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IN THE MATTER OF THE *HUMAN RIGHTS CODE*,  
RSBC 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before  
the British Columbia Human Rights Tribunal

BETWEEN:

X by Y

**COMPLAINANT**

AND:

Board of Education of School District No. Z

**RESPONDENT**

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**REASONS FOR DECISION**

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Tribunal Member: Emily Ohler

On their own behalf: Y

Counsel for the Respondent: Sari Weins

Date of Hearing: September 20 -21, October 14, 18-20,  
November 16-17, 2022 with written  
submissions on December 16, 2022

Location of Hearing: Videoconference

I	INTRODUCTION.....	2
II	Issues.....	3
III	Credibility.....	3
IV	Evidence and Findings of Fact about the events giving rise to the complaint.....	4
	A. Learning support in grade 2.....	8
	B. Learning support in Grade 3 and the Classroom Incident.....	12
	C. Learning support in Grade 4 and the EA issue.....	20
V	Analys and Decision.....	28
	A. Did the District reasonably accommodate X during Grade 2 in relation to the adequacy of learning support?.....	30
	B. Did the District reasonably accommodate X during Grade 3 in relation to the adequacy of learning support and his removal from the classroom?.....	32
	C. Did the District accommodate X during grade 4 in relation to the adequacy of learning support, the consistency in Education Assistant support, and the token economy?.....	37
VI	Conclusion.....	42

## I INTRODUCTION

[1] Y brought this complaint on behalf of her son, X, against two schools operated by the Respondent, Board of Education of School District No. Z [**District**]. Y alleges that the District discriminated against X under s. 8 of the British Columbia *Human Rights Code* [**Code**] based on mental disability. Y says the District failed to reasonably accommodate X in accessing educational services during grades 2 – 4, and when it removed him from the classroom for a few days in grade 3.

[2] X first began struggling in school toward the end of grade 1 at a small school in the District [**1<sup>st</sup> School**]. Even though no disability had yet been diagnosed, the District put supports in place. In the summer between grades 1 and 2, X and his family experienced the sudden death of X's father due to a cardiac event that occurred in the family home with both X and Y present.

[3] While managing the complex emotional, economic, and logistical impacts of this sudden loss, Y continued to support X and her other children, showing herself to be a dedicated advocate for X and his interests. This included having X receive a psychoeducational assessment in the early part of grade 2. The assessment resulted in X being diagnosed with Dyslexia, a learning disability; and Attention Deficit and Hyperactivity Disorder [**ADHD**], a behavioural disorder. This diagnosis informed a plan and supports that the District put in place to accommodate X going forward. However, struggles continued as behavioural issues mounted. Y and the District moved X to a new school for grade 4 [**2<sup>nd</sup> School**], where Y continued to have concerns about the adequacy of the accommodation because of continuing issues with X's learning and social challenges, and willingness to attend school.

[4] The complaint alleges that the District failed to reasonably accommodate X in grades 2 and 3 by providing inadequate and inconsistent learning support, and by removing him from the classroom for a few days early in grade 3. It further alleges that the District failed to reasonably accommodate X in grade 4 by providing inadequate supports, injecting uncertainty into the learning support he received from an Education Assistant, and in the manner in which a rewards program was introduced.

[5] Y is self-represented and has put forward X's case in the best way she is able. She did an excellent job under stressful circumstances, and was an effective advocate for X. However, for the reasons that follow, I have found that the District did not breach the *Code* in its treatment of X. As a result, the complaint is dismissed.

## II ISSUES

[6] The burden is on Y to establish that X experienced adverse impacts in his education that are connected to his disabilities under s. 8 of the *Code: Moore v. BC (Education)*, 2012 SCC 61 at para. 33. Once that is established, the burden shifts to the District to establish a justification defence. In this case, it is not disputed that X experienced disability-related adverse impacts. Therefore, the issues before me are whether the District has established that it reasonably accommodated X:

- a. during grade 2, in relation to the adequacy of learning support?
- b. during grade 3, in relation to the adequacy of learning support and in removing him from the classroom after the a behavioural incident?
- c. during grade 4, in relation to the adequacy of learning support, consistency in Education Assistant support, and the implementation of the rewards program or "token economy"?

[7] I note that the District has raised timeliness issues related to the grade 2 allegations. Because I have found there was no breach of the *Code*, I have not addressed timeliness.

## III CREDIBILITY

[8] I heard this matter over eight days. Six witnesses gave evidence. Both parties filed written closing submissions. On the whole, I have found all of the witnesses to be credible, doing their best to provide an accurate recollection of events within their knowledge.

[9] At times, the evidence of Y differed from the evidence of other witnesses in respect of events relevant to the issues above. Where that is the case, I decide whose evidence to prefer. In doing so, I start from the presumption that witnesses are telling the truth: *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 10. Where testimony conflicts with other evidence, I assess the trustworthiness of their testimony “based on the veracity or sincerity of [the] witness and the accuracy of the evidence that the witness provides”: *Bradshaw v. Stenner*, 2010 BCSC 1398, aff’d 2012 BCCA 296, leave to appeal refused, [2012] SCCA No. 392 (QL) at para. 186.

[10] I have considered “the witness’ ability and opportunity to observe events, the firmness of their memory, their objectivity, whether the witness’ evidence harmonizes with independent evidence that has been accepted, whether the witness’ testimony seems implausible, and the demeanor of a witness generally”: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2019 BCSC 739 at para. 90. At times, a witness may testify honestly but their evidence may not be reliable because of their inability to accurately observe, recall, or recount the event: *R. v. H.C.*, 2009 ONCA 56 at para. 41; *Youyi* at paras. 89-90. Where I have preferred the evidence of one witness over another, I have explained why.

