

August 4, 2020

Brian Evans
Assistant Deputy Minister
K-12 Education and Early Childhood Development
Department of Education and Early Childhood Development

Via Email and Mail: brianevans@gov.nl.ca

Dear Mr. Evans,

RE: GRIEVANCE

I write at this time regarding a difference between the parties, namely, a violation of Clause 3.04 of the Provincial Collective Agreement (the Agreement) and occupational health and safety legislation, in the context of the COVID-19 pandemic and Public Health emergency. Specifically, the Department of Education and Early Childhood Development's (EECD) recently released K-12 Education Re-entry Plan (the Plan) for the school system fails to comply with such occupational health and safety legislative standards. In addition, EECD has failed to meaningfully consult with the Newfoundland and Labrador Teachers' Association (NLTA) in the development of the Plan, as required by Clause 3.04 of the Agreement.

We note that the EECD claims on the first page of the Plan to have consulted with the NLTA in the development of same. As is detailed further herein, there was no meaningful consultation with the NLTA with regards to the Plan.

Since the COVID-19 pandemic and the declaration of a Public Health emergency, resulting in a suspension of in-school instruction, the NLTA has attempted to actively engage with government and the school districts on issues and concerns that need to be addressed in order to ensure a safe and sustainable re-opening of schools in September. The NLTA had hoped that government's K-12 Education Re-entry Plan would articulate a vision for and provide the necessary resources to ensure compliance with all Public Health advisories and guidance. The Premier reached out to NLTA President Dean Ingram on July 6, 2020, assuring him that the NLTA would be fully consulted and engaged in further discussions on the implementation of the Plan, including the granting of NLTA's request for a meeting with Public Health officials. That meeting occurred on July 27, 2020, but any change to the Plan, or meaningful consultation with EECD, have yet to

occur. Although meetings with government prior to the release of the Plan were cordial, and government officials gave every indication of being open to NLTA concerns, comments and suggestions, ultimately there is scant indication in the Plan that NLTA submissions or input were, in fact, considered at all. Further, the NLTA was not provided with a draft version of the Plan to provide feedback prior to its finalization and release. In fact, the NLTA was simply and suddenly advised via email on Friday, July 3 at 4:25 PM that the Plan would be released the following Monday.

Throughout discussions with government, the NLTA has been consistent and clear that any plan(s) put in place must respect the need for safe teaching and learning environments. The Plan that was released contains deficiencies and concerns in these areas. With respect to safety in particular, the Plan has serious shortcomings and is characterized by conflicting information. Plan directives pertaining to physical distancing (or the lack thereof) are particularly problematic. For example, the Plan states:

- The daily school routine should not be disrupted to accommodate smaller class sizes for physical distancing.
- Strict physical distancing should not be over-emphasized to children in the school setting as it is not practical and could cause psychological harm.
- For the purposes of contact tracing, consider limiting capacity of rooms to a number that allows physical distancing (i.e. fewer students in a smaller room, more students in a larger room). Schools must develop procedures and plans for in-person learning that support physical distancing (2 metres) where possible, and to separate cohorts to the greatest extent possible.

Parts of the Plan appear to completely contradict the Public Health advice that has been given to ensure health and safety in other contexts. The NLTA appreciates that the school environment is not identical to these other venues and spaces. However, respectfully, one of the underlying premises of the Plan appears to be a perceived ability to better contact trace in schools due to the presence and use of cohorts. Unfortunately, this does not reflect the reality of the school environment. There appears to be little consideration regarding how practically meaningful the concept of a cohort is, when one considers bussing realities, the operational needs of schools and the collective agreement requirements.

The Plan appears to be based on the premise of a “trade-off” of risk. The risk of COVID-19 infection and transmission among children and staff in the school setting is balanced against the risk of harm to students’ physical and mental health caused by school closures. In taking this approach, the Minister of Education and Early Childhood Development has, in consultation with

Public Health officials, created a higher risk of COVID-19 infection for workers in schools than is acceptable under Public Health directives for other environments and workplaces, such as restaurants, churches, theatres, etc. There are also other safety concerns, including but not limited to the fact that school bus drivers are the only workers identified in the Plan as requiring specific protections.

