In the Matter of an Arbitration under the *Labour Relations Code*

Between:

British Columbia Public School Employers' Association

(the "Employer")

And:

British Columbia Teachers' Federation

(the "Union")

Special Education Designations

LOU No. 17 MOA – Class Composition Joint Committee

Arbitrator:	Marguerite Jackson
Counsel for the Employer:	Michael Hancock
Counsel for the Union:	Patrick Dickie Gretchen Brown
Dates of Hearing:	October 15, 16, 29, 30, 2018 May 14, 2019
Place of Hearing:	Vancouver, BC

I

This case concerns Special Education designations and class composition provisions in the collective agreement and arises from Part II of Letter of Understanding No. 17 ("LOU No. 17") which is part of the 2013-2019 collective agreement and from a Memorandum of Agreement signed on March 9, 2017 (the "MOA").

In order to understand the current dispute it is necessary to refer to some history. That history is lengthy but a summary should be sufficient to explain my mandate.

The following paragraphs from the Union's Summary of Argument are a good starting point:

1. In 1987, BC teachers obtained the right to organize
2. Between 1987 and 1994, locally certified teacher associations negotiated local collective agreements with the province's school boards. The local collective agreements contained a variety of class composition provisions many of which turn on various special education categories contained in the Ministry of Education Special Education Services Manual (the "Ministry Manual").
3. In June 1994, the *Public Education Labour Relations Act* ("PELRA") came into force. It established a province-wide public school teacher bargaining unit. The Union became the exclusive bargaining agent for the province-wide unit and the BCPSEA became the exclusive bargaining agent for the school boards.
4. PELRA also introduced province-wide bargaining by designating cost provisions as provincial matters to be negotiated at the provincial level. Provisions dealing with workload were expressly designated as cost provisions. This included class composition provisions.
5. After the enactment of PELRA, the locally negotiated class composition provisions were rolled into the 1996-1998 provincial collective agreement and continued in the 1998-2001 collective agreement. At the provincial level, there were K-3 class size provisions and non-enrolling ratios negotiated, but no additional class composition provisions.

The parties were in bargaining in 2001 to renew the 1998–2001 collective agreement. However, in early 2002 the BC government passed legislation which imposed a new agreement, prohibited bargaining on a number of subject matters including class composition and removed pre-existing collective agreement provisions dealing with class composition among other subjects.

A number of challenges were made by the BCTF to the legislation and its successors over the next many years. Finally, on November 10, 2016 the Supreme Court of Canada ("SCC") determined the issue. A majority of the Court endorsed the BC Court of Appeal dissenting decision of Mr. Justice Donald who had held that the legislation was unconstitutional and ordered that the collective agreement language removed through that legislation be restored to the collective agreement immediately: see ***BCTF v. British Columbia* 2016 SCC 49.**

One result of this decision was that the class composition provisions that had been negotiated decades earlier were again part of the collective agreement.

At the time that the class composition provisions were negotiated, a Ministerial Order had been issued requiring the integration (or mainstreaming) of children with Special Needs into regular classrooms. The Ministry of Education had produced a Manual that identified and defined medically diagnosed conditions, identifiable disabilities and syndromes potentially relevant to a student's educational needs. The categories included conditions such as moderately mentally handicapped, visual impairment, autistic and severe learning disabilities to name a few.

There is significant variation in the class composition provisions that were negotiated by local parties in the seven years from 1987, when teachers were allowed to organize, to 1994 when province-wide bargaining was established by legislation. Some of the provisions limit the number of Special Education or Special Needs students who can be integrated into a regular class while other provisions require reductions in maximum class size when Special Needs students are included. A number of provisions provide for additional classroom support for students with Special Needs. Some provisions refer to Special Needs students in general terms while other provisions specify particular categories of students. There are also provisions that distinguish between Low Incidence/High Cost students and High Incidence/Low Cost students. This list is not exhaustive.

It is against that historical backdrop that the class composition provisions and the questions I have been asked to address should be viewed.

LOU No. 17 was mentioned at the beginning of this award. It forms part of the collective agreement and was negotiated by the parties in anticipation of the SCC decision to address what the parties would do if that decision impacted collective agreement language. If the decision did, LOU No. 17 required the parties to re-open negotiations regarding the provisions that were restored by the SCC.

In March, 2017 the British Columbia Public School Employers' Association ("BCPSEA"), the British Columbia Teachers' Federation ("BCTF") and the BC Ministry of Education agreed to the terms of the MOA referred to earlier. That MOA dealt with how the restored language would function. With respect to the class composition provisions a Class Composition Joint Committee was established but failing agreement the matter was to be referred to arbitration. The applicable sections of the MOA provide as follows:

> PART II – CLASS COMPOSITION PROVISIONS
>
> *Class Composition Joint Committee*
>
> 20. Given the complexity of class composition issues and the changes that have occurred within the definitions of special education designations and classifications, a Class Composition Joint Committee ("the Committee") will be established upon ratification of the Letter of Understanding #17 final agreement to examine and resolve outstanding issues related to class composition as follows:
>
> A. After establishing terms of reference, the Committee will meet and attempt to agree upon a consistent approach to how composition impacts class size/teacher workload for those School Districts that have class composition language;
>
> B. If, after meeting, the Committee is unable to agree upon a consistent approach to class composition, the Committee will meet and attempt to agree upon the definitions of special education designations and classifications in the current context of educational service delivery;
>
> C. If the Committee is unable to agree on the definitions of special education designations by June 30, 2018, the matter will be referred to Arbitrator John Hall for a final and binding determination of the definitions and classifications of special education designations in the current context of educational service delivery. Arbitration dates will be pre-booked during the fall of 2018 and best efforts will be made to conclude the arbitration hearing by November 30, 2018. The Provincial Parties will request that Arbitrator Hall's decision be issued as soon as possible and, in any event, no later than January 31, 2019. This decision will be used to determine class organization for the 2019/2020 school year and thereafter until the Provincial Parties negotiate an alternative approach to class composition.
>
> D. Unless the Provincial Parties agree otherwise, during the 2017/2018 and 2019/2019 school year, the current Ministry of Education definitions of special education designations and classifications will apply on an interim and without prejudice basis while the work of the Committee set out in paragraphs 8 (A-C) is completed.

