acknowledges consultation is not synonymous with negotiation and an employer is not required to obtain mutual agreement. However, the opportunity must be meaningful and allow for bilateral interaction.

The Union submits that in applying those principles in this case, the Employer has an obligation to identify EEN students in consultation with SBTs. However, the Employer did not do so until well into 2018, which should have occurred by the beginning of September, 2017. That time frame is the point at which the MOA required class composition as well as school based and ancillary provisions to be implemented (Paragraph 10 (A)).

The Union asserts the Employer's obligation to identify EEN students requires the Employer to both initiate and engage in consultations with SBTs. However, no interaction at all occurred with SBTs until April 24, 2018, when the Employer sent its package of materials to schools, which was well beyond even the January 31, 2018 time frame.

The Union says the MOA required to Employer to, at the very least, implement Article D.3.1.1 as soon as practicable, which was prior to January 31, 2018.

The Union goes on to say the 209 student names on the Employer's list in April 2018 were not the product of the required consultation under Article D.3.1.1.

The Union characterizes the Employer's action in sending the package of materials to schools on April 24, 2018 as simply seeking the "blessing" of the Employer's EEN list by SBTs, which the Union argues, is not proper consultation.

The Union says in addition, the information provided to the SBTs at that time was insufficient as it gave no indication why the identified EEN students had been chosen. On the other hand, the Employer expected the SBTs to provide a significant body of information and documents to support referrals for there to be any likelihood of a student being designated by the Superintendent. The Union says the required active and meaningful exchange of views was completely lacking.

The Union goes on to argue the April 24, 2018 package of materials did not provide instructions or alert SBTs to the type of data required to support referrals and as a result, not surprisingly, SBTs were unclear about the information necessary to support a referral.

The Union says the lack of clarity resulted in SBTs providing a wide range of information and documents and some simply providing student names. The Union says, the School District rejected most of the SBT referrals, regularly citing the need for additional supporting information.

The Union goes on to say it was not until November 2018 that the Employer distributed forms to schools providing some basis for SBTs to appreciate the type of documents and information necessary for the EEN process. The Union submits the lack of adequate guidance or instructions prior to that point meant the consultative requirements were absent.

The Union says an additional flaw in the process was that the Employer's denial letters sent to SBTs, at least prior to May, 2019, contained no reasons for the Superintendent's decision. The letters did not explain why the criteria used by the Superintendent had not been met. Consequently, the required active and meaningful exchange of views was absent.

The Union says even today, the reasons provided for a decision not to designate a student referred by an SBT, remain inadequate.

The Union submits that an inherent element of the duty to consult is a bilateral interaction and that both parties are informed of the other's views, which has not been and is not, present.

Finally, the Union argues Article D.3.4 requires the Employer to put in place a process to ensure a full explanation is provided to SBTs in circumstances where a student does not qualify for additional resources. The Employer's alleged failure to do so is said to constitute a breach of that provision.

As remedy for the alleged breaches of the Collective Agreement the Union seeks a declaration, which it submits has an important vindicating effect: *Tie Communications Canada v IBEW, Local 213* BCLRB No. B 63/1996 ("Tie Communications") at para 31-33; *B.C. Teachers' Federation v B.C. Public School Employers' Assn.* (2010) B.C.C.A.A.A. No. 1 (Dorsey) ("BCPSEA") at para 118.

The Union seeks an award of damages in addition to the declaration. In that regard the Union says damages may be appropriate for a breach of a duty to consult even where the consultation would not have made a substantive difference in the outcome: see for example *Re Burrard Yarrows Corporation, Vancouver Division v International United Brotherhood of Painters, Local 138* (1981) B.C.C.A.A.A. No. 20 (Christie) at para 34; *Re University of Victoria v Canadian Union of Public Employees, Local 951* (1990) B.C.C.A.A.A. No. 194 (Kelleher); *Giant Yellowknife Mines Ltd. V C.A.S.A.W., Local 4 (Re)* (1990) C.L.A.D. No. 24 (Bird) ("Yellowknife") at para 31; *Re Ivaco Rolling Mills v U.S.W.A., Local 7940* (1994) O.L.A.A. No. 489 (Roach); *Canadian Broadcasting Corp v Communications, Energy and Paperworkers Union of Canada* (1998) C.L.A.D. No. 301 (Blendel) ("Canadian Broadcasting Corp"); *United Food and Commercial Workers International Union, Local 342-P v Horizon Milling, GP,* (2007) C.L.A.D. No. 153 (Pelton).

The Union argues that even where there is no actual loss of opportunity, there must still be a meaningful remedy: see for example *Yellowknife.*

The Union submits, like *Yellowknife*, this is not a case involving bad faith. Bad faith is not a requirement for a remedy for a failure to properly consult. While acknowledging the time frame in issue in this case was a difficult period, the Union says nonetheless, the Employer failed to properly consult SBTs as required under Article D.3.1.1.

The Union acknowledges that many cases where damages have been awarded involve an obligation to consult prior to the contracting out of work; however, it says the duty to consult in Article 3.1.1 is as important as the duty arising in the contracting out cases.

The Union says in cases where damages have been awarded for breaches of a duty to consult, those damages are typically calculated based on the number of employees in a bargaining unit. For example in *Canadian Broadcasting Corp* Arbitrator Blendel ordered the employer to pay $250.00 for each union member in the bargaining unit. The Union submits the same formula should be utilized in this case. There are about 1500 FTE members in COTA's bargaining unit which would mean a total award of approximately $375,000.00.