#### **IV EVIDENCE AND FINDINGS OF FACT ABOUT THE EVENTS GIVING RISE TO THE COMPLAINT**

[11] I do not refer to everything that was presented at the hearing, but only what is necessary to reach my decision.

[12] X is a student enrolled within the District. From Kindergarten to grade 3, which spanned from 2016 to 2020, X attended the 1<sup>st</sup> School, transferring to the 2<sup>nd</sup> School beginning his Grade 4 year in 2020.

[13] Y described the 1<sup>st</sup> School as “small and awesome” because it was so friendly. Her other children had previously attended. She noted, however, that because it was such a small school there were some limitations, including many split-grade classes and a principal who was only

part time. While the principal was shared with another school, there was a dedicated full-time Vice Principal [VP].

[14] Y described the 1<sup>st</sup> School positively, but she also said that during X's time there, it was "totally out of control". A particularly challenging variable was the presence of two siblings who consistently exhibited aggressive behaviour toward other students. The youngest of the two siblings [Other Student] was in X's year and had behavioural challenges. The parent of another student from their class testified that the Other Student often appeared to target X. She told of one physical altercation she witnessed during grade 1 where the Other Student appeared to be the aggressor. She noted that there were "so many things" happening every day at the 1<sup>st</sup> School with the Other Student and his sibling that impacted many of the students.

[15] X completed Kindergarten at the 1<sup>st</sup> School with no significant issues. Things began to change in grade 1, with some learning and behavioural challenges emerging.

[16] The BC Ministry of Education [Ministry] ascribes certain designations to students with special learning needs. Designation "Q" indicates a "high incidence" need or set of needs. These would be needs related to learning disabilities that are seen in a high proportion of students, for example. Other designations are ascribed to conditions that are more severe, require higher levels of support and tend to be lower incident among the general population of children in school.

[17] Ministry and District policy centres the classroom teacher to support all students and their learning plans because that is who spends the most time with students. The policy is also to keep students with their peers, involved in broader learning activities and goals. For students with Ministry designations, however, additional supports are provided including access to Learning Support Teachers [LST] and Education Assistants [EA]. There are also District level LSTs who provide training opportunities and promote best practices for school-based LSTs. In the District, LSTs report to a District Principal responsible for student support services [District LS Principal]. Other supports within the District include Behaviour Analysts, who provide an extra layer of expertise in supporting children with behavioural challenges, school and District-level

counselors, a speech pathology team, and school psychologists, for example. All report to the District LS Principal.

[18] The 1<sup>st</sup> School had two EAs on staff at the school-level and one district-level EA who visited occasionally, mostly to support the school-level EAs. The 1<sup>st</sup> School also had a school counsellor. The VP testified that EAs are typically assigned to students with low-incident designations who typically have higher needs, to provide support like occupational therapy or life skills programs, like tying shoes or meeting other self-care needs, for example, and would be available to help other students as time permits. EAs are not typically assigned to students with learning disabilities. Rather, students with learning disabilities, who are typically ascribed a high-incidence designation, would be assigned an LST who are better suited for supporting such students' learning needs.

[19] LSTs and EAs provide support under the overall guidance of the classroom teacher. That support is guided by an individual education plan [IEP] that is developed with the involvement of the parent of a student with a designation. The VP explained what is typically involved in developing an IEP. It includes assembling a school-based team and meeting with parents to talk through the child's strengths and their challenges. Sometimes, a functional behavioural assessment is also undertaken. This includes exploring what happens at home that sets the child up for their day, for example, their sleep; what happens right before the challenging behaviour such as conflict with a peer; what is the nature of the behaviour; and what is the best way to respond based on the reason that it happens. The VP noted that you want to ensure you are not accidentally re-enforcing the behaviour with the wrong response. The VP testified that, in addition to IEPs, schools may also create a safety plan for students who have unsafe behaviours. A safety plan may involve a student needing to go home at a certain point to de-escalate and rest. It may also involve the use of a hold where the teacher is trained in non-violent intervention and the parent has consented.

[20] Despite the fact that X had not yet been diagnosed with a disability or given a designation in grade 1, the District assembled a school-based support team consisting of the VP, an LST, the school counsellor, and X's classroom teacher when X began having some

behavioural challenges during his grade 1 year. Minutes from a January 19, 2018, team meeting indicate that X was struggling with remaining focused, self-regulating, and was engaging in some attention-seeking behaviours. The school-based support team developed an action plan to support X through the remainder of grade 1. The VP explained that, even though X had not yet been diagnosed with a disability, the 1<sup>st</sup> School provided learning support because they have a focus on early intervention when they see a student struggling.

[21] Around this time, Y took X to their family doctor, who assessed him as “an active little boy” but identified no disabilities. Nonetheless, by the end of the school year, the District was providing X with pull-out reading support three times per week with an LST, meaning that he would go out of the classroom for reading support sessions.

[22] Minutes from a May 4, 2018 team meeting state that X took “a great deal of time with EA and classroom teacher to start and complete work”, struggled with impulse control, and struggled with managing his anger. He would anger easily, it says. It notes that X had been accepted by an outside counsellor. The action plan from this meeting included maintaining the strategies in place, and more items involving Y. One of those items was giving Y a letter to take to X’s doctor about the 1<sup>st</sup> School’s concerns and getting Y’s permission to speak with the outside counsellor and to have a District-level resource teacher observe X in the classroom.