E. The Provincial Parties recognize that the interim Committee approach to class composition issues set out in paragraph 8 (A, B and D) is agreed to on a without prejudice basis. Neither of the Provincial Parties will refer to this approach or the practices that it establishes regarding class composition in any future collective bargaining, arbitration or proceeding, including the final and binding arbitration referenced in paragraph 8 (C).

The work proposed for the Class Composition Joint Committee is set out in the following Terms of Reference:

Terms of Reference
Proposed approaches and tasks for the committee

1. Identify how the definitions of students with special needs, as outlined in the restored Collective Agreement language, apply in the current educational context. This may include analyses such as:
    a. Reviewing changes to the Ministry's special education policy since 1995.
    b. Identifying changes to special education categories and designations (pre-2002/2016).
    c. Examining data related to how many students fell within each special education category in 2001 and comparing this data to how many students fall within each category now.
    d. Examining how the nature of students have changed within each category.
    e. Examining differences in existing class composition language.
    f. Assessing the impact of changes to special education categories and designations and assigning categories and designations to the present student population.
    g. Assessing the impact of changes to special education categories and designations on class composition, language.

Unfortunately, the Committee was unable to reach agreement and the matter was referred to arbitration in accordance with paragraph 20(C) of the MOA.

For various reasons the timeline for the decision and the arbitrator mentioned in paragraph 20(C) changed but the mandate of the arbitrator appointed under the MOA remained the same. That mandate is to determine "the definitions and classifications of special education designations in the current context of educational service delivery."

After discussions between the parties, agreement was reached on most of the special needs categories or designations and that agreement on the applicability of the present definitions is appended to this award. There are only two categories in dispute. In 1995 these two categories were described as Category G – Autism and Category J – Severe Learning Disabilities. Today they are described as Category G – Autism Spectrum Disorder and Category Q – Learning Disabilities.

II

Special Education/Special Needs

Students with Special Needs were and are assigned to an appropriate Special Needs category by their school districts and the designations reported to the Ministry of Education on a particular Form for funding and other purposes. Once a student with Special Needs is identified, the school board must ensure that an Individual Education Plan ("IEP") is designed for that student.

Many of the local class composition provisions referred to, and were tied to, Special Education or Special Needs categories. These categories were contained in Ministry of Education Manuals. In the period before the class composition provisions were prohibited, there had been two Manuals. One was dated May 1985 and the second was dated June 1995.

The 1985 Manual contained the following Special Needs categories:

3.20 – Moderately Mentally Handicapped
3.21 – Severely and Profoundly Mentally Handicapped
3.22 – Physically Handicapped
3.23 – Visual Impairment
3.24 – Hearing Impairment
3.25 – Autistic
3.26 – Severe Learning Disabilities
3.27 – Mildly Mentally Handicapped (E.M.H.)
3.28 – Severe Behaviour Problems
3.29 – Rehabilitation
3.30 – English as a Second Language
3.31 – Indian Education
3.32 – Gifted
3.33 – Hospital
3.34 – Homebound

By 1988 Multiple Handicapped was added as category 3.19.

The 1995 Ministry Manual had a number of changes concerning special needs categories including the following:

a. The definition of Autism changed from that endorsed by the Canadian Society for Autistic Children (October 1977) to the definition of the American Psychiatric Association based on the Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition ("DSM – IV").

b. Moderately Mentally Handicapped and Severely and Profoundly Mentally Handicapped categories were combined into a single Moderate to Severe/Profound Intellectual Disabilities (now category C) with its own new definition.
c. The Moderate Behaviour Disorder category was created.

It was around this time that a number of the special needs categories began to be identified by letters. Autistic became Category G and Severe Learning Disabilities became Category J.

The Ministry Manual was further revised in 2002 and one revision replaced Severe Learning Disabilities (Category J) with Learning Disabilities (Category Q). In 2006 Category G was changed in the Manual from Autism to Autism Spectrum Disorder ("ASD"). There were further revisions in subsequent years but none to Category Q or Category G which are the only categories I have been asked to consider.

The current Ministry Manual contains the following special needs categories:

A. Physically dependent
B. Deafblind
C. Moderate to Profound Intellectual Disability
D. Physical Disabilities or Chronic Health Impairment
E. Visual Impairments
F. Deaf or Hard of Hearing
G. Autism Spectrum Disorder
H. Intensive Behaviour Intervention/Serious Mental Illness
K. Mild Intellectual Disability
P. Gifted
Q. Learning Disabilities
R. Moderate Behaviour Support/Mental Illness

I have reviewed all of the relevant Ministry Manuals as well as other exhibits that relate to Autism/ASD, Severe Learning Disabilities and Learning Disabilities. The material is extensive. However, the following descriptions concerning these categories represent only the variations over time upon which the parties' differing positions are based.

Severe Learning Disabilities/Learning Disabilities

Severe Learning Disabilities was a category in the 1985 Manual and the students were described as those whose learning difficulties "are so severe as to almost totally impede educational instruction by conventional

methods." These students were distinguished from the mild to moderately learning disabled who should be able to be supported by a Learning Assistance teacher. The following definition was contained in the Manual:

> Learning disabilities is a processing disorder involved in understanding or using symbols or spoken language. These disorders result in a significant discrepancy between estimated learning potential and actual performance. Generally, a discrepancy of two or more years on grade equivalent scores or a similar discrepancy on standardized score comparisons is recognized as significant. This discrepancy is related to basic problems in attention, perception, symbolization and the understanding or use of spoken or written language. These may be manifested in extreme difficulties in thinking, listening, talking, reading, writing, spelling or computing.

In the 1995 Manual the heading had been changed to "Students with Learning Disabilities" but those eligible for funding remained the students with severe learning disabilities who, in addition to other criteria, had to demonstrate "a discrepancy of 2 standard deviations between estimated learning potential and academic achievement as measured by norm-referenced instruments in Grades 3-12." This disability was also referred to as Category J.

The 2002 Manual still used the heading "Students with Learning Disabilities" but no longer required a learning disability to be severe before a student could be designated for collective agreement or Ministry purposes. The reference to "two standard deviations" had changed to the following language: "Students with learning disabilities may demonstrate a significant discrepancy between estimated learning potential and academic achievement as measured by norm-referenced achievement instruments in Grades 4-12."