The Union goes on to say its preferred remedy is that any damages award be utilized to serve students and consequently the Union seeks an order of five additional FTEs of teacher time as mutually agreed between the parties. The Union says there is authority for such a remedy: see for example *Vancouver School District*.

In the alternative, the Union seeks the award of monetary damages of approximately $375,000.

The Employer

The Employer submits consultation by the Superintendent under Article D.3.1.1 is clearly a district level process and as such, as expressly provided in the MOA, was to be implemented by January 31, 2018. The Employer goes on to say the Union accepted that view in the April 4, 2017 AIC meeting, which was confirmed in the evidence of the Union witnesses at the hearing.

The Employer argues the SBT language in Article D.3 contains three elements. First, SBTs are to operate in a manner consistent with Article D. 3.2. Second, the requirements of Articles D.3.3 through D.3.9 are to be adhered to. Third, the Superintendent is required to consult with SBTs in the process of identifying EEN students.

The Employer says this grievance is limited to the third element of Article D.3 which contains the consultation requirement.

The Employer submits that the dictionary definition of consult is "to seek advice or information from; ask guidance from": see for example *Dictionary.com.* In the context of Article D.3.1.1, the Superintendent is to seek advice or information from SBTs in order to accurately assess a student's educational needs and requirements.

The Employer argues that SBTs are problem solving units made up of a group of professionals involved in assessing and addressing a student's particular educational needs. At some point, a student is referred by a teacher to a SBT which has access to information about and documents relating to that student's educational needs. Consequently, the plain meaning of Article D.3.1.1 is that the Superintendent must seek information from the SBT in order to accurately assess a student's educational needs when determining if the student should be identified as EEN.

The Employer submits while the actual words used in a collective agreement are significant, words that are not used are also significant: see for example *Canroof Corp v TC, Local 230* (2013) 114 C.L.A.S. 288 (Surdykowski); *Rio Tinto Alcan Inc v Unifor, Local 2301* (2015) B.C.C.A.A. No. 80 (McConchie) ("Rio Tinto") at para 70.

The Employer goes on to say that in this case, the absence of words such as "in person" or "face to face" or even "meeting" is significant. While consultation is required, no particular form of it is specified.

The Employer submits there is nothing in this Collective Agreement providing any basis for a conclusion the obligation to consult under Article D. 3.1.1 goes beyond the plain and ordinary meaning of the word.

The Employer argues the interpretation advanced by the Union would essentially require face to face meetings between the Superintendent and SBTs, which is inconsistent with collective agreement interpretative principles. In this Collective Agreement, there is no restriction on the Employer's ability to, for example, use forms to gather information from SBTs nor is there even a requirement that forms be used at all.

The Employer agrees it is well-established consultation includes a bilateral interaction by parties informed of each other's position where each has an opportunity to give and receive information. Consultation requires an exchange of ideas and a mutual opportunity for both sides to be heard.

The Employer goes on to submit consultation is not the same as negotiation and mutual agreement is not required. What is required is that the opportunity to consult should be meaningful and allow for bilateral interaction: see for example *IAM* at para 50; *CBC* at paras 113-114).

The Employer argues the purpose of the consultation process in Article D. 3.1.1 provides the context for its requirements: see for example *IAM* at paras 63 and 64: *CBC* at paras 108-114.

The Employer says in the circumstances of this case, the nature of the Employer's obligation to consult with SBTs under Article D.3.1.1 must be considered in the context of the purpose of the consultation, which is to accurately assess a student's educational needs and requirements. That purpose requires a bilateral interaction providing a meaningful opportunity for SBTs to give information about a student to the Superintendent and for the SBT to be able to understand the Employer's view regarding whether a student meets the EEN criteria.

The Employer accepts the process cannot simply be a "lip service" or a sham.

The Employer says in the circumstances of this case, while consultation does not require mutual agreement, nonetheless, the Employer made significant efforts to consult and collaborate with COTA in order to develop a common approach to the implementation of Article D.3.1.1 and to communicate information about the process to schools. The Employer argues the Union now essentially asserts those persistent, good faith efforts by the Employer to be collaborative and consultative in its attempts to implement Article D.3, should result in the Employer being found to be in breach of the Collective Agreement.

The Employer submits between March 9, 2017, when the MOA was finalized, and January 31, 2018, when the process under Article D.3.1.1 was to be implemented, the Employer took a number of steps to analyze the restored language, determine the Employer's obligations arising from it and put in place processes to meet its obligations. The Employer says there were many AIC meetings between March and July 2017 involving senior representatives of the School District and COTA. However, it became apparent from early in the process the parties had very different views regarding the scope of the EEN category, which was the parties' primary focus at that time. That difference had important implications for the implementation process.

The Employer says both parties hoped their differences could be resolved expeditiously through arbitration in the fall of 2017, which unfortunately turned out to be impossible.

The Employer submits on the occasions the parties discussed the SBT process under Article D.3 in the spring of 2017, their focus was on elements such as the placement of students, involvement of parents, mentoring of new teachers, materials to be provided to classroom teachers and communicating information about the process to schools. However, there was no discussion regarding the consultative process in Article D.3.1.1., nor did the Union raise that matter as a concern during the parties' discussions. The Employer says the fact the Union did not see it as a concern is reflected in the Union's draft communication to the schools regarding the SBT process, which did not even mention the consultative process under Article D. 3.1.1.

