

Class Size and Composition Grievances

Since the passage of Bill 28, the *Public Education Flexibility and Choice Act* in 2002 and Bill 33, the *Education (Learning Enhancement) Statutes Amendment Act* in 2006, the BC Teachers' Federation (BCTF) has launched a series of grievances concerning class size and school organization matters.

With the codification of school organization matters in public policy and outside the scope of collective bargaining, the arbitral landscape has shifted concerning what can be the subject of arbitration and how disputes grounded in statutes can be litigated. The nature of these disputes is punctuated by what has emerged as a philosophical divide between those who believe that class size and related matters must be the subject of collective bargaining and those who believe they should be the subject of public policy outside of the scope of bargaining. The history of this matter is as follows:

- January 2004: Arbitrator Munroe rules that the matters concerning class size and composition were not arbitrable.
- February 2005: The BC Court of Appeal sets aside the Munroe award and determines that arbitrators have jurisdiction to determine whether there has been a violation of the *School Act* or the Class Size Regulation.
- January 2006: The Munroe award establishes that districts must be in compliance by September 30 and maintain compliance thereafter; that rounding cannot be applied to district averages; and that in split class situations, the class size provision of the youngest grade applies to the entire class.
- September 2006: Bill 33, the *Education (Learning Enhancement) Statutes Amendment Act* is enacted, establishing new class size parameters, processes, and guidelines.
- June 2008: The Class Size Regulations are amended to contain a definition of "consult."

Bill 33 was a continuation of the public policy shift initiated with the 2002 legislation. Rather than impose limits or caps, the policy decisions that gave rise to Bill 33 were intended to guarantee that student-centred decision making would determine the best educational options for class size and class composition. The decision would be made following inclusive discussions.

The numbers for grades 4 and above represented what policy makers described as decision points or "triggers" to guarantee that particular processes would occur, which included those with an interest in learning conditions for all students. When a class was above the number of students prescribed, the legislation contemplated an inclusive process: the teacher of the class was to be consulted or was required to consent and the principal and superintendent were to have determined whether, in their opinion, these conditions were appropriate. The rationale for the class was then to be made available publicly.

These decision points were intended to create a standard for assuring that learning conditions were appropriate. The determination that the learning conditions of a class were appropriate for all students was to be made through professional, educational judgments resulting from inclusive dialogue among those affected by the decisions. The same principles applied to consideration of classes enrolling more than three students with an IEP.

Class Size and Composition Grievances: 2006-2007 and 2007-2008 School Years

Scope of Grievance

The scope of the grievance for the 2006-2007 school year covers the following districts, schools and classes:

- Seven school districts (SDs 8, 36, 39, 53, 62, 67, 70)
- 30 schools
- 537 classes

The scope of the grievance for the 2007-2008 school year covers the following districts, schools and classes:

- 16 districts (SD 5, 8, 20, 28, 36, 39, 44, 58, 61, 62, 63, 68, 69, 70, 73, 82)
- 137 schools
- 1,162 classes

Status of Proceedings

The parties agreed to arbitrate seven representative schools of the 167 schools identified above. Although this award will not be binding on any of the other schools that are part of this grievance, it is hoped that the arbitration award on the seven representative schools will assist the parties in resolving some or all of the remaining classes and schools covered by these two grievances. However, should this not occur, Arbitrator Dorsey will maintain jurisdiction for determination of these classes.

Forty-seven days of arbitration were scheduled to hear the evidence on these seven schools. To date, the parties have completed 36 of the 47 days with the last day scheduled June 19, 2009.

Final argument is scheduled for July 13-17, 2009 with an award expected in August 2009, just prior to the commencement of the 2009-10 school year.

Anticipated Award in August, 2009 — Issues that Arbitrator Dorsey May Address

With respect to classes over 30 (grades 8-12) or three IEPs (grades K-12), it is expected that Arbitrator Dorsey may rule on the following:

1. Whether each class in the seven representative schools is in compliance with the legislation or not.
2. Clarification on which party bears the onus.

3. A determination of under what circumstances consultations have to take place. For example, does consultation also have to take place with the teachers who provide preparation relief for the class?
4. If consultation is required, has it in fact taken place and, if so, was it appropriate; i.e., clarification on what is required to meet the consultation requirement.
5. Interpretation of the phrase "appropriate for student learning."
6. Articulation of the factors to be considered by the principal and superintendent when reaching the opinion that the classes are appropriate for student learning.
7. Determination of the test for "opinion"; i.e., very high test (discriminatory/arbitrary) or a very low test (reasonableness) or something in between?
8. When considering IEPs, must the IEP be related to the subject matter of the class to be counted; i.e., does a student with an IEP related to math apply to a PE class?
9. Has the delay in the process prejudiced the employee's ability to properly defend the merits of the grievance?