Autism/Autism Spectrum Disorder

In both the 1985 and the 1995 Manual the only students who could be identified and placed in the Autistic category were those who had been diagnosed as having autism. The 1995 Manual specifically excluded from this category "[s]tudents who present with any of the cluster of disabilities referred to as "pervasive developmental disorders." Instead, such students were to "be assigned to the category that best reflects the nature of their disabling conditions and the type and intensity of interventions required." This continued to be the state of affairs in the 2002 Manual.

Autism changed to Autism Spectrum Disorder (ASD) in the 2006 Manual and its composition now included all of the following categories: Autistic Disorder; Pervasive Developmental Disorder–Not Otherwise Specified/AtypicalAutism ("PDD-NOS/AtypicalAutism"); Asperger Disorder/Syndrome; Rett Syndrome; and Childhood Disintegrative Disorder. This change was subsequently adopted in the DSM -5 and is still found in the 2016 Ministry Manual.

The following table sets out the Employer's description of the functional limitations for students with Autism as that term was defined prior to 2002 using DSM-IV criteria compared to the matching level in the DSM-5 Manual:

Category G 1995-2003 (DSM IV)	**REQUIRED DSM V DIAGNOSIS**
Marked disorder of communication	Level 2 Severity – Social Communication "Marked deficits in verbal and non-verbal social communication skills"
Severe disturbance of intellectual development	"with an accompanying intellectual impairment"
Delayed language acquisition	"with an accompanying language impairment"

III

The Evidence

Five witnesses testified: Renzo Del Negro, CEO of BCPSEA; Glen Hansman, BCTF President at the time of his testimony; Ryan Hazelden, Manager of Data Infrastructure and Management, Ministry of Education; Dr. Hélène Ouellette-Kuntz, an expert on Autism Spectrum Disorder; and Catherine Jameson, a retired educator with extensive education and work experience in supporting children with special needs.

Renzo Del Negro, the CEO of BCPSEA, was present at the bargaining table in 2014 when LOU No. 17 was concluded. He also participated in the negotiations that took place shortly after the November, 2016 SCC decision and that resulted in the MOA.

The MOA refers to collective agreement provisions that were "restored" by the SCC decision. Mr. Del Negro testified that this meant the

restored language was to reflect the language that had existed in the deleted provisions in 2001. He felt that this was the shared understanding of the parties at the bargaining table. Any changes to the restored provisions would have to be negotiated.

Mr. Del Negro reviewed BCPSEA's Bargaining Minutes from February 14, 2017 and its class size and composition proposal. He explained that the parties knew there would be challenges to the restoration of the class composition language since the number of Special Needs students had changed as had the definitions of special education designations and classifications. The proposal was for the establishment of a Committee to attempt to agree on a consistent approach to composition but, failing that, "to attempt to agree upon the definitions of special education designations and classifications in the current context of educational service delivery." If no agreement could be reached the matter would be referred to arbitration. The only difference between this proposal and the corresponding class size and composition provision in the final version of the MOA was the arbitrator's name and specific dates.

Mr. Del Negro testified that in the discussions concerning the mandate of the arbitrator he expressed the intent that the arbitrator was to determine what the definitions would be to capture the students equivalent to those in 2001.

At a bargaining meeting held on February 7, 2017 the Minutes record a discussion about Category J:Autism. The Minutes reflect that Glen Hansman, BCTF's then President, referred to the fact that a student designated in Category G now may have been designated differently in 2001. Mr. Del Negro also referred to BCPSEA's view that the students who would be captured for workload in the restored class composition provisions are the ones who would have been captured by the language that existed in 2001 and that restoration did not mean expanding definitions. The Union's Minutes of the same date record a similar comment from Mr. Hansman that "we're not here to add to what was."

In cross-examination, the following points were established. First, the initial discussion with respect to special education, including class size and composition, was held on December 13, 2016. At that meeting the Union position as expressed by Mr. Hansman was to simply change the category letters and names in the class composition provisions to today's category letters and names. Mr. Hansman gave the example of category J that had "morphed to category Q." Mr. Del Negro had replied that it wasn't that simple.

Second, Mr. Del Negro agreed that in a series of subsequent meetings in December and January, 2017 he had said the 2001 definitions should be used but the Union wanted to use the current categories and definitions and adjust for changes in category letters. Third, Mr. Del Negro agreed that the parties remained at odds as to what definitions – current or from 2001 – correlated to restoration.

Mr. Hansman also testified. It was clear from his evidence overall that the Union's view of what the implementation of the restored provisions should achieve was very different from BCPSEA's. The Union's position, as explained by Mr. Hansman at various meetings between the parties in January and February, 2017, was that the current Ministry categories and definitions should apply and all that was required was housekeeping adjustments to the letter designations and category names that had changed over the years.

The focus of Ryan Hazelden's evidence was the Waterfall Charts that were based on data collected for many years from Forms 1701. Form 1701 is a Student Data Collection document upon which all funding for School Boards is dependent and which each Board must complete. The Form includes, among other data, the number of students in each Special Needs category. The Charts show the change in the number of students in a particular Special Needs category over time. The Charts also show the movement of students from one category to another.

Mr. Hazelden explained that with respect to category G there was a steady growth of students from 1996 to 2017. However, in 2006 the growth was dramatic with an increase of 1,122 students. 540 of the students who were newly designated as belonging in category G came from category D (Physical Disability/Chronic Health Impairment) while 182 of the new students in G had had no diagnosis the previous year.

As I noted earlier in this award it was in 2006 that category G that had previously been headed "Autism" changed. Category G was now defined in the Ministry Manual as "Autism Spectrum Disorder" and included not only Autistic Disorder but also PDD-NOS, Asperger's, Rett's and Childhood Disintegrative Disorder.

Prior to 2006 the increase in the number of students in category G each year ranged from 88 in 1997 to 331 in 2005. After the sharp increase of 1,122 students in 2006, the average growth in subsequent years was in the mid 400s. By 2016 Category G had increased from 1,312 students in 2001 to 8,459 students.

Category J was Severe Learning Disabilities. Mr. Hazelden referred to the Waterfall Charts that showed 15,075 students were included in category J in 1999. In 2002 category J was replaced by category Q, Learning Disability. Category Q had 15,236 students in 2002, of whom 10,748 came from the now defunct category J, while 3,642 students who had not previously been in a special needs category also became part of category Q. Much smaller numbers of students from other categories moved to category Q and made up the 15,236 total.