The Employer says that is not surprising given the Union's view at the time that all Ministry designated students should fall within the EEN category. The Employer goes on to say that COTA did not want a reference to consultation with the SBTs to be included in the communication to schools because that would have been inconsistent with the Union's position on the EEN issue.

The Employer notes there was clearly no obligation on the Employer to consult with SBTs about the EEN designation process prior to the fall of 2017, as the provision was not yet effective.

The Employer says while the parties disagreed about the scope of the EEN designation, the referral process was clearly understood by both. The Union was also actively communicating with its members regarding the nature of the difference between the parties on the EEN issue.

The Employer submits that, notwithstanding the parties' fundamental disagreement, on December 19, 2017 it provided documents to schools, which included clear statements that students could be referred by teachers at any time to SBTs and by SBTs to the Superintendent for consideration. By January 31, 2018, the School Board had made it very clear to both the Union and schools that SBTs were to refer any students to the Superintendent they believed should be considered for the EEN designation.

The Employer says the fact there were no referrals by SBTs at the time is not surprising given the Union's disagreement with the Employer's view of the nature of the EEN designation, which was actively communicated by the Union to its members. The lack of referrals by SBTs, which would have given rise to consultation, is not the result of any failure by the Employer to communicate information to SBTs. The Employer goes on to note that very soon after the Union withdrew its EEN grievance in early March 2018, SBTs began to refer students to the Superintendent for consideration.

The Employer submits that, not only is it not required under Article D.3.1.1, but it is also not administratively feasible, for the Superintendent to initiate consultations with SBTs. Classroom teachers identify struggling students and refer them to SBTs who possess the knowledge of the student and are best situated to determine when a consultation with the Superintendent regarding a student is warranted.

The Employer says it put in place a process designed to enable SBTs to refer students to the Superintendent for consideration as required, by January 31, 2018. The Employer goes on to say when there were no referrals by SBTs, on January 29, 2018 it asked the Union to accept the students identified by the School District as meeting the EEN criteria in order to get the process moving, but the Union would not agree.

The Employer says the reason the Employer did not consult with SBTs until April 24, 2018 was because the Employer was waiting for the Union's response to the Employer's January 29, 2018 proposal. That proposal was repeated on February 2, March 15, April 8 and April 10, 2018. As soon as the Union rejected it on April 17, 2018, the Employer immediately initiated consultations with SBTs on April 24, 2018.

The Employer submits if it is found the Employer did not meet its obligations to consult prior to January 31, 2018, the process initiated on April 24, 2018 met the Employer's obligation to consult under Article D.3.1.1. The Employer provided the EEN criteria and a list of students the Employer believed met the criteria, to the SBTs. The Employer requested their input. That reflects the required bilateral interaction which provided a meaningful opportunity for SBTs. In addition, the SBTs did in fact communicate their views to the School District and the process was clearly not a sham.

The Employer goes on to argue all the referrals from SBTs received by the School District in late June of 2018 were duly considered. The fact a number of them were not approved does not establish a failure to consult. Where an SBT referral failed to provide sufficient information, the School District provided a list of possible sources for additional information for the purposes of reconsideration, all of which were available to the SBTs. The Employer says that reflects an appropriate back and forth as contemplated in the concept of consultation.

The Employer says the letters denying EEN designations, confirmed the Superintendent's decision, provided an explanation of the basis for it, the criteria and considerations used in the decision and identified sources of possible information to support a reconsideration. The Employer says, on the evidence, that format was in place by June of 2018.

The Employer submits Article D.3.1.1 does not require face to face meetings as long as the elements of consultation exist by other means. The Employer says it continued to refine and improve the process including, while not required, developing a standardized referral form. While the Union takes issue with the form, in fact, the Union agreed a form would assist the process and the Employer actively consulted with the Union and attempted to address the Union's concerns in the form's development.

The Employer submits the Union has expressed concerns about the time required by the SBTs to assemble a referral package; however, the SBTs possess the information and documents regarding a student's educational needs and requirements. Article D.3.1.1 requires the Superintendent to consult with SBTs regarding that information in order to accurately assess a student's educational needs.

The Employer submits that while Article D. 3.4 requires a full explanation where the Superintendent decides a student identified by a SBT does not qualify for additional resources, no such language is present in Article D.3.1.1. In addition, Article D.3.4 only applies to students referred to the Superintendent to be considered for an EEN designation, not all 21,000 students in the School District.

The Employer goes on to note that, while the Collective Agreement does not require it, the School District has developed several processes for schools to request additional resources for any student. Those include school reviews, individual student reviews and "hot spot" budgets controlled by Assistant Superintendents.

The Employer says it made numerous attempts to restore the Article D.3.1.1 language. It spent many months collaborating and consulting with the Union attempting to find common ground and to avoid confusion in the schools regarding the EEN designation and the SBT process. The Employer submits that notwithstanding the Union's opposition to the Employer's view regarding the nature of the EEN designation, the Employer nonetheless attempted to find ways of implementing the Article D.3 language to the best extent possible.

The Employer argues it met its obligation to consult under Article D.3.1.1. To the extent to which it may be found it did not, under all the circumstances, the only appropriate remedy would be a declaration and an order for future compliance.