According to Public Health Guidance, *“the potential risk of COVID-19 spread is highest when individuals are indoors, within 2 meters of each other, for more than 15 minutes, in a small space with limited ventilation, sharing equipment or food, and/or taking deep breaths (e.g. while singing, shouting or exercising).”* Yet, in the context of the K-12 education system, the Plan disregards this accepted and oft repeated principle. Examples in the Plan include, but are not limited to:

- Public Health directions do not allow fitness centres, or dance or yoga studios, to operate unless specific space utilization and physical distancing of 2 metres is maintained between bubbles at all times. For children’s sessions and classes, a maximum of 1:10 leader/adult to child ratio is advised to help ensure physical distancing. But, under the Plan, space utilization restrictions, limited grouping sizes, and physical distancing are not mandatory for children and adults.
- Public Health directions do not allow arenas to operate unless a minimum of 2 metres or six feet between all household bubbles is possible at all times. As arenas are frequented by children and adults, how can strict physical distancing for household bubbles not be a mandatory safety requirement in the school context? Public Health directions for arenas also require participants and spectators to leave the building as soon as an activity concludes, with no lingering or post event activities/socializing. In contrast, extra-curricular activities in the K-12 school setting are encouraged and considered “safe” despite the fact they will bring groups of students from different classes/cohorts together for additional periods of time along with teacher sponsors and, often, outside volunteers (coaches).
- Throughout the Public Health directions and guidance for various sectors, employers are required to ensure that when physical distancing between clients and service providers cannot be maintained, physical barriers or face masks are required. Yet, the same expectations are not required to protect service providers in the school context.
- Public Health directions do not allow restaurants to operate unless tables are at least 2 metres apart, including on outdoor patios, and patrons are asked to refrain from visiting tables other than their assigned table. But, physical distancing of tables and desks is not required in the school context.

- Public Health directives do not allow summer camps to operate unless there is a staff to child ratio of 1:10 (not including respite workers). As summer camps provide services to school aged children, why is there no Plan direction pertaining to staff to student ratios in the school context?
- Public Health directives for faith based organizations prohibit the offering of child minding, children's services and Sunday school, which are all identified as "higher risk activities". However, the K-12 Education Re-Entry Plan, developed in consultation with Public Health officials, states that, "children may be less susceptible to COVID-19 infection and may be less likely to transmit the virus to others." There is an obvious contradiction in the direction and advice for these two types of activities. How is an hour of Sunday school, which would typically involve fairly small groups of children, "high risk", but 30+ students in a classroom together for 5 hours is not?
- Public Health has provided detailed direction and guidance for activities ranging from yoga classes, restaurants, arenas, cinemas, summer camps, bingo halls, public transit, etc. The Plan does not, however, provide the same level of detail, direction and guidance for parents, teachers and students in the school context.
- Public Health directives require everyone, including caregivers, children, parents, volunteers and delivery persons, to be screened prior to attending a childcare centre. However, the Plan does not require similarly comprehensive screening requirements for those who may attend school buildings.
- Public Health directives do not allow public transit buses to operate if a full sized bus exceeds a maximum of nineteen (19) passengers on board or other sized vehicles exceed at any time 50 per cent capacity. There are no similar restrictions on school buses.
- School staff regularly administer medication, health support procedures and personal care supports to students who require this assistance in order to attend school. Other services such as Speech Language Pathology, behavioural interventions, and certain supports for children who are Deaf/hard of hearing or Blind/visually impaired often require close contact between staff and students. Some students with exceptionalities are prone to spitting and otherwise exposing staff who work with them to contact with their bodily fluids in various ways. However, the Public Health guidance included with government's K-12 Education Re-Entry Plan is silent on safety measures for employees who are engaged in dealing with these routine realities in our schools.

These are all issues which could have been identified to the EECD and addressed in a timely manner if the NLTA had been properly consulted.

Respectfully, the Plan as drafted does not meet the standard expected by provincial occupational health and safety legislation. In addition to the general legislative duty on employers found in section 4 of the *Occupational Health and Safety Act* (OHSA) to ensure, where it is reasonably practicable, the health, safety and welfare of their workers, section 5 of the OHSA requires employers, where it is reasonably practicable to do so, to:

- provide and maintain a workplace and the necessary equipment, systems and tools that are safe and without risk to the health of his or her workers;
- provide the information, instruction, training and supervision and facilities that are necessary to ensure the health, safety and welfare of his or her workers;
- ensure that his or her workers, and particularly his or her supervisors, are made familiar with health or safety hazards that may be met by them in the workplace; and
- conduct his or her undertaking so that persons not in his or her employ are not exposed to health or safety hazards as a result of the undertaking.