[23] X’s final grade 1 progress report indicates he was meeting expectations in areas including math, social studies, and science; and approaching expectations in speaking and listening, reading, and writing. Among other things, it indicates that he needed frequent reminders to work and play cooperatively with his peers and was able to tell when he was becoming angry, upset or frustrated.

[24] On the heels of this positive progress, during the summer break between grade 1 and grade 2, X’s sibling was hospitalized for a lengthy period with a serious illness, causing much stress for the family. Then, later in the summer, X was at home with his parents when his father experienced a cardiac event in another room and suddenly passed away.



## A. Learning support in grade 2

[25] On returning to school for his grade 2 year in September 2018, Y took X for a psychoeducational assessment at the recommendation of the 1<sup>st</sup> School. This resulted in an October 2018 report [**Diagnosis Report**]. The Diagnosis Report describes X as having “great ideas” and being an “in-depth thinker”. It notes that “[h]e enjoys playing outside, Art and playing with the tablet. He is very social and enjoys playing with his friends.” It describes him as “a child who wants to please and responds well to encouragement.”

[26] The Diagnosis Report goes on to say that X had “significant concerns related to behaviour and emotional regulation, working memory, initiating tasks and planning/organizing (executive function) concerns.” These things, it says, suggested the presence of Attention-Deficit Hyperactivity Disorder [**ADHD**] and gives a provisional diagnosis to be confirmed by a pediatrician.

[27] The Diagnosis Report also diagnoses X with Developmental Dyslexia. On this point, it notes that while he had average verbal comprehension, fluid reasoning abilities, and above average visual-spatial problem-solving skills, his working memory was low. He had “difficulty quickly recognizing and retrieving letters and words when reading and spelling.” Because he had not automatized word identification or the sound-symbol relationship of letters, he was behind in reading and spelling.

[28] The Diagnosis Report concludes that X “will need an intensive remediation program to increase his literacy skills so he doesn’t become discouraged and frustrated.” It sets out specific recommended approaches for learning supports and also indicates that X would need “**substantial support** in the classroom and an IEP-Individual Education Plan to document specific goals and objectives as well as accommodations and supports” [emphasis original].

[29] The Diagnosis Report says that X met the criteria for a Q designation by virtue of his learning disability. The District LS Principal testified that children with ADHD alone do not receive a designation because it is so high-incidence, and because related supports are embedded in the classroom. When additional behavioural issues arise in conjunction with

ADHD, an IEP may be created in consultation with parents to support development of executive functioning.

[30] Y provided a copy of the Diagnosis Report to the 1<sup>st</sup> School in the Fall. She also took X to his pediatrician who confirmed the ADHD diagnosis and prescribed X medication to assist with his self-regulation.

[31] The District assembled a school-based support team consisting of the VP, an LST, a counsellor, and the classroom teacher. Unlike in grade 1, the team also included the school psychologist [**Support Team**]. The Support Team reviewed the Diagnosis Report. Minutes from the initial team meeting on October 25, 2018 set out an action plan that included obtaining the appropriate designation from the Ministry for X, continuing counselling, providing pull-out learning support three times per week, and meeting with Y to further develop an IEP for X. Pull-out learning support is run by an LST who takes participating students to a designated room away from the classroom to provide supplemental teaching.

[32] In addition to providing the learning supports, the 1<sup>st</sup> School provided X with quiet, safe spots for him to sit and have quiet time if he felt that he needed some time away from the classroom. The VP's office was one of those places. The VP testified, and I accept, that X would go to her office a lot seeking quiet time. She said that she would leave him and then ask if he wanted to talk. She said that he usually would because he loved to talk with people. After their discussions, X would leave well-regulated and go back to class. The VP described X as "an easy child to love and get along with". She noted that the team was encouraging outside counselling for X. The VP testified that she and X got to know each other well. She testified and I accept that X would speak with her about the death of his father. From the VP's perspective, X was processing a great deal of trauma and needed extra support.

[33] The VP testified that X was showing successes through grade 2, and as he succeeded, they would increase the goals for X, which had both academic and social elements. The social element was encouraging X to engage rather than withdraw from participating. The VP noted that X was easily distracted, so they put a little desk in the hall for when he chose quiet time.

She explained this is among the tools used for all kids who struggle with self-regulation and distraction. She noted that there was work with the whole class to help the students identify their emotions and regulate with different strategies.

[34] The 1<sup>st</sup> School updated X's IEP on December 13, 2018, at a meeting that included Y and the VP. The IEP set out various supports for X including pull-out LST support for 20 minutes three times per week; counselling through the school and outside tutoring with the method recommended in the Diagnosis Report. It noted that, by the time of the December IEP update, X was learning to self-regulate and making some progress in this regard.

[35] Minutes from a January 24, 2019, team meeting note that X had shown improved attendance and participation in his learning supports over November and December but had been more angry and resistant with adult instruction since returning from winter break. In her evidence, Y acknowledged that the 1<sup>st</sup> School had reported an improvement in X's behaviour with his ADHD medication. It appears that sometime around midway through the grade 2 year, however, X stopped taking the medication. In her evidence, Y explained that X did not like the way the medication made him feel, and it required that he not eat or drink anything for long periods of time. She said that it absolutely affected his behaviour, but she understood why he did not want to take it. On balance, she and X decided that the negative effects outweighed the positive and so she decided to discontinue X's medication. She acknowledged in her testimony that X had a harder time at school off the medication and it probably made things more challenging.