Following receipt of the initial award in August, if any violations are determined to be found the union will be seeking a remedy. If this occurs, full arguments will be required on the issue of remedy, including:

- The prejudice that the employer has suffered as a result of receiving the particulars at such a late date
- Whether a declaratory award is appropriate
- If beyond that of a declaratory award, what redress would be appropriate; i.e., TOC days, additional support, monetary redress, etc.

Class Size and Composition Grievances: 2008-2009 School Year

Scope of Grievance

The scope of the 2008-09 grievance is still at issue between the parties and has not yet been determined by Arbitrator Dorsey.

The following is the BCTF's present position on the scope of the 2008-2009 grievance:

- All grade 8-12 classes that are over 30 students or K-12 classes that are in excess of three IEPs are in violation. This may include:
 - Classes at the beginning of the year
 - Classes in second semester
 - Classes during the year that become in excess of 30 or three IEPs; i.e., 30 to 31 students or three to four IEPs
 - Classes during the year that have already gone through the consultation and declaration processes, but then receive additional students or IEPs; i.e., class increases from 31 to 32 students, or increases from four to five IEPs.

- With respect to particulars, for the first semester the BCTF has referred the employer to the Ministry of Education website report, which indicates the following for the 2008-09 school year with respect to all 60 school districts:

14,321 total classes

- 3,336 classes over 30 in grades 8-12
- 10,844 classes greater than three IEPs in grades 4-12
- 141 classes of greater than three IEPs in K-3.

- Of the 14,321 classes that the BCTF alleges are in violation, they have provided “2 boxes of documents which contain details of the union’s particulars with respect to those classes we will be relying on as samples of our grievances.” The two boxes contained the BCTF consultation sheets for the 4,263 classes in 329 schools covering 43 school districts.
- Now that the BCTF has identified the 14,321 classes that are over 30 or more than three IEPs, the BCTF takes the position that the onus has shifted to the employer to prove that they have met the two requirements (consultation, declarations of appropriate for student learning) that permit the employer to be over 30 students and/or three IEPs.
- As a result of the shifted onus, the BCTF takes the position that the employer is now required to provide the BCTF with particulars on each of the 14,321 classes, “including the employer’s rationale as to why each constitutes an appropriate learning environment, and details of the consultation.” In a March 11, 2009 letter the BCTF advises:

We refer you to Ministry’s website at <http://www.bced.gov.bc.ca/reporting/enrol/class-size.php> for the full list of classes which are covered by our grievance. Rather than printing out and highlighting every class in each district that has more than the class size and composition numbers set out in the *School Act*, we thought it more efficient to refer you to the website. Where a class exceeds the number of students or the number of students with IEPs set out in the legislation, it is covered by our grievance. We request particulars for each of these classes, including the employer’s rationale as to why each constitutes an appropriate learning environment, and details of the consultation.

- The BCTF’s position is that the shifted onus not only requires the employer to provide these particulars, but will require the employer to present their case first in arbitration and bear the legal onus of proving that they are not in violation as opposed to the BCTF proceeding first and the onus being on the union to prove that the employer is in violation of the *School Act*.
- With respect to the *School Act*’s requirements to meet district class size averages, the BCTF takes the position that each district will be required to provide particulars on the method and basis in which they calculated their district class size averages.

Status of the 2008-2009 Grievance

The parties agreed that Arbitrator Dorsey will also be seized of the 2008-09 class size grievance. Fourteen days of arbitration have been scheduled in September and October of 2009.

Prior to proceeding, the following preliminary issues will be addressed:

1. Scope of the grievance.
2. Which party must proceed first in the arbitration process.

3. What particulars are required to be produced by whom, when, and in what order.
4. What issues are to be arbitrated (presently the BCTF has grieved compliance to the entire statute and regulations)?

Although the scope of the grievance has not been determined, it is anticipated that the following issues may be added:

1. Have the district class size averages reported to the ministry been appropriately calculated?
2. Timing and accuracy of the various reports that are required under the legislation.
3. Classes after September 30; i.e., second semester, classes that increase or change during the year.

BCTF Initiatives Related to Class Size and Composition Issues

Collection of Student Support Information

Further to our @Issue No. 2009-16 dated May 1, 2009

(<http://www.bcpsea.bc.ca/access/publications/aissue/2009/ai2009-16.pdf>)

we continue to see some BCTF locals collecting information on students. Arising from the BCTF AGM, they have launched an initiative with respect to the collection of information regarding the services and supports that are being provided to students.

Teachers in several districts have been asked to complete forms listing the names of students and any supports that they are, or in the teacher's view should be, receiving. We understand that teachers are being advised to provide these completed forms to principals and/or staff representatives.