Doctor Hélène Ouellette-Kuntz is a tenured professor in the Department of Health Sciences at Queen's University in Kingston, Ontario who testified by video conference. She has close to 30 years experience in the field of intellectual and developmental disabilities including Autism Spectrum Disorder or ASD. Dr. Ouellette-Kuntz has particular expertise concerning the changing prevalence of ASD and her research has involved collaborations with British Columbia among other provinces as well as international collaborations.

Dr. Ouellette-Kuntz had reviewed the Waterfall Data as well as the changes in the Special Education categories over time. She was asked by the Union to answer the following questions based on her expertise:

1. What factors have caused or contributed to changes in the numbers of students in the various special education categories in British Columbia public schools from 1996 to present? Where more than one factor has caused or contributed to changes in the numbers of students with a particular special education designation, to the extent possible please advise as to the relative significance of the various factors.
2. In regard to category "G" Autism Spectrum Disorder (formerly Autism), do students with PDD-NOS/Atypical Autism, Asperger Disorder/Syndrome, Rett Syndrome, and Childhood Disintegrative Disorder have significantly less limitations than students with Autistic Disorder?
3. What if any difficulties would there be in applying definitions from the Special Education Manual in effect in 2001 (i.e. the 1995 Special Education Manual) to students today?

In providing her opinion on the three questions Dr. Ouellette-Kuntz used a number of terms that may need an explanation. *Prevalence* is one such term and means the number of cases of a particular condition in a population at a certain point in time or over a period. Dr. Ouellette-Kuntz explained that there are a number of factors that could contribute to changes in *prevalence* including the following: the size of the underlying population; response to effective interventions or treatments; *incidence* which is the number of new cases of that condition in a given time frame; recognition of the condition due to increased awareness of parents and clinicians; earlier age at

diagnosis as a result of improved awareness and availability of diagnostic services for the particular condition; diagnostic substitution whereby different diagnoses are given to the same individuals over time; and changes in diagnostic criteria resulting from changes in the understanding of the condition.

Dr. Ouellette-Kuntz summarized her views in the following paragraph from p. 9 of her opinion letter:

> In summary, multiple factors can be expected to have had an impact on the number of children in each special education category over time beside the changes in definition. The impact of these various factors is difficult to quantify and is likely different for each special education category. For autism/ASD, such factors (diagnostic substitution, earlier age at diagnosis), can reasonably be assumed to account for 2/3 of the increase over time. It is clear that the prevalence had been steadily increasing before the change in definition. The broadening of the special education category G from autism (autistic disorder) to ASD (autistic disorder, Asperger disorder and PDD-NOS) would not necessarily mean that the additional children identified (the proportion of the increase due to changes in the definition) would be less severely affected than the children identified prior to the change in definition. Finally, in my opinion, there is no practical way to use DSM-IV subtypes to determine eligibility for special education category G going forward.

Catherine Jameson has vast experience working with special needs students both as a resource teacher and in a teaching evaluation centre where she provided instructional strategies for students with learning disabilities. She also has significant administrative experience and is currently being trained to perform contract work in special education audits and general enrolment audits.

Ms. Jameson's explanation of how a student would meet the definition of Category J in the 1995 Manual is summarized in the Employer's Outline of Legal Argument in paras. 60 and 61:

> 60. Ms. Jameson explained that to meet the definition of Category J. a student had to operate on a discrepancy of 2 standard deviations between their estimated learning potential and academic achievement as measured by norm-referenced instruments in Grade 3-12. Ms. Jameson explained that an average standardized test would have a score of 100 and that a "standard deviation" was 15. Therefore, a student with two standard deviations would be testing between 70-84.
>
> 61. In terms of the process for designating students, Ms. Jameson confirmed a student would need to work with the school based team and undergo a

psychoeducational assessment to be designated as learning disabled – consistent with the process outlined at … page 93 [of the 1995 Manual]:

> **Identification and Assessment**
>
> Most students included in the Severe Learning Disabilities category will be identified by the school system through the progressive assessment process described in Section C. In some cases, students will have been identified prior to school entry through assessments in clinical settings.
>
> If these measures prove insufficient, the school-based team will refer the student for assessment. The assessment is often multidisciplinary, supplementing the psychoeducational assessment with information from the speech-language pathologist or the occupational therapist.
>
> The assessment of a student with a learning disability should:
>
> - integrate information from a number of sources (e.g., the family, health, social-emotional adjustment, developmental history);
> - assess overall intellectual functioning, specific cognitive abilities, pre-academic or academic skills and socio-emotional status;
> - assess the learning strengths and weaknesses, and their implications for learning; and
> - contribute to the process of planning and evaluating the education program.

Category J was replaced with Category Q in 2002 and was headed "Learning Disabilities." According to Ms. Jameson a significant change was that the definition had broadened to include mild to moderate learning disabilities.

IV

Positions of the Parties

The issue between the parties is whether, as the Union asserts, the present G and Q categories are applicable to the restored class composition provisions or whether, as the Employer argues, category G and J (the predecessor to Q) as they were defined in the 1995 Manual are applicable to the restored class composition provisions.

The arguments of the parties can be summarized as follows.

The Union submitted that despite the complex history the issue is quite straightforward. Many of the local class composition provisions that were negotiated decades ago were linked to various categories contained in the Ministry Manuals. In its Summary of Argument the Union put the question this way:

> Did the parties tie themselves to a snapshot of the Ministry categories as they existed at a particular point in time (the "Snapshot Definition") or did the parties tie themselves to Ministry categories as they continued to evolve over time in accordance with changes in science and policy (the "Evolving Definition").
>
> (para. 62)

The Union asserted that it is the Evolving Definition that the parties chose based on the following reasons:

> First, the parties acted in accordance with the Evolving Definitions until the deletion of the class compositions in 2002. The 2001 snapshot that the employer is advancing is significantly different than the definitions that existed when the local class composition provisions were negotiated some seven to twelve years earlier. The employer accepts the evolution of the categories until 2001, but wants the evolution to stop there. To do so is contrary to the acceptance... of the evolution up until that date.
>
> Second, by tying class composition provisions to Ministry categories the parties established bright lines to easily identify students with special needs for the purpose of class composition provisions. It is not feasible to accurately apply long obsolete definitions to identify students who would have been designated in a particular special needs category in 2001, and doing so would give the employer a discretion that is contrary to the bright lines that the parties established when the provisions were negotiated.
>
> Third, the Evolving Definition is a principled approach. In some instances it will result in more students being counted for the purpose of class composition provisions, in others it will exclude students who would have been counted in the past. On the other hand, the employer is not seeking a consistent Snapshot Definition for all categories. The employer wants to apply the Snapshot Definition to certain categories that expanded after 2002, while accepting the Evolving Definition for other categories in which the numbers of designated students has decreased significantly since 2002. We say that our principled approach to defining special needs categories should be adopted over the cherry-picking approach sought by the employer.
>
> Fourth, applying outdated, obsolete, and sometime offensive definitions would result in designated special needs students who need supports being left out of the collective agreement provisions that are designed to provide supports to students who need them. The employer receives Ministry funding for each category G and Q students and it should be required to provide each designated student with all of the supports that were negotiated by the parties in the collective agreement for those students.
>
> (paras. 64-67)

In addition, the Union submitted that applying the Evolving Definition would be consistent with awards that dealt with changes to external standards that affected provisions in the collective agreements and the arbitrators held that the obligations in the agreements still remained: see *Weyerhaeuser Canada Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 105 (Retiree Benefits)* [1999] OLAA No. 821 (Devlin) adopted in *Health Employers' Assn. of British Columbia v. Nurses' Bargaining Assn.* [2003] BCCAAA No. 157 (Dorsey); *Richmond (City) v. IAFF, Local 1286* [2002] BCCAAA No. 341 (Kelleher).

The Employer began its argument by referring to the evidence which, from its perspective, demonstrated that there are now a significant number of students in Category G and in Category Q (the closest comparator in 2001 being Category J) who would not have been included in those categories in 2001. The following paragraphs from the Outline of Legal Argument expand on this point:

> 6. ...
>
> a. Category G (Autism) now includes students across the full autism spectrum, including students at the higher functioning end of the spectrum who would not have been included in this category in 2001 (e.g. Asperger's students).
>
> b. Category J (Severe Learning Disabled) is now Category Q (Learning Disabled) and includes students with mild to moderate learning disabilities who were not included in Category J (or as designated students at all) in 2001.
>
> 7. The consequences of the expansion of these categories are significant for Boards, given the restrictive nature of class composition language. Collective agreement provisions that limit the inclusion of special needs students, or require reductions in class size, are based on two foundational assumptions:
>
> a. that designated special needs students materially impact teacher workload in a manner distinct from students without special needs; and/or
>
> b. membership in specific Ministry funding categories can be used to determine the relative workload impact of designated students.
>
> 8. Setting aside concerns with the accuracy of these assumptions, a purposive approach which respects the original intent of the parties must reflect the severity of the educational needs and workload impact of the classifications as they existed in 2001. The 1995 Manual formed the backdrop for the negotiation of all of the restored language, and framed the expectations of the parties regarding the composition of Ministry categories. The expansion of restrictive composition language to include students with less severe disabilities than those which comprised the relevant classification in 2001 would distort the original intent of the parties.
>
> 9. References to Autism, Category G, Severe Learning Disabled and Category J should be interpreted using the Ministry's 1995 Manual. The Information needed to designate students for the purposes of class size and composition language using the 1995 Manual definitions is already collected and would not require a student to be re-assessed.

The Employer's position overall was that Category G and Category J ought to be restored in a manner consistent with the Ministry designations

before 2001 and that an expansion (or contraction) of those categories would be contrary to the arbitral principles of interpretation and the plain meaning of restoration.

The Employer relied on the bargaining history that led to the MOA which focused on getting the language of the class composition provisions back to what it was, the plain meaning of the word "restoration," an arbitrator's lack of jurisdiction to amend, alter or add to the collective agreement terms as well as the approach taken by Arbitrator Munroe where he had to consider the impact of Ministry category changes on collective agreement provisions: see ***BCPSEA and BCTF*** [1998] BCCAAA No. 113. (This award will be discussed in Part V).

The Employer also reviewed in detail the evidence concerning the changes in Category G (Autistic). In 1995 that category included only students diagnosed with autistic disorder but by 2006 was described as Category G (Autism Spectrum Disorder) and included syndromes such as Asperger's and Rett's which had previously not been included in Category G. A similar review was made of Category J (Severe Learning Disabilities). It was eliminated from the Manual in 2002 when Category Q (Learning Disabilities) replaced it.

The Employer submitted that references in collective agreement provisions to students with Autism or Category G should include only those students who would have been included in 2001. The Employer asserted that this is not the impossibility claimed by the BCTF but can be done using diagnostic information that is already available and the appropriate criteria is set out in Part II of this award.

The Employer took a similar position with respect to the interpretation of Category J and argued that students whose testing results are not at least 2 standard deviations from the norm – which was a requirement to meet the Category J definition – should not be considered as included in Category Q (the replacement for Category J) for the purposes of the class composition provisions of the collective agreement. The Employer stressed that the information necessary to determine whether current students meet this criteria will be found in student files.

V

Analysis and Decision

The history of special education categories and definitions is complicated and the evidence concerning Autism, ASD and Learning Disabilities is complex. Both are necessary to understand the issues and to assist with my interpretative task. That task is an unusual one since, as the Union pointed out, "[t]here is no one particular class composition provision to interpret, or one particular collective agreement to examine, or any particular bargaining history to consider" (Summary of Argument, para. 71). What I have been asked to do is determine the proper interpretation of restored class composition provisions that referred to "Autism" and/or Category G students as well as to "Severe Learning Disabled" and/or Category J students.

First, class size and composition provisions have been interpreted by arbitrators "in a purposeful manner as benefits for teachers and students to preserve a positive learning environment": see *British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation* [1999] BCCAAA No. 370 (Taylor), para 40. I agree with that approach and recognize as many arbitrators have that class composition provisions are workload limits that provide benefits for teachers: see, inter alia, *Sooke School District No. 62 v. Sooke Teachers' Assn.* [1995] BCCAAA No. 27 (McPhillips). The issue before me is the breadth of those negotiated rights.

Second, it is common ground that as a result of the SCC decision the class composition provisions were restored to the collective agreement. The term "restored" is normally understood to mean that something is brought back to its former condition.