[36] At the hearing, Y testified that she did not find there was any particular issue with respect to X's education through the grade 2 year. She did, however, say that the small group learning worked poorly for X and she questioned whether pull-out support was provided as often as it was supposed to be under the IEP.

[37] On the whole, I do not find that the supports provided by the District were inconsistent. I am satisfied on a balance of probabilities that inconsistencies in pull-out learning support flowed not from the District but from X's willingness to attend. I heard a great deal of evidence

about X sometimes missing his pull-out support sessions because he did not want to go. Notes show that X would sometimes not attend the sessions depending on his mood. This was consistent with the evidence of the VP, and of Y who acknowledged that it was sometimes similarly difficult to get X to attend his after-school tutoring sessions.

[38] The minutes from the January team meeting also include notes that X would sometimes complain that the learning support related to reading was too easy and that he would sometimes be reluctant to attend. The VP testified that X would often refuse to attend his LST sessions. He would talk to her about why he did not want to attend his LST sessions, and it generally hinged on his wanting to stay in the classroom, finding it boring, or thinking it was too “baby-ish”. She explained that a token economy was introduced to try to encourage him to go. This entailed providing X with small rewards for reaching certain goals.

[39] The District’s evidence about the provision of learning supports showed that by the second half of grade 2, the 1<sup>st</sup> School began providing X with one-on-one pull-out support to account for challenges he was facing in the small group setting. A report for the April – June 2019 period indicates that when provided with individual support, X was “engaged and cooperative with tasks but this was still dependent on his day” and had made progress that he “should be proud of” in working toward his IEP goals. His end-of-year progress report similarly reflects some progress academically and in self-regulation and notes “his out-going personality has helped him maintain friendships with others.”

[40] In cross-examination, the VP was asked why X was advanced to grade 3 in circumstances where he was not yet reading at grade level. She explained that schools rarely hold kids back a grade, as it does not catch them up, rather, it tends to double down on their giving up. The intention behind continuing to move students forward with supports as necessary is to message to them to focus on moving forward. The District LS Principal explained similarly that, in any cohort of children, there is always a wide breadth of need and learning level. It is up to the school to create an environment that will support all the kids to meet their respective learning goals. He noted that the kids move forward as a cohort given that holding children back does not change the range of needs but has negative social impacts. He explained that all kids are on

their own journey from “approaching” to “exceeding” learning goals, and it is up to the schools to provide “different access points” for kids across the range.

[41] Reports over the course of X’s grade 2 year are consistent with the evidence of the VP, showing steady progress toward various goals. At the same time, however, by the end of grade 2, X was still reading at a grade 1 level.

## **B. Learning support in Grade 3 and the Classroom Incident**

[42] On the whole, Y described X’s Kindergarten, grade 1 and grade 2 years as “okay”. She explained that the “nightmares began in grade 3”.

### *1. Start of the year*

[43] As with the previous year, the 1<sup>st</sup> School developed an IEP for X for his grade 3 year that included specific goals, strategies and supports. The IEP, dated September 3, 2019, notes that X needed encouragement to persevere through challenging tasks as he often gave up rather than pushing through. The VP testified that they were trying to focus on helping X ask more questions and participate in activities instead of just giving up. The District expanded X’s support team, adding a Behaviour Analyst and the District LS Principal, who as mentioned earlier, was responsible for planning and administering resources for students with special needs and the associated needs of schools within the District.

[44] As the school year progressed, X’s behavioural challenges continued. He began yelling, throwing objects or being verbally and physically aggressive toward others. Around late September 2019, Y raised concerns about X’s learning progress and with his behavioural challenges. X had begun sometimes “bolting” from the classroom and even leaving the school. The 1<sup>st</sup> School convened a meeting on October 1, 2019, between Y, the VP, the District LS Principal, and a District LST. The VP recalled that Y thought X was getting more frustrated and negative about school, and she was worried about inconsistent support.

[45] Y outlined her concerns at that meeting. She did not believe that the LST support that was supposed to be happening 3 times per week was consistent, and as a result, she did not

believe X's learning disability was being addressed. Y believed that X was acting out because he was discouraged about falling behind.

[46] The VP testified that, during the meeting, Y was resistant to relying on technology to supplement X's learning and asked that the EA be made available for X on a daily, one-on-one basis because X was concerned about his peers knowing he was falling behind. The District LS Principal suggested the school psychologist doing another review of the Diagnosis Report. He also suggested involving the District mental health liaison. The District LS Principal testified that he said outside counselling should be involved because of mental health concerns related to everything X had experienced. He explained that the mental health liaison is available when 1-on-1 support is identified as needed. That person fosters relationships between the school and external community supports. They can visit the home, the parent, and bring the school and community supports together.

[47] The District LS Principal testified that Y was not open to having the mental health liaison involved or any additional outside counselling beyond what had already been accessed privately. In her evidence, Y acknowledged that she may have seemed unreceptive, but noted that she was feeling quite frustrated with the whole situation at the time. She also noted that she had been trying to access outside counselling resources for X and hitting obstacles that she did not wish to share with the District at that time.