The Employer says the remedy of five FTEs of teacher time sought by the Union, which the Employer calculates would cost about $500,000.00 would be punitive, not compensatory in nature. The Employer goes on to say there is no rational connection between that remedy and the breach, and it is not consistent with well-established remedial principles; see for example *Royal Oak Mines Inc v Canada (Labour Relations Board)* (1996) 1 S.C.R. 369 ("Royal Oak") at para 60; *Vancouver (City) Fire and Rescue Service v Vancouver Fire Fighters' Union, Local 18* ((2017) B.C.C.A.A.A. No. 42 (Fleming) ("Vancouver Fire Fighters").

The Employer submits that the cases where damages have been awarded for a breach of a duty to consult typically involve contracting out situations. In those cases, the purpose of the right to consultation is to allow a union the opportunity to persuade an employer not to take steps prejudicial to employees in the bargaining unit. In this case, the opportunity is for SBTs to provide information to the Superintendent. The Employer's obligation to consult is with SBTs, not the Union or each teacher.

Analysis and Decision

Legal Framework

Interpretative Principles

The well-established arbitral approach to collective agreement interpretation is described in some detail in *Canadian Labour Arbitration- Brown and Beatty ("Brown and Beatty"):* 4:2100-2300. It can be briefly highlighted as follows. The primary purpose of the interpretative exercise is to discern the parties' intentions based on the actual words chosen, given their plain and ordinary meaning. The language in issue is to be read in the context of the entire collective agreement and harmoniously within the scheme of the collective agreement and its purposes.

It is presumed the parties intended all words used will have meaning, intended what the language actually says and did not intend for there to be a conflict. A helpful and often quoted summary of the applicable principles is set out in *Pacific Press v Graphic Communication International Union, Local 25-C* (1995) B.C.C.A.A.A. No. 637 (Bird) at para 27.

1. The object of interpretation is to discover the mutual intention of the parties.

2. The primary resource for an interpretation is the collective agreement.

3. Extrinsic evidence (evidence outside the official records of agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention of the parties.

4. Extrinsic evidence may clarify but it cannot contradict a collective agreement.

5. A very important promise is likely to be clearly and unequivocally expressed.

6. In construing two provisions of a collective agreement, a harmonious interpretation is to be preferred over one which places them in conflict.

7. All clauses and words in a collective agreement should be given meaning if possible.

8. Where an agreement uses different words, it is presumed the parties intended the words to have different meanings.

9. Ordinary words in a collective agreement should be given their plain meaning.

10. Parties are presumed to know about relevant jurisprudence.

As noted in *Rio Tinto* all words must be given meaning and different words are presumed to have different meanings: para 70.

Consultation

There is no real controversy regarding the general legal principles or elements of consultation.

I accept the purpose of consultation under Article D.3.1.1 provides guidance in determining its requirements: see for example *CBC* at paras 113-114; *IAM* at paras 63-63.

The elements and associated obligations attaching to the concept of consultation are extensively discussed and analyzed by Arbitrator Hall in *IAM* and *International Forest Products.* See also *CBC*. By way of brief summary, consultation is a substantive right which extends far beyond the mere giving of information or lip service: *International Forest Products* at para 55.

Its characteristics can be summarized as involving a bilateral interaction in which both parties have an active role in making their views known and considering the other party's views. Each should be informed of the other's views and each should have a meaningful opportunity to give and receive information.

Each party must be open to the other's views and to seriously consider them before a final decision is made.

Consultation is not negotiation nor is it a veto power and mutual agreement is not required.

Application of the Framework to the Circumstances of this Case.

I find that Article D.3 contemplates that SBTs are to operate in a manner consistent with Article D.3.2 as well as Articles D.3.3 through D.3.9.

The purpose of Article D. 3.1.1 is to ensure the Superintendent (or designate) has the information necessary to identify EEN students and accurately assess their educational needs and requirements which is to be accomplished through consultation with SBTs. That purpose informs the nature of the Employer's consultation obligations.

While the consultation is to occur between the Superintendent and SBTs and not the Union or individual teachers, the requirements of the consultation process flow from the Collective Agreement, which the Union is a party to.

Article D.3.1.1 does not expressly require any specific form of consultation. Accordingly, the well-established elements for it discussed earlier are applicable to the specific facts of this case in determining if the Employer met the requirements of Article D.3.1.1.

Turning to the circumstances of this case, the School District initiated discussions regarding the implementation of Article D.3 with the Union in March, 2017, very soon after the provincial parties concluded the MOA.

The fact Article D.3 had been removed from the Collective Agreement for 15 years meant its language had not evolved with changing circumstances between 2002 and 2017 and those attempting to implement it had no experience with it. In addition, the EEN category in Article D.3 is unusual and not present in most other local agreements.

Shortly after the parties began their implementation discussions, it became apparent they fundamentally disagreed about the scope of the EEN designation. The parties' difference on the issue had real implications for, and impact on, the implementation of Article D.3 and in particular D.3.1.1.

I am satisfied between March and July of 2017, the Employer made substantive efforts to determine its obligations under the restored language and how it was to be appropriately implemented. It met with COTA at least 10 times during that time frame and I accept the EEN issue was the primary focus of those discussions.