The following are some excerpts from a recent memo from a local to its members:

The forms have a few purposes:

1. To help teachers in the organization of classes and of supports for students; to help teachers in assessing needs and reporting them to their principals. Of course, this might seem like a kind of wish list, but it will help your preparations as classes are being organized for next year, 2009-10. Therefore, you may keep a copy of the list you create with student names, and you might want to make a copy for the next teacher(s) of these students.
2. It will help the president in creating a report for the Board and other education partners about the supports needed and the needs not being met (see below, BCTF EC motion). I can't do it without you.
3. To be supportive in the organization of classes for next year (Bill 33) (see below).
4. To assist in the provincial grievance/arbitration underway on "Bill 33" matters.

Resulting from a referral at the 2009 AGM, the BCTF Executive Council adopted the following motion:

"That local presidents advise boards and DPACs and teachers advise parents that teachers:

1. Will participate in timetabling and organizing classes for September that are in the legislative limits for class size and composition.
2. Where administrators violate or exert pressure to violate legislative limits, teacher will produce a "needs" organization for the school, object in writing to the proposed violations, and withdraw from any further participation in the process unless ordered to do so."

Note: there will be further advice on this action to follow from the Spring RA (this week, May 28-29); therefore, please prepare this information for now, in anticipation of further actions.

BCTF Rationale:

We have taken the position that until there has been consent or consultation, classes cannot exceed the limits set out in the *School Act*. And, the Act is clear that the principal must obtain the consent of or consult with the teacher within 15 school days after the opening day of school.

But BCPSEA's position is that teachers can give prior consent and can engage in prior consultation merely by the act of timetabling or organizing classes in May or June. That is the position BCPSEA has consistently taken during weeks of arbitration hearing, and that is the position that BCPSEA is urging the arbitrator to adopt.

BCPSEA's position is that if teachers organize or timetable classes in the Spring, that is evidence that consultation has taken place and that is evidence that the classes are appropriate for student learning."

Consultation Process

To date neither the BCTF nor BCPSEA have made or submitted arguments in the arbitration proceedings to Arbitrator Dorsey with respect to their positions. Final argument by the BCTF and BCPSEA to arbitrator Dorsey is scheduled for July 13-17, 2009. The above is not an accurate representation of what BCPSEA will argue in the week of July 13-17, 2009. It is clear that the consultation requirement is to occur in September, within 15 days after the opening day of school. However, when viewing that consultation, it should not be viewed by the arbitrator in isolation; i.e., the building of classes is not a one-time event, it should be considered in the context of the collaborative process that occurs in the building of classes that commences in the spring and continues throughout the upcoming school year.

Collection of Student Information/Teacher Participation in Organizing Classes

It is the normal practice, where a teacher has a concern about a student, to provide this information to their administrator and/or school-based team who are specifically tasked and qualified to assess students and address concerns.

What is unusual and not appropriate is for teachers to collect this private information of students and provide it to their union representative for other purposes. It appears that there are two initiatives being coordinated by the BCTF:

1. To collect personal student information to create a report about teacher's opinions concerning students' needs that are not being met.

2. Where classes are over 30 (grades 8-12) or three IEPs (grades K-12), withdraw from participating in the longstanding practice of teachers working collaboratively with administration and counselors in building classes.

The *Freedom of Information and Protection of Privacy Act* (the Act), addresses the collection, use, and disclosure of personal information. School districts and their employees may not collect, use, or disclose personal information other than as is permitted under the Act. Information about any support that a student is or should be receiving is the personal information of that student. As employees of school districts, teachers are also bound by the provisions of the Act.

In our view, the Act does not permit a teacher to disclose to his or her staff representative any information that identifies individual students, either by name or otherwise, along with the supports that those students are or, in the teacher's view should be, receiving. If teachers provide students' personal information to staff representatives or other union officials, we may need to seek clarification on the issue from the Office of the Information and Privacy Commissioner. If teachers in your district are providing staff representatives with such information that could identify the student, please contact your BCPSEA labour relations liaison.

Under the legislation, the following two conditions must be met if a grade 8-12 class is to exceed 30 students or a K-12 classes is to have in excess of three IEP students:

- a. In the opinion of the superintendent of schools for the school district and the principal of the school, the organization of the class is appropriate for student learning, and
- b. The principal of the school has consulted with the teacher of that class.

Taking the position that all classes over 30 (grades 8-12) or three IEPs (grades K-12) are automatically a violation of the legislation regardless of the individual circumstances and make-up of the class makes it very difficult for the district to differentiate valuable input from teachers in the building of classes versus that of a mechanical opposition.

With respect to teacher participation in organizing classes for September, the school organization process should continue as it always has. There should be no change in school districts with respect to teacher participation in such processes and it is not appropriate for the union to attempt to undertake a concerted action during the term of the collective agreement.

Questions

Should you require assistance or wish to discuss this issue further, please contact your BCPSEA labour relations liaison.