[48] A safety plan was also discussed at that time because of some incidents with X and other students. The VP testified that, when X would get upset with his peers, he would yell, throw things, and sometimes chase and push. As a result, the 1<sup>st</sup> School had a safety plan in place for X. The VP testified that the safety plan provided for the 1<sup>st</sup> School to phone Y if X remained escalated for a long time, and at times have her come to the school to help him de-escalate. She said that there were times Y was unavailable to bring X home because of work obligations and, in those cases, X would spend the rest of the day in the VP or counsellor's office because he was too tired or otherwise unable to return to the learning.

[49] Following the meeting, the District put further supports in place for X. The IEP was supplemented with a behaviour plan. The District LS Principal assigned an extra teacher to the 1<sup>st</sup> School who could provide coverage in the event an LST was absent or pulled away for urgent support, and as an extra set of hands in the classroom. The District added the Behaviour Analyst to X's support team and an EA for the classroom. By the end of Fall 2019, X's classroom had 4 children with IEPs, including X, supported by an extra teacher and EA in addition to increasing the LST pull-out support. Y described the IEP as a good, accurate description of X's needs. She expressed no concern with the strategies and supports provided other than noting that, as the year progressed, she believed that the EA support provided was inconsistent.

[50] The EA schedule submitted into evidence for this time shows an EA working with X on a daily basis, along with three other students in his classroom.

[51] Initially, X was in the same pull-out LST group as the Other Student, but they were moved to different learning groups after four weeks. In cross-examination, Y asked the VP whether X was stigmatized by his being pulled out of class for LST support. The VP replied no, noting that X was not the only one who was going from his particular classroom.

## *2. Classroom Incident*

[52] One of the allegations in the complaint is that the District discriminated against X when it removed him from the classroom for a few days following an in-class incident. In the Fall of 2019, the VP was away due to an injury. A vice principal from a different school then moved into the acting vice principal role [**Acting VP**] from October to mid-December 2019, when the VP returned. The Acting VP characterized X's grade 3 classroom as "high-needs" with several students requiring additional supports. He testified that he would be called to X's classroom from time to time because X was having some difficulty settling down at the beginning or end of the day. He testified that X would be wandering around the classroom while the other kids were on the carpet. The Acting VP would go and pull X out to talk with and get to know him, taking him for a walk down the hall or spending a few minutes in his office.

[53] The Acting VP gave evidence on the in-class incident, which I understand to have occurred sometime in late October or early November [**Classroom Incident**]. There was an altercation on the playground, and when X re-entered the classroom afterwards, he was elevated to the point that the teacher felt the need to clear the classroom. I do not have evidence on the exact circumstances surrounding this. However, the Acting VP testified that once the classroom was cleared, he was in the class with two EAs while X yelled and jumped from desk to desk. He was trying to calm X. X went to climb the shelf behind the teacher's desk to grab tacks, taking a handful of them and was shouting things like, "shut-up", "fuck off", and "you're not the boss of me". The Acting VP said that X then ran toward him with his fists but then just began wandering around. He said that they tried not to do too much aside from tell X that it would be ok. As X began to calm down, the Acting VP told the EAs to go, and X sat down. He then invited X to his office and X followed him there. The Acting VP gave X some books and building toys and left him alone for about 20 minutes at which time X began talking about what had happened.

[54] The Acting VP testified that X had been quietly playing in a sandbox when other students approached and disrupted him, causing him to go into fight-or-flight mode. Y gave evidence that she understood the other kids involved had "beaten" X up, though she gave little evidence about what exactly she understood to have happened. She was particularly upset that the other children involved were allowed to return to school with no consequences. She acknowledged, however, that the other students involved had been sent home and were not permitted to return to school after this, though the length of time they were barred from school grounds is not clear.

[55] Ultimately, I have little detailed evidence of what exactly X said occurred on the playground that triggered his reaction in the classroom, but the Acting VP described X's subsequent reaction in the classroom as a "pretty classic trauma response" that he and the other staff present understood, including that he could not be calmed so they had to just keep him safe while he eventually self-calmed. He observed of his various interactions with X, "there



was something going on with that little guy”, noting that he was refusing invitations to participate in class, and was angry and upset a lot.

[56] The Acting VP said that after the Classroom Incident, he determined it was appropriate to give X a break from the classroom, both for X and for the other kids who needed a safe learning environment. He described the classroom as one that needed “a lot of TLC”, with X not the only student who needed breaks. The Acting VP said that the removal from the classroom was important to keep everyone safe and give X breathing space to figure things out. He was supposed to be at home, but it became in-office because of Y’s work commitments. This is consistent with Y’s evidence. In a way, the Acting VP said, this was better because X was in school, and it gave him a chance to get to know X and Y. He noted that it is easier to just have X go home so he could do his work, but with X in his office, it became about X, who he described as a “sweet, sensitive, smart boy”. He said X surprised him with his level of connection.

[57] The Acting VP said, and I accept, that he was speaking with a number of people to get help and advice to ensure there was sufficient support at the school, and spent a great deal of time listening to Y’s concerns and speaking with her. The Acting VP said it took some time for Y to understand that X spending time in his office was not a punishment or consequence but was healing time. The Acting VP described the office as an awesome, peaceful place to be. “You create the conditions for kids to come to you for help”, and X would indeed come to talk. The Acting VP spoke of the importance of listening to kids and understanding what they need. For X, it was a calm class, clear expectations, and patience with each other. He explained that while work was being done with X outside of the classroom to get him back to a place where he could return to the classroom regulated, work was also being done in the classroom for a successful return. The Acting VP described the approach with X after the Classroom Incident as “all hands on deck” to pair him with specific kids and try to calm everything down. He observed that they were beginning to get some traction.