As part of its attempts to implement the language, in the spring of 2017, the Employer provided the Union with the Employer's school organization information, which included a list of Ministry designated and EEN students, to illustrate the Employer's implementation efforts. As a result, the implications of the parties' difference on the EEN issue became clear to the Union.

I find the Employer's development of the EEN criteria in the spring of 2017 was thoughtful and considered and the criteria developed were clearly relevant to the identification of EEN students. While Article D.3.1.1 does not require it, the Employer provided the Union with those criteria.

In light of the significant differences between the parties on the EEN issue, the Union felt obliged to file the EEN grievance on May 16, 2017, which had an understandable impact on the implementation process.

I accept both parties hoped their differences would be expeditiously resolved through arbitration in the fall of 2017, but that was ultimately not possible.

While the focus of the parties' attention in the spring of 2017 was the EEN issue, where they did discuss the SBT process they focused on matters such as the placement of students, involvement of parents, mentorship of new teachers and materials to be provided to classroom teachers. However, they did not discuss the requirements of consultation under Article D. 3.1.1., nor did the Union raise that as a concern in those discussions. That is not surprising because the Union's position regarding the scope of the EEN category, if it prevailed at arbitration, would have meant little or no consultation with SBTs would be necessary, as all 2400 Ministry designated students would also be designated as EEN, meaning the two categories would be essentially synonymous.

The conclusion that the consultation process contemplated under Article D.3.1.1 was not seen as an issue at that time is supported by the one page communication documents drafted by COTA which did not mention or deal that issue. In fact, the Union was reluctant to have any reference made to the Article D.3.1.1 consultation, which is also not surprising given its position regarding the EEN issue.

The parties had a number of discussions about a communication to schools explaining the SBT process but, not surprisingly, given their divergent views regarding the EEN issue, were unable to agree on all of its contents.

The Employer continued its efforts to develop a communication document explaining the new SBT process over the course of the summer of 2017, shared a revised draft with the Union in early September and the parties met to discuss it in early October 2017.

I am satisfied the Employer's obligation to consult with SBTs under Article D.3.1.1 did not arise prior to the commencement of the 2017/2018 school year, as Article D.3 was not in effect at that time. However, I find the March to September 2017 time frame nonetheless provides part of the overall context for my decision.

<u>When did the Employer's obligation under Article D.3.1.1 arise?</u>

Under the MOA, there are two possible dates; i.e. at the commencement of the 2017/2018 school year or January 31, 2018.

Paragraph 10 of the MOA reads in part as follows:

> *The Provincial Parties recognize that it may take time to transition from existing practices to the processes that are defined in the restored language. The 2017/18 school year will serve as a transition period to full implementation of the restored process and ancillary language by January 31, 2018….*

Paragraph 10 (A) provides that restored school based processes and ancillary language including language pertaining to SBTs was to be implemented at the commencement of the 2017/18 school year.

Paragraph 10 (B) provides that restored school-based processes and ancillary language that makes reference to a district level process or restored district level processes were to be implemented as soon as practicable, but no later than January 31, 2018.

As their name suggests, SBTs are based in each school. Their core group is comprised of school based staff who assist the classroom teacher with students who have special educational needs in each school. They may include the classroom teacher. They may also include parents or outside professionals. However their focus is on a student in that particular school. Students are typically referred to SBTs by the classroom teacher.

On the other hand, the Superintendent is responsible for the operation of the entire School District and clearly functions on a district level basis. Consultation under Article D.3.1.1 is between the Superintendent and SBTs. While each SBT is school based, the consultation occurs on a district wide basis as reflected in the process followed by the School District after April 24, 2018. More specifically, the School District provided all SBTs with the same package of materials and the same criteria were applied to all students referred to the Superintendent by the SBTs. The Superintendent (or designate) made the EEN determination on a district level basis.

I find Article D.3.1.1 is best characterized as a district level process therefore one captured by Paragraph 10 (B) of the MOA. Accordingly, subject to the MOA direction to implement such provisions “as soon as practicable” Article D.3.1.1 was to be implemented by January 31, 2018.

That conclusion is reinforced by the fact that in the April 4, 2017 AIC meeting, COTA acknowledged the effective date for the full implementation of Article D.3.1.1 was January 31, 2018. I note that was consistent with information provided to the School District in the BCPSEA implementation guide.

I also find it likely the parties understood in the spring and fall of 2017 that the consultation process contemplated in Article D. 3.1.1 was to be implemented by January 31, 2018, while the Employer was obliged to make its best efforts to ensure that occurred sooner.

Did the Employer meet its obligation under Article D.3.1.1?

I am satisfied the consultation under Article D.3.1.1 was not identified as a real issue by the parties in the spring and fall of 2017, at least until the Union filed its grievance in late November of 2017.

COTA members often participate in SBTs, including as Chairs. I find that, on at least several occasions, COTA told the Employer the Union intended to advise its members to refer all Ministry designated students to SBTs as part of the EEN referral process. I find it was reasonable under all the circumstances for the Employer to have concluded all Ministry designated students could be referred to the Superintendent as part of the EEN process. I also

find the Employer communicated to the Union and schools in the fall of 2017 and early 2018 its view that SBTs could refer students to the Superintendent at any time.