Third, as with any collective agreement interpretation, the object is always to discover the mutual intention of the parties and to do so by construing the words found in the agreement which in the ordinary course should be given their natural meaning: see, inter alia, *Pacific Press v. Graphic Communications International Union, Local 25-C* [1995] BCCAAA No. 637 (Bird).

While there are no specific collective agreement articles to construe, there are words in the restored class composition provisions whose meaning must be determined. Those words – Autism and Severe Learning Disabled – should be interpreted within the general context in which they were used. That context includes the fact that a Ministerial Order had been issued requiring the integration of children with special needs into regular classrooms and a

Ministry of Education Manual had been produced identifying and defining numerous conditions, disabilities and syndromes that could be used to identify and assess students with special needs. Subsequently, class composition provisions were negotiated by some locally certified teacher associations and individual school districts. Some of those provisions identified special needs students within particular categories as defined in the Manual and specified certain requirements when those identified students were included in a regular classroom such as reductions in class size or limits on the number of students in specific categories who could be included in a regular class.

The essence of the Union's Evolving Definition argument is that a class composition provision that refers to Autism or Category G should be interpreted as though it refers to ASD/Category G. Furthermore, the definitions for ASD/Category G from the Manual currently in effect should apply. As for Category Q, the effect of the Union's position is that a class composition provision that refers to Severe Learning Disabilities or Category J should be interpreted as though it refers to Learning Disabilities/Category Q and the definitions from the Manual currently in effect should apply.

In order to accept the Union's position it would be necessary to look at the words "Autism" and "Severe Learning Disabled" as they are found in class composition provisions and give those words something other than their plain meaning.

The Union based its position that both parties had tied themselves to the Ministry categories as they evolved over time on four arguments outlined earlier in Part IV of this award. I have considered those arguments but am not able to agree with them.

It is undisputed that many of the class composition provisions are tied to various Ministry categories. But the Union argued that the parties tied the class composition provisions to Ministry categories as they evolved over time and not to the categories in existence when the provisions were negotiated, which were the categories found in the 1985 Manual, or the categories in the 1995 Manual which governed the classifications in 2001 before the class composition provisions were removed by legislation in early 2002.

The Union stressed that the Employer is relying on the definitions from the 1995 Manual which did not exist when the class composition provisions were negotiated between 1987 and 1994. The Union says this shows that the Employer accepted evolving definitions until 2001 but not beyond that point, an approach which is untenable.

The Union made a similar point in another aspect of its argument when it said that applying the Ministry categories as they evolved over time is a principled approach in contrast to the Employer's "cherry-picking." The Union asserted that the Employer has acted inconsistently by applying the definitions that existed before 2002 to categories that later expanded – and in particular to Autism and Severe Learning Disabled – while accepting today's definitions for other categories where the number of designated students has significantly decreased since 2002.

I cannot agree with the Union's assertion. The Employer has taken the position that the proper approach is to look at who the students were who were included in particular categories and referred to in class composition provisions before 2002. If the categories have not functionally evolved and the students in a particular category today are functionally the same as the students in that category in 2001, then the Employer has agreed that provisions referring to students in such categories include students in the same or similar categories today. The fact that the number of students in a particular category has expanded since 2001/2002 is irrelevant to the agreements reached. I need go no further than Category H as an example of the Employer's position. Category H was referred to as Severe Behaviour Problems or Severe Behaviour Disorders in the 1985 and 1995 Manuals and is now referred to as Intensive Behavour Interventions or Serious Mental Illness. According to a November, 2017 BCTF publication "Education Facts," the number of students in this category has increased by 21.33% since 2000-2001. Yet the Employer has agreed that collective agreement provisions that refer to Severe Behaviour Problems/Disorders are referring to students designated in the present Category H and has done so because the students are functionally the same and the nature of the challenge in the classroom remains the same.

The same functional approach also explains why the Employer accepts the definitions from the 1995 Manual for Autism and Severe Learning Disabled even though the class composition provisions containing those terms were negotiated earlier. The categories for Severe Learning Disabled and for Autism in the 1985 Manual as well as in the 1995 Manual included the same type of students.

In the case of the Severe Learning Disabled category, both Manuals said that the learning disability must be severe and both Manuals included comparable criterion: "a significant discrepancy between estimated learning potential and actual performance [which is] [g]enerally, a discrepancy of two or more years on grade equivalent scores or a similar discrepancy on standardized score comparisons" (1985); "a discrepancy of 2 standard deviations between estimated learning potential and academic achievement" (1995).

As for the Autism category, while the definition of Autism changed from the 1985 Manual to the 1995 Manual, both Manuals limited the students who could be so identified to those with autism only and did not include students with any other developmental disorder. Further, the symptoms, although worded somewhat differently, were basically equivalent.

The definitions and the type of students in both the Autism and Severe Learning Disabled Categories in the 1985 Manual and the 1995 Manual were the same in their essential nature. It follows that the Employer's acceptance of the 1995 Manual for these two categories had nothing to do with the acceptance of the concept of an Evolving Definition. Instead the acceptance was based on the fact that the students in the Autistic category between 1987 and 1994 were functionally the same as those in the Autism category in the 1995 Manual and this was also true of the students in the Severe Learning Disabilities Category.

There were two other aspects of the Union's Evolving Definition argument. One was that the parties tied class composition provisions to Ministry categories to establish bright lines to easily identify Special Needs students for the purpose of class composition provisions. I accept that the parties linked the Special Needs students identified by category to the corresponding category in the Ministry Manual. But there is no basis for concluding that the link extended to categories whose definitions had changed and expanded.

The remaining point advanced by the Union to bolster the Evolving Definition argument was that the application of outdated definitions would lead to Special Needs students not receiving supports that were negotiated in the class composition provisions. The Employer responded by stressing that each Special Needs student has an IEP and it, not the agreement, determines what support services would be provided to a student based on an individualized assessment. I accept the Employer's argument in this regard.

Fourth, I have carefully reviewed the decision of Arbitrator Munroe in ***BCPSEA and BCTF*** [1998] BCCAAA No. 113 which is the only award cited by the parties that bears any similarity to the instant case. The Employer asserted that the conclusion reached by Arbitrator Munroe conforms with the position advanced by BCPSEA in this matter. The Union disagreed and argued that Arbitrator Munroe took the Evolving Definition approach by accepting the evolution of the category in issue before him which was Severe Behaviour.