[58] Y asked the Acting VP in cross examination how the break from the classroom would have been restorative for X had it happened at home. The Acting VP replied that “Mom knows best”, noting that X was “totally dysregulated”, placed in a challenging classroom, and needed

space. The Acting VP said that X spoke a lot about his Dad during this time, and how he missed him. He observed, “this family needed help beyond what I’m trained for.”

[59] In Y’s evidence on this period, where the Acting VP had viewed the days spent in office with X as healing and positive for him, Y insisted that X merely “performed as he was required to perform”, saying that X “was a very good sport and jumped through all of their hoops even though he was the one who was the victim.” She described X as ‘marching himself into’ the Acting VP’s office from Monday to Wednesday then returning to class Thursday and Friday as “a spectacle” and more of “a target”. At the same time, Y acknowledged that the Acting VP spent lots of time with X trying to meet his needs.

[60] There is a dispute in the evidence about the length of time during which X was out of class and in the Acting VP’s office, with the Acting VP saying it was roughly one and a half days, and Y saying it was closer to three. On a balance of probabilities, I prefer the evidence of Y that it was longer than a day and a half, though I cannot find that it was three whole days. The precise length of time is not ultimately material given that it would have been no more than 3 days based on the evidence before me. I accept Y’s evidence that the Acting VP had initially suggested a break of one week; that she pushed back on this on the basis that she could not accommodate X at home and felt such a long break was unnecessary and unfair; and that she remembers well her own experience of dropping X off on those days for him to go to the Acting VP’s office rather than his classroom.

[61] There is also a dispute in the evidence about the substance of X’s days while in the Acting VP’s office. On a balance of probabilities, I prefer the evidence of the Acting VP over Y’s in respect of what transpired for X over the one and a half days he spent outside the classroom in the Acting VP’s office. The Acting VP spoke of his direct knowledge of his interactions with X during that time, and of his observations of X’s behaviour. Y’s evidence seemed largely based on her own perceptions, and seemed focused on her concerns about the fairness of what may or may not have happened to the other children involved in the playground altercation that gave rise to the Classroom Incident. She acknowledged that it was her own view that X may

have been “a spectacle”, and it was not clear what this was based on beyond her own concerns and perceptions, including her own experiences as a child.

[62] Just before the Acting VP left the 1<sup>st</sup> School for the regular VP’s return, he had a team meeting that Y also attended. He testified he felt a sense of relief because it seemed like they were moving things forward, that Y expressed those sentiments too, and they had a plan, especially with a District Behaviour Analyst now on the team. Meanwhile, despite acknowledging the efforts of the Acting VP, Y seems to have viewed the relationship differently than he did, describing him as “a pimple” with whom she had to play nice. It seemed these ill-feelings came from her lingering frustration over ‘what he did to X’, which I understood as his having kept him in his office rather than the classroom for a few days. Regardless, Y did acknowledge in her evidence that she said positive things during that meeting and did not voice her negative views at the time.

### *3. Learning supports for the remainder of grade 3*

[63] The District implemented various strategies to support X’s self-regulation such as identifying areas, called “caves”, where X could go if he needed to calm down, consistent with a suggestion made by Y during the October meeting. The District also employed ‘pre-teaching’ methods, prompting for success, and using an executive planning tool.

[64] The District also increased the amount of support provided. X’s progress report for the December 2019-March 2020 period showed that he continued to make progress and had been receiving 40 minutes of in-class support alongside four 30-minute sessions of support per week.

[65] In her evidence, Y disputed whether LST and EA supports were consistently offered over the course of the year. She said that she remembered seeing a support teacher walking away from her in the hallway apologizing for not having time. She said that she remembered well how it felt each time she would see the teacher. The evidence of the VP, meanwhile, was that the LST was in fact consistently available but X would often not wish to participate. When this was put to Y, she explained that X’s pull-out support included the Other Student, with whom he had an adversarial relationship because he had bullied X, and this is why he would not want to

go. She acknowledged, however, that she never raised this with the 1<sup>st</sup> School but asserted that the 1<sup>st</sup> School knew that X was being picked on and she should not have to tell them how to do their job. Y contended in her evidence that the LST was simply overwhelmed.

[66] The EA schedule shows consistent assignment to and availability for X. By the end of the school year, the District was providing X with one-on-one EA support in the classroom.

[67] I prefer the evidence of the VP on this point. While I accept that there may have been one or two incidents where Y met an LST in the hallway who seemed overwhelmed, her evidence was too vague to support a finding, on a balance of probabilities, that the LST or EA was not providing consistent support as provided for in the IEP.

[68] In the meantime, the EA who had been working with X in the classroom had also been working with the Other Student. By January 2020, when the Other Student left the 1<sup>st</sup> School, the District retained the EA on a full-time basis resulting in X now having the benefit of a dedicated EA. He also accessed the school counsellor twice per week. The District LS Principal testified that this was the only situation in the District where an EA was assigned to support a Q-designated student. The District LS Principal explained that, if X was starting to exhibit negative behaviour and not in a good place to learn, the EA would be able to assist him to facilitate a safe break, find him if he bolted from the classroom, which he sometimes did, or employ tools to assist him in self-regulating.