I accept the Employer believed it had established a process for SBTs to refer students to the School District for consideration as EEN, prior to January 31, 2018. It is apparent the Employer's view was its consultation obligation arose as a result of a referral from a SBT. However, the contents of the Employer's December 19, 2017 package to schools and SBTs reflects a recognition of the importance of providing sufficient information regarding the process to the SBTs to ensure consultation could occur and the purpose of Article D.3.1.1 could be achieved.

I find that it most likely the parties intended through the implementation requirements in the MOA, that Article D.3.1.1 would be fully operational by January 31, 2018 which would include the identification of EEN students after consultation with SBTs, a central component of Article D.3.1.1. It is apparent the Employer recognized the identification of EEN students without consultation with SBTs did not meet the requirements of Article D.3.1.1.

Consultation requires at least in part, an ability to deliberate and consider. The EEN concept was essentially a new one for everyone in the School District, including the SBTs. At least implicit in the purpose of Article D.3.1.1 is an obligation on the Employer to provide information necessary to allow the SBTs a meaningful opportunity to come to a reasoned view or judgement about whether a student should be identified as EEN. In other words, to be able to properly "deliberate upon" or "consider" the matter.

However, the information provided by the Employer in its December 19, 2017 package to schools did not, for example, indicate the criteria to be used in the EEN designation process, the type of information necessary to support a referral, or the possibility of a reconsideration.

I find the information provided to SBTs, at least prior to January 31, 2018, would likely have been insufficient to ensure the SBTs were able to properly fulfill their role and the purpose of Article D.3.1.1.

In any event, there was not the required back and forth or bilateral interaction between the Superintendent and SBTs prior to January 31, 2018. The Employer's EEN list was not the product of consultation with SBTs, at least prior to April, 2018. While I am satisfied the Employer made real efforts to implement Article D.3.1.1, I find the Employer did not comply with the requirement of Article D.3.1.1 to identify EEN students after consulting with SBTs, by January 31, 2018.

I also find, while it would have been reasonable for the Employer to assume the Union was considering the Employer's January 29, 2018 proposal to waive the consultation requirement, the associated risk was if the Union rejected it, the January 31, 2018 implementation deadline would be missed, which is what occurred.

<u>Did the Employer meet the requirements of Article D.3.1.1 after January 31, 2018</u>

The Union argues the Employer's breach of Article D.3.1.1 has been ongoing and continues to this day.

Recognizing the Employer's EEN list was not the result of consultation with SBTs, the Employer, in good faith, made its January 29, 2018 proposal to dispense with the need for consultation in respect to the students on the Employer's EEN list. I accept it was on a one-time basis, intended as the first step and as a means of at least partially implementing the requirements of Article D.3.1.1.

I appreciate the importance placed on Article D.3.10 by the Union which reasonably saw the accurate assessment of EEN students as a mechanism for giving effect to Article D.3.10. It is understandable why the Union was keen to see Article D. 3 fully implemented as soon as possible and why it was reluctant to risk undermining it in any way.

I find the Employer's delay in commencing a consultation process with SBTs between February 1 and April 24, 2018 was because the Employer was actively seeking the Union's agreement to initiate the EEN process without the need to consult with SBTs by using the students identified by the Employer as a starting point.

Once the Union ultimately rejected the Employer's proposal on April 17, 2018, the Employer immediately initiated a consultation process with SBTs on April 24, 2018.

The package of materials the Employer provided to schools on April 24, 2018 included information explaining the composition of SBTs under Article D.3, the functions of SBTs under Article D.3.2, the factors to be considered in the consultation process, an explanation that the functions of the SBTs were broader than the role under Article D.3 and an express reference to the SBT role provided in the Manual. That package explained the identification of EEN students was to occur after consultation with SBTs and provided the criteria to be used for the identification of EEN and Severe Behavioural students.

The package also contained a memo directing the relevant information be shared with and reviewed by SBTs and a power point presentation regarding the SBT process. Each school received information identifying EEN students in that school from the list of 209 names identified by the Employer.

That information was supplemented by a meeting between School District staff, Principals and school staff and a presentation by Mr. McEwen and Mr. Lalonde.

I am satisfied the SBTs received and reviewed the documents including the EEN list for each school and, with a few exceptions, agreed with the names on the list.

It is important to bear in mind the SBTs have the knowledge, including documents relevant to assessing the education needs and requirements, for each student.

I find the process involved a bilateral interaction between the Superintendent and SBTs which provided a meaningful opportunity for input by SBTs and was clearly not a sham or mere lip service.

However, the Union argues the information provided to the SBTs at that point did not identify the type of documents or data necessary to support an EEN referral. The Union acknowledges that occurred in November 2018 and the Employer began providing more detail in its denial letters in May 2019.

The Union asserts an additional flaw was the alleged lack of meaningful reasons in the denial letters, for example an explanation of why EEN criteria had not been met, which the Union says,

continues to this day. The Union also says the flaws in the referral form are a further indication of a breach of Article D.3.1.1.

Turning first to the referral form, it was initially proposed by the Union. The Employer acted on that suggestion, consulted with the Union and revised its drafts to attempt to address the Union's concerns. In fact, the Union agreed the Employer addressed the Union's primary concerns.

I find that while such a form obviously assists in the process, it is not expressly required under Article D.3.1.1 nor is it necessary to meet the requirements of consultation. I accept the purpose of Article D.3.1.1 can be met in a variety of ways.