In my view Arbitrator Munroe's decision is consistent with the Employer's position. The following examination of the Munroe decision should illustrate the basis for my opinion.

Article 9, headed "Teacher Workload," included Article 9.K which was the relevant collective agreement provision in the Munroe decision. Article 9.K addressed the inclusion of special needs students in regular classes. Article 9.K.2 and Article 9.K.6 were the key provisions:

2. For the purpose of this Article, a "student with special needs" shall be defined as a student identified by Central Screening as requiring modification of school practices or specific education services in the following Ministry of Education categories:
   Severe:
   1.19 dependent handicapped
   1.18 moderately mentally handicapped
   1.18 severely handicapped
   1.18 autistic
   1.17 severe behaviour

   Less Severe:
   1.18 physically handicapped
   1.18 visually impaired
   1.18 hearing impaired
   1.17 severe learning disabled
   1.17 mildly mentally handicapped
6. A teacher of any regular class shall not be required to enrol more than one (1) student with special needs identified in categories 1.19 (dependent handicapped), 1.18 (moderately mentally handicapped, severely handicapped, autistic) and 1.17 (severe behaviour). No more than two (2) students with special needs shall be enroled in any one (1) class, save for very exceptional circumstances, without the agreement of the teacher.

As is apparent from those provisions, students with special needs were defined as students in certain specific Ministry of Education categories, some of which were headed "Severe" and some of which were headed "Less Severe." A limited number of these special needs students could be enroled in any regular class. The category in issue before Arbitrator Munroe was "Severe Behaviour" under the "Severe" heading. Severe Behaviour was a defined funding category in the Ministry Guidelines and was one of the categories in the collective agreement that met the definition of a student with special needs in Article 9.K.2. It was numbered 1.17.

Arbitrator Munroe had this to say about the purpose of including students with special needs in regular classes.

> 5... As a matter of public policy, school boards are required to provide special needs students with an educational program in classrooms where such students are integrated with other students who do not have special needs, unless the circumstances in a given instance dictate otherwise (Ministerial Order M150/89 as amended by M397/95). The assumption underlying the public policy is that the inclusion of special needs students in regular classrooms enhances the educational experience of everyone concerned.
> 6. No doubt, the parties to this collective agreement support the public policy aforesaid. But as they have also recognized, the implementation of the public policy must have consequences in terms of class size and composition. As regards the composition of regular classes, Article 9.K.6 says that a teacher of a regular class shall not be required to enrol more than one special needs student identified in the categories headed "Severe" in Article 9.K.2; and not more than two special needs students in total...The obvious rationale for the limits imposed by Article 9.K.6 is the extra challenges facing the regular classroom teachers by the integration of the special needs students in the Article 9.K.2 categories.

Arbitrator Munroe went on to note three points. First, while all the categories listed in Article 9.K.2 were Ministry funding special needs categories, not all Ministry special needs categories were referred to in Article 9.K.2. "Rehabilitation," for example, was also a defined funding category in the Guidelines. Its programs were aimed at junior high school students with severe socio-emotional problems who had difficulty coping with the traditional school structure. But Rehabilitation was not a category included in Article 9.K.2. In other words, students identified under the Rehabilitation category were not considered special needs students under Article 9.K.2. Second, the headings of "Severe" and "Less Severe" were collective agreement labels and not Ministry groupings. Third, "Article 9.K.2 incorporates by reference the definitional substance of the Ministry categories of special needs students" (para. 8).

The predecessor to Article 9.K was in the 1990-92 agreement and the only substantive difference was that the Severe Behaviour category had been numbered 3.28. The collective agreement in effect at the time of the Munroe decision was the 1992-95 agreement that had been the result of an interest arbitration. This agreement was later extended and in force in 1998 when the dispute was arbitrated.

While the 1992-95 agreement was being negotiated and the interest arbitration was held, the numbering of funding categories for special needs students was again changed by the Ministry. Severe Behaviour which had been numbered 1.17 was now identified as 1.16 and also referred to as

category H. The parties agreed that Severe Behaviour, category H, numbered 1.16, should be considered the equivalent of Severe Behaviour, numbered 1.17, in Article 9.K.2 and 9.K.6.

The problem arose over a new category that was created and described as Moderate Behaviour Disorders including Rehabilitation Programs. It bore some resemblance to the Rehabilitation category mentioned earlier. The number assigned to this new category was 1.17 which had previously been the number assigned to "Severe Behaviour." This new category was also described as category M. It was to include students with behaviour problems that went beyond mild but stopped short of severe.

The issue before Arbitrator Munroe was whether category M should be considered part of the Article 9.K.2 reference to "1.17 severe behaviour" and thus be included in Article 9.K.6 which limited the number of students so identified to no more than one in any regular class. The union said that category M should be included while the school board argued that category M was not one of the categories listed in Article 9.K.2 and was irrelevant to Article 9.K.6.

The following passage sets out Arbitrator Munroe's conclusion that the category M students were not included in Article 9.K.2 and so could not be counted in Article 9.K.6 for class composition purposes:

> 59. To repeat: there does not exist any perfect definitional overlap – between the old and the new. The union is correct in principle that changes of Ministry numbers and labels cannot deprive it of negotiated rights. **But the union is not entitled to use Ministry funding decisions to stretch the collective agreement's class size provisions beyond their original intent**. When the parties decided to adopt Ministry funding categories and definitions in the formulation (in part) of their class size agreement, they opened themselves up to precisely the kind of issue which has now arisen between them. Clearly, neither side can be allowed to skew the original bargain by reference to mid-contract Ministry changes. In the absence of perfect overlap between the old and the new, **I think the issue is properly addressed by asking which of the two competing positions most closely coincides with the parties' bargain as originally framed and mutually understood**. Expressing the matter that way, I conclude that the employer's position is the more likely expression of true intent by a clear margin. (emphasis added)

It is evident from this passage that when it came to determining whether a new category of students – category M – was included in Article 9, Arbitrator Munroe did not base his conclusion on what had changed in the relevant Ministry categories over time because that would "skew the original bargain." Instead, he looked to "the parties' bargain as originally framed and mutually understood." I find his reasoning persuasive.