[69] X's report card from March 2020 showed 70 minutes of in-class support and 30 minutes of pull-out support four times per week. It also reported some improvement in all areas, with his being assessed at the "emerging" level of proficiency. It set out suggestions for how X could be supported at home over the Spring break. Y acknowledged that there had been some improvement though she said that X still was not getting what he could have had at a different school. It is not entirely clear what she believed X was missing. Y also acknowledged that the District LST Principal and the Behaviour Analyst represented an additional layer of support from the District to help X with his behavioural challenges. Ultimately, Y agreed that X made progress over the course of grade 3.

[70] The Covid-19 pandemic began in British Columbia in March 2020 with school moving online after Spring break. The LST and EA, along with the Behaviour Analyst reached out consistently throughout lockdown, and in May brought X back to school in person.

[71] In May 2020, X returned to in-person school as one of only four students who did so.

[72] Given X's ongoing behavioural challenges, the District LS Principal and Y decided that it would be positive to transition him to the 2<sup>nd</sup> School which had good staff to support him. Y recalled conversations asking the 1<sup>st</sup> School to provide more emotional support to X, noting her view that, if a kid was being supported properly, he would not be having the issues X was having. She believed it would be better at the 2<sup>nd</sup> School.

[73] By the end of grade 3, X's progress report showed that he was making satisfactory progress in all areas of the curriculum, though he was still behind grade level.

### **C. Learning support in Grade 4, the token economy and, and the EA issue**

[74] X transferred to the 2<sup>nd</sup> school for grade 4 with the agreement of Y. The District LS Principal coordinated the transition between schools and coordinated the support teams. The Behaviour Analyst collaborated closely with the 2<sup>nd</sup> School Team including its Principal [**2<sup>nd</sup> School Principal**], and the District LS Principal remained involved.

[75] The 2<sup>nd</sup> School Principal has experience working with students with a broad range of special needs. He explained that, when he encounters students with behavioural issues, his approach is to understand not only what the student is trying to communicate through that behaviour but also all "lagging skills" which are informing it. He explained that, with challenging behaviour, communication may not come as quickly as a reaction like a kick or hit, and so he tries to understand which skills need to be developed in a student to help them communicate in a different way.

[76] The 2<sup>nd</sup> School Principal testified that he met X when X transferred. They were introduced by Y and the District LST Principal. He recalled meeting in a large group that included some of the staff from the 1<sup>st</sup> School that had been involved in supporting X there. When X

moved to the 2<sup>nd</sup> School, Y also agreed to the involvement of the mental health liaison. At the 2<sup>nd</sup> School, X's support team consisted of his classroom teachers, LST teachers, the school counsellor, the 2<sup>nd</sup> School Principal, District LS Principal, school psychologist, and the Behaviour Analyst.

[77] The support team developed an IEP for X by October 2020 along with a behavioural plan. The 2<sup>nd</sup> School Principal outlined a number of strategies, tools and supports that were available for X. In her evidence, Y acknowledged that she was aware of the various individualized strategies put in place to support X's learning and his behavioural challenges.

[78] In her evidence, Y explained that the 2<sup>nd</sup> School had done a lot to try to accommodate X, but the issues were twofold. The first was the social cost she attributed to the pull-out learning support and the token economy even though may have helped X academically. The second was that X was 'bouncing' between two different EAs each day which was a stressor for him. I address each of these concerns in turn.

*1. Social challenges and the token economy*

[79] The IEP included the continuation of the token economy that had been put in place at the 1<sup>st</sup> School. The 2<sup>nd</sup> School Principal testified that the support team worked with the Behaviour Analyst to set up a program to incentivize positive behaviours. It could be free time, or gametime, or preferred time with friends. He said that it worked well at first, but these types of programs do plateau and stop working sometimes. He explained that they involve kids in the design to varying degrees and had asked X what he would like. In class, it is not advertised when a child is on this kind of program, but some kids can see that a student may be working towards something that others are not.

[80] Y acknowledged that by late March 2021, things were going alright until other kids began picking on X because of the token economy. She testified that when other kids would ask him where he got something and he would explain, they would pick on him and he began hiding under his desk. When asked if it was possible that his perspective was maybe not

consistent with what was happening, Y acknowledged that his frame of reference was the 1<sup>st</sup> School where he had experienced altercations with the Other Student.

[81] Y said that there had been no issues with the behaviour plan at the 1<sup>st</sup> School but at the 2<sup>nd</sup> School it was a “big failure”. She acknowledged she had been consulted about the behavioural program. She said that the way the behavioural program was administered led to it undermining X’s social success. She explained that the accomplishments were easy and because other kids did not get rewards, they would tease X when they noticed him getting rewarded. She said that X withdrew socially because of how he was treated when other kids saw him receiving rewards that they were not receiving. She said X was left alone to explain to the other kids why he was receiving these rewards.

[82] Y contended that X’s feelings of being ostracized were part of what gave rise to X hiding beneath his desk from time to time during class. It seems this behaviour created a cycle as X’s peers would sometimes not approach X because of his hiding under his desk, which worsened the problem. The 2<sup>nd</sup> School Principal testified that X’s going under his desk had a negative impact on him because people would see him there. The District LS Principal acknowledged that, when this behaviour began, they engaged the Behaviour Analyst to provide additional support. The District LS Principal observed that the school-based team found that X would hide under his desk when he felt overwhelmed. They had a process in place. If X retreated under his desk, his EA would intervene first, followed by the 2<sup>nd</sup> School Principal, followed by LST or counsellor.