While I appreciate the Union's concern regarding the amount of time required by SBTs to assemble the documents and information necessary to support an EEN referral, the SBTs, not the Superintendent, have the actual knowledge and access to information regarding a student's educational needs. I note the review of the EEN referrals by School District staff also involves considerable time.

I find there is no basis upon which to reasonably conclude the development, content or impact of the referral form is a violation of the Collective Agreement.

In June 2018 a number of referrals were made by SBTs, which the School District duly considered. Where the Employer determined a student referred by an SBT did not meet the EEN criteria, typically, although not in every case, the Employer's letter to the SBT advised of that decision, provided an explanation of the factors considered, reiterated the criteria and considerations relied on in coming to the decision, provided both a brief explanation and the types of additional information and documents that could support a reconsideration.

I find while a face to face meeting between the School District and SBTs could possibly be useful in some cases, it is not required for the purposes of consultation under Article D.3.1.1.

As an aside, my role is to determine whether the essential requirements of consultation under Article D.3.1.1 have been met, not whether the process reflects best practices.

I agree with the Union that the explanation and reasons provided could have been more fulsome to ensure as much clarity and efficiency as possible, as is at least implicitly recognized by the Employer's subsequent changes to the contents of those letters. However, I am satisfied the process in June or July 2018, while not without at least some understandable flaws associated with a new process, was nonetheless, when viewed together with the information provided by the Employer in April 2018, sufficient to establish the hallmarks of a consultative process. There was bilateral interaction that provided a meaningful opportunity for the SBTs to understand the process, criteria to be met and to assess whether a student should be referred for consideration. As well if a referral was denied, the nature of information to support a reconsideration was provided.

The Union points to the alleged lack of full reasons are required under Article D.3.4 as an additional indicator of a breach of the Collective Agreement.

Article D.3.4 requires that where the Superintendent determines a student identified by a SBT does not qualify for additional resources, a full explanation is to be provided to the SBT.

Article D.3.1.1 does not contain the same obligation. While the School District receives requests for additional resources for students who are not identified as EEN, the first sentence of Article D.3.4 expressly refers to EEN students which provides the context for the requirement for full reasons; i.e. EEN students. I find the provision addresses only EEN students.

Under Article D.3.1.1, a SBT may refer a student for identification as EEN. Article D.3.4 recognizes a SBT may also request additional resources be provided for that student. In my view, the provision further recognizes that a SBT may request additional resources for a student already identified as EEN. Under Article D.3.4, where a request for additional resources in either of those circumstances is not granted, a full explanation must be provided.

I find Article D.3.4 is an additional requirement to the duty to consult with SBTs under Article D.3.1.1, in those limited circumstances.

In my view, a full explanation contemplates reasons for a decision, providing a rationale, sufficient details or elucidation so the basis for a decision can be understood.

Given there have been no apparent denials of requests for additional resources in respect to any EEN students, there is no live issue regarding whether reasons provided in that context meet the requirement of Article D.3.4.

While the Union says there is no real process for SBTs to request additional resources for students identified as requiring them, I am satisfied the School District has put in place several options. To that end, the Student Support Services department may conduct school reviews as well as reviews in respect to individual students. Assistant Superintendents also have “hot spot” funds to address emergent issues during the school year. All of those options may be accessed by SBTs, Principals and even school staff.

While not a requirement of Article D.3.4, it would be reasonable to expect the School District would provide adequate reasons for a denial of a request for additional services for a non EEN student, which in any event, would appear to reflect the Employer’s practice.

Having reached those conclusions, there are areas in the Article D.3 process the parties could explore for improvement.

Conclusion

For the reasons provided, I find the Employer did not fully meet the requirements of Article D.3.1.1 by ensuring its implementation by January 31, 2018, which constitutes a violation of the Collective Agreement. More specifically, the Employer did not identify EEN students after consultation with SBTs prior to January 31, 2018. However, I find the breach was of a limited duration and the Employer has met the requirements of Article D.3.1.1 since at least June or July of 2018.

I find the Union’s grievance should be granted in part.

Remedy

I find a declaration to the effect the Employer violated Article D.3.1.1 is appropriate. However, the Union seeks an order directing five additional FTE's of teacher time to be used for the benefit of EEN students. In the alternative the Union seeks damages in the amount of $ 250.00 for each Union member in the School District.

The Union's interest in the full, complete, timely restoration of Article D.3 is legitimate and not surprising. The Union says the Employer could have relied on its management rights to impose a process for consultation between the Superintendent and SBTs to ensure the full implementation of Article D.3.1.1, by January 31, 2018 at the latest. I agree.

However, the Employer's obligation to consult with SBTs under Article D.3.1.1 was essentially a new requirement. The Employer acted in good faith throughout this process and made substantive efforts to implement the language of Article D. 3.1.1. In that exercise, it adopted a collaborative, co-operative labour relations approach to the implementation. That approach is laudable, particularly given the labour relations impact of the removal of that language from the Collective Agreement by legislation.

As well, given the consultation is a Collective Agreement obligation, it is understandable why the Employer sought to work co-operatively with COTA on the implementation of Article D.3 and in particular Article D.3.1.1.

The imposition of a consultative process under Article D.3.1.1, while within the Employer's rights, would not likely have assisted in repairing or improving the parties' relationship.

I also note the approach adopted by the Employer is consistent with Section 2 (d) of the B.C. *Labour Relations Code* (the "Code") which encourages co-operative labour relations approaches.