I have not forgotten the Union's assertion that Arbitrator Munroe accepted what it calls the "Evolving Definition" whereby the parties tied themselves to Ministry categories as they evolved over time. However I must respectfully disagree. While Arbitrator Munroe did refer in para. 12 to "the evolution of category 3.28-severe behaviour (which later became 1.17 severe behaviour)", in my opinion he was simply noting that the focus of the proceeding before him was the changes over time in the Severe Behaviour category from when it first became part of the collective agreement. But his conclusion was that the class size and composition language at issue must be interpreted in accordance with the original bargain despite any changes in the Ministry categories.

Fifth, I have considered the Union's submission that the Evolving Definition that I am urged to apply is consistent with awards that dealt with changes to external standards affecting collective agreement benefit provisions: see, inter alia, *Weyerhaeuser Canada Inc.,* supra. The essence of those awards was that since the parties had agreed that the employer would pay for a specific percentage of certain health benefits, legislative changes to the government medical plan that resulted in greater cost to the employer for those same benefits had to be borne by the employer as such an external change did not relieve either party of its collective agreement obligations.

I cannot agree that the situation in the case before me is analogous to that in the three medical benefit awards. In those cases it was evident what benefit the employers had agreed to provide to its employees. For the situations to be comparable, any references in class composition provisions to "autism" or "severe learning disabled" would need to include words such as "autism and any subsequent definitions" or "severe learning disabled and any replacement category." It has not been suggested that such references are contained in any of the restored class composition provisions.

Despite the Union's skillful and thorough submission, I am not persuaded for the reasons I have given that the parties tied themselves and the class composition provisions to Ministry categories as they changed over time. I am left with the categories that were originally negotiated and that should be interpreted, as Arbitrator Munroe commented, in the context of the "definitional substance" of the Ministry categories that existed then. In my view this best reflects the original bargain struck.

It is my conclusion that restored class composition provisions that include the terms "Autism" and/or "Category G" as well as the terms "Severe Learning Disabled" and/or "Category J" must be applied only to students who would have been included in those categories under the 1995 Manual.

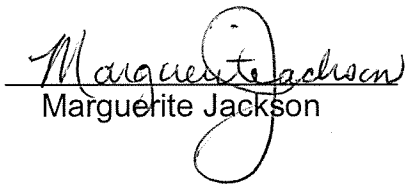
VI

For all the foregoing reasons I make the following declarations:

1. Restored class composition provisions which refer to "Autism" and/or "Category G" students apply only to students who would have been included in "Category G" under the 1995 Manual.
2. Students currently in "Category G" who would not have been included in this Category in 1995 must, in accordance with the terms of the 1995 Manual, be placed in the most appropriate (if any) 1995 category for class composition purposes.
3. Restored class composition provisions which refer to "Severe Learning Disabled" and/or "Category J" students apply only to students who would have been included in "Category J" under the 1995 Manual.
4. Students currently in "Category Q" who would not have been included in "Category J" in 1995 are not "designated" or "special needs" students for the purposes of interpreting restored class composition provisions.

I retain jurisdiction over all aspects of the implementation of this award.

Dated at the City of Vancouver this 28th day of August, 2019.



Marguerite Jackson

BCPSEA –and- BCTF (Special Education Designations)

Items Agreed to Between the Parties

In addition to my findings on categories G and Q above, the parties have agreed as follows regarding the remaining Ministry of Education special education categories.

The agreements set out below apply only to collective agreement provisions whichrefer to Ministry categories, or Ministry category groupings, for collective agreement purposes.The agreements set out below do not apply to collective agreement provisions where the local parties did not intend (either explicitly or through past practice) to refer to Ministry definitions/categories. Disputesin this regard will be resolved separately through the grievance provisions of the relevant collective agreement.

- Collective agreement provisions that refer to students in the former category Physically Dependent with Multiple Needs (Dependent) (1995 Manual) are referring to the students designated in the present category A – Physically Dependent.

- Collective agreement provisions that refer to students in the former category Deafblind (1995 Manual) are referring to the students designated in the present category B – Deafblind.

- Collective agreement provisions that refer to students in the former categories Moderately Mentally Handicapped (1985 Manual), Severely and Profoundly Mentally Handicapped (1985 Manual) or Moderate to Severe/Profound Intellectual Disabilities (1995 Manual) are referring to the students designated in the present category C – Moderate to Profound Intellectual Disability.

- Collective agreement provisions that refer to students in the former category Physical Disabilities or Chronic Health Impairments (1995 Manual) are referring to the students designated in the present category D – Physical Disability or Chronic Health Impairment.

- Collective agreement provisions that refer to students in the former category Visual Impairment (1985 Manual and 1995 Manual) are referring to the students designated in the present category E – Visual Impairment.

- Collective agreement provisions that refer to students in the former category Hearing Impairment (1985 Manual) or Deaf or Hard of Hearing (1995 Manual) are referring to the students designated in the present category F – Deaf or Hard of Hearing.

- Collective agreement provisions that refer to students in the former categories Severe Behaviour Problems (1985 Manual) or Severe Behaviour Disorders (1995 Manual) category are referring to the students designated in the present category H – Intensive Behaviour Interventions or Serious Mental Illness.

- Collective agreement provisions that refer to students in the former categories Mildly Mentally Handicapped (E.M.H.)(1985 Manual) or Mild Intellectual Disabilities (1995 Manual) are referring to the students designated in the present category K – Mild Intellectual Disabilities.

- Collective agreement provisions that refer to students in the former categories Rehabilitation (1985 Manual) or Rehabilitation Programs (1995 Manual) are referring to the students designated in the present category R - Moderate Behaviour Support/Mental Illness.

- Collective agreement provisions that refer to students in the Ministry's former low incidence group of categories (as they existed in the 1985 Manual) are referring to those students designated in the present categories A, B, C, D, E, F, G as set out above.

- Collective agreement provisions that refer to students in the Ministry's former high incidence group of categories (as they existed in the 1985 Manual) are referring to the students designated in the present categories H, K, P, Q, and R as set out above.

- Collective agreement provisions that refer to students in the Ministry's former low incidence group of categories (as they existed in the 1995 Manual)are referring to those students designated in the present categories A, B, C, D, E, F, G, and H as set out above.

- Collective agreement provisions that refer to students in the Ministry's former high incidence group of categories (as they existed in the 1995 Manual) are referring to the students designated in the present categories K, P, Q, and R as set out above.