Further, section 14 of the *Occupational Health and Safety Regulations, 2012* (the Regulations) establishes a duty on employers to ensure, so far as is reasonably practicable, that work procedures promote the safe interaction of workers and their work environment to minimize the potential for injury. Injury is defined to include occupational disease. Occupational disease is defined in the schedule to the Regulations as including, “Infectious or parasitic diseases contracted in an occupation where there is a particular risk of contamination”, which would include COVID-19 in the school context. Unfortunately, the Plan, characterized as it is by a systemic disregard for accepted, sound and oft repeated Public Health advice, fails to meet these legislative standards. While the legislation in issue governs the Employer’s occupational health and safety requirements by directing the Employer to act in such a fashion, in the Plan, EECD has ensured non-compliance with such legislation.

In addition to the above noted legislative deficiencies, there was no meaningful consultation with the NLTA in developing the Plan, resulting in a breach of Clause 3.04 of the Agreement. The NLTA has two legislated responsibilities in this province under the *Teachers’ Association Act* (TAA). The first is as the bargaining agent for teaching and learning assistants, program specialists, school counsellors and psychologists, speech-language pathologists, teachers and school administrators. This representation provides the NLTA with a unique and detailed understanding of the public education system. Since March 15, the NLTA has received and responded to more than 31,000 direct emails from our members in the field. It is also the legislated right and responsibility of the NLTA, pursuant to the TAA, to advise government and the public

on practical issues in education. It is in the context of this legislated authority that Clause 3.04 of the Agreement must be considered. That clause provides:

Government agrees to consult with representatives of the Newfoundland and Labrador Teachers' Association about contemplated changes in Government Regulations or Ministerial Policy which would affect teachers' terms and conditions of employment not governed by this Agreement.

This collective agreement requirement reflects the legislated role and accepted expertise of the NLTA in matters pertaining to the public school system. Further, while consultation, or the verb "consult" is not defined in the Agreement, arbitral authority as well as Memoranda of Understanding and published articles upon which arbitrators in this Province have relied when rendering decisions have defined the elements of consultation in the context of the Agreement. Consultation *must* involve a bilateral interaction by parties informed of each other's position where each has the opportunity to give and receive information. Further, in the context of consultation, the provision of a clear and legitimate rationale for decision making, including a logical explanation as to why a proposal could or could not be accommodated, is essential. As well, input must be considered before a decision is made, i.e., that the input will be taken into account when the decisions are made.

There is absolutely no evidence that the NLTA's input and feedback was considered when developing the Plan. Superficial consultation, with a pre-determined outcome, does not meet the collective agreement bar "to consult", and in fact constitutes bad faith. How could there have been meaningful consultation, or bilateral interaction, when the Association had no ability or opportunity to comment on the specific Plan proposed prior to its publication? The requirement for each party to be fully informed of the other's position was not met. Significant decisions have already been made. Consultation on decisions after the fact is not true or meaningful consultation. Where is the evidence of meaningful bilateral discussion? The Plan could have been developed as it stands without any NLTA involvement whatsoever, as it does not reflect any consideration of NLTA submissions. The NLTA is also left to question the legitimacy of government's rationale when developing the Plan, given the complete disregard for Public Health guidance provided in other contexts.

In the result, The NLTA respectfully submits that, in failing to comply with occupational health and safety legislation in developing the Plan, the Department has violated sections 4 and 5 of the OHSA and section 14 of the Regulations. Further, in failing to consult in an adequate and/or meaningful fashion, the Department has breached Article 3, namely Clause 3.04, of the Agreement, as well as all other applicable legislative provisions, articles and clauses. In addition, The NLTA further contends that the Department's failures and omissions as set out herein

constitute an unreasonable, arbitrary and bad faith exercise of management rights, in violation of Clause 39.01 of the Agreement.

The relief sought is the proper application of the Agreement, namely:

1. A declaration that adequate and meaningful consultation must occur forthwith with respect to the Plan;
2. Monetary redress (damages); and
3. All other appropriate redress.

I would appreciate the meeting required pursuant to Clause 31.20 of the Provincial Collective Agreement at your earliest opportunity. I look forward to your reply.

Sincerely yours,

Stefanie Tuff
Assistant Executive Director