The difficulties associated with the implementation of the restored language, which were expressly recognized in the MOA, were exacerbated by the unusual EEN language of this Collective Agreement. The understandable, but fundamental disagreement between the parties in that regard, which arose almost immediately after the parties began their discussions in March 2017, had an impact on the implementation.

Section 82 of the *Code* provides arbitrators with the authority to award compensatory damages for a loss arising from a breach of a collective agreement. The basic principle of compensatory damages is a party should be placed in the same position they would have been but for the wrongful action of the other party.

There must be a rational connection between a breach of a collective agreement, a statute, its consequences and remedy. The remedy should also be responsive to the ongoing nature of the parties' relationship and should not serve to impair or undermine it: see for example *Royal Oak* at para 60; *Vancouver Fire Fighters* paras 714-715.

A remedy is to be fashioned to compensate an aggrieved party for actual losses arising from a breach of a collective agreement: see for example *Hertz Canada Ltd. v Canadian Office and Professional Employees' Union, Local 378* (2011) B.C.C.A.A.A. No. 65 (MacDonald) at para 7.

The essential nature of the breach of the Collective Agreement in this case is a failure to consult, which is typically characterized in the arbitral jurisprudence as a lost opportunity. The

general principle guiding a lost opportunity remedy is that, if a declaration is not sufficient, damages are available to ensure an employer is provided with a meaningful incentive for future compliance with a collective agreement.

The opportunity lost in this case was not one involving the Union's ability to persuade the Employer not to make a decision that would fundamentally impact the bargaining unit, such as contracting out. Rather, the opportunity lost was for the SBTs to provide information to the Superintendent in order to ensure the identification of EEN students and an accurate assessment of their educational needs.

I agree with the comments in *Tie Communications* that a remedial declaration implicitly carries a warning that conduct that is the subject of the declaration is not to be repeated. As well, a remedial declaration both provides a vindicating effect and guidance to the parties for their future conduct: see for example *BCPSEA* at para 118. In my view, that has an important labour relations function.

I find, considering all the circumstances of this case, a declaration is an appropriate remedy.

To the extent to which any additional remedy should be considered, I note that in seeking the remedy of five FTEs of teacher time, the Union relies on *Vancouver School District.* That case involved a remedy for a breach of class size and composition provisions, not an obligation to consult. I also note there are specific in kind remedies set out in the MOA for the breach of such provisions.

An order directing five additional FTEs of teacher time could have at least arguably been available in the Union's EEN grievance had the Union's position prevailed at arbitration. However, that grievance was withdrawn.

I accept the cost to the Employer associated with that remedy would be approximately $500,000.00. I find that remedy is not proportional and does not have the necessary rational connection to the nature of the breach and its consequences. It would go beyond being compensatory and under all the circumstances is not warranted.

In terms of the Union's claim for damages, I accept the cost of that remedy would be approximately $375,000. To the extent to which an opportunity was lost by SBTs, it is important to bear in mind their composition. They are made up of school administrators, outside professionals, from time to time parents, as well as COTA members. In that context I find that remedy would not be proportional and there would not be a rational connection between the award of $250.00 for each COTA member in the School District and the loss of opportunity by SBTs to consult with the Superintendent to identify EEN students and ensure their educational needs were accurately assessed. In addition, I am satisfied the lost opportunity to consult was limited to the February 1 to April 24, 2018 time frame when I find there was substantial compliance with Article D.3.1.1, or at the latest when the denial letters to SBTS were put in place in June or July of 2018.

I find that both the five FTEs of teacher time and damages remedies would incentivize the Employer to in future, if faced with a similar type of disagreement with the Union, opt to resolve that disagreement through the exercise of its management rights rather than adopting the collaborative, co-operative labour relations approach encouraged under Section 2 (d) of the

Code. That could undermine the parties' relationship, which reinforces my conclusion those remedies are not appropriate.

Under all the circumstances, I find it would not be appropriate to order either of those two remedies. I find a declaration to be an appropriate and sufficient remedy.

Summary and Conclusion

For the reasons provided, I find the Employer breached Article D.3.1.1 of the Collective Agreement by not identifying EEN students after consultation with SBTs to ensure the accurate assessment of student educational needs, by the required January 31, 2018 deadline. Accordingly, the grievance is granted in part.

I also find, while improvements to the process could be made, which the Employer has indicated it is open to, the Employer substantially complied with the basic requirements of Article D.3.1.1 by April 24, 2018, and in any event by June or July 2018.

I find declaratory relief to be an appropriate and an adequate remedial response in all the circumstances of the case and I decline to order the additional remedies sought by the Union.

Having reached those conclusions, I would encourage the parties to work together to improve the process. As a general comment, both the School District and COTA have important and relevant information for the productive functioning of the process, which is part of the Collective Agreement.

Both parties have an interest in ensuring the consultative process in Article D.3.1.1 is as clear, fulsome and effective as possible to ensure the purpose of the provision is met. Achieving that purpose is consistent with both parties' interest in giving full effect to the Ministry's Special Education policy. The Union has an additional interest in that a fulsome consultation process which ensures as accurate an assessment and provision of necessary support services as possible for EEN students will also be a means of giving effect to Article D.3.10.

Dated in the City of Burnaby, this 12th day of September, 2019

"MICHAEL FLEMING"

Arbitrator