[83] The 2<sup>nd</sup> School Principal testified that the team was trying to teach X some “perspective-taking” to manage his challenges with social situations. He observed that X would get stuck with his perspective of the social situation and needed to learn how to take another perspective of an issue that needed to be resolved. His primary strategy was avoidance, and the 2<sup>nd</sup> School tried helping him understand that this can sometimes make the problem bigger. When something triggered him, X would often just run away, or he would go in the cloakroom, or he would pull up his hood and not engage. It would take time for him to share what happened and what he was reacting to.

[84] X would also sometimes “bolt” from the classroom when he got upset. The 2<sup>nd</sup> School allowed him to do this but had to know where he was going to make sure he was safe. They set up a respite room that X could go to as needed so he had a safe place to retreat to in those times. Additionally, the 2<sup>nd</sup> School Principal noted that X would sometimes like to remove himself to find quiet without removing himself from the classroom, so in addition to retaining the respite room, they also positioned his desk near the cloakroom so he could quietly and easily slip out while minimizing the “social cost”.

[85] The 2<sup>nd</sup> School Principal explained that sometimes X would shut down without an apparent trigger. He would go to the cloakroom, and staff would check on him every two to three minutes depending on his feedback. Sometimes X would talk and sometimes he would not. The 2<sup>nd</sup> School Principal noted that it is hard to receive and give information when were shut down. The cloakroom was a specific safe place that X could go to de-escalate, which was better than his bolting from the classroom.

[86] The 2<sup>nd</sup> School had offered X a variety of supports beyond the learning and behavioural ones through different clubs and programs including a friendship club which, according to Y, was “mildly successful”.

[87] A persistent challenge X faced was his perception of having no friends and feeling singled out. The 2<sup>nd</sup> School Principal observed that, while sometimes X’s sense of social isolation was accurate, other times he observed that, while what X was feeling was real, it did not necessarily align with what was happening. He would try to bring the kids together to work through issues as they arose. He noted that they could not always get X to join them to talk through issues, though eventually he began joining and they were able to work through issues and reach peer understanding when conflict arose.

[88] The 2<sup>nd</sup> School Principal testified that he observed that, for X, if the topic was of interest and he felt he could contribute, he worked well, but if those conditions were not present, he would leave the group or even the classroom. As outlined in the documents from the time, the 2<sup>nd</sup> School Principal observed that X was needing help to navigate social situations, was needing



a lot of encouragement to push through instead of giving up and was trying to build resilience and stamina.

[89] In Y's view, the 2<sup>nd</sup> School was not creating the circumstances for X to be okay. Her concern appeared to arise from her sense that the 2<sup>nd</sup> School had made X "a spectacle", in her own words, through the very accommodations that had been put in place to remove the disability-related barriers to his learning. As mentioned above, these included the LST pull-out learning, and also the token economy. Y did not raise this concern with the 2<sup>nd</sup> School or the District, however. She also, as I have noted, acknowledged that the District "threw everything it had" had the situation.

[90] Notwithstanding challenges, X was making progress over the course of the grade 4 year in developing both academic and behavioural skills, including navigating friendship challenges.

## *2. The EA Transition*

[91] X had been supported by a dedicated EA who worked with him one-on-one in grade 4 [Designated EA]. An April 13, 2021, email from the 2<sup>nd</sup> School Principal to Y summarizes key points from a March 31, 2021 team meeting that Y had attended. It outlines various positives and progress. It also identifies that X was very attached to his Designated EA and was most confident when with her.

[92] The District LS Principal testified that the team wanted to ensure continuity of support for X as he moved into grade 5, and was aware of X's strong relationship with his Designated EA. The 2<sup>nd</sup> School Principal testified that he observed X's strong reliance on his EA for just about anything. He noted that this would not be sustainable as X got older and so they were looking to build more confidence and independence. The 2<sup>nd</sup> School Principal was also aware that the Designated EA would likely not be able to return for the grade 5 year in part because of the way that EA jobs are assigned through the union seniority process. To create as much stability as possible and also to try to foster more independence for X, the District decided to start the transition to add a new EA to X's supports in addition to the Designated EA.

[93] The 2<sup>nd</sup> School Principal noted there was no indication that the split between two EAs would cause acute distress for X, because X worked with other EAs when the Designated EA would go on leave, for example. The plan was to slowly start building up X's work with other EAs, hoping to get close to 50% with his Designated EA and a new one over 6 to 7 weeks. Initially, a new EA began transitioning in to work with X only once a week. However, X reacted badly. The thought of the Designated EA leaving made X very anxious, and Y reported that it was impacting his behaviour. The District stopped this transition when they saw the impact on X.

[94] The 2<sup>nd</sup> School kept the Designated EA with X for the rest of the year, and she worked exclusively with X except for breaks. However, the District LS Principal noted that X did not seem to recover from the possibility of his EA leaving, and this translated into poor self-regulation again, both at school and at home. The VP from the 1<sup>st</sup> School had observed in her testimony that relationships were very important to X, noting that he needed extra support when someone new came into the picture. Once he had a relationship, he could move between the various adults because he felt safe and comfortable. The District LS Principal noted that transitions are always challenging, and this one was significant for X, but X's progress in learning skills to navigate conflict with peers, academically, and building self-regulation tools had progressed over the year until hitting a roadblock with the advent of the EA transition.

[95] On May 18, 2021, the 2<sup>nd</sup> School Principal emailed Y advising her that X had told his EA that he wanted to commit suicide, had tried to hang or choke himself, and that he was only living because of his siblings. The email says that, at some point during the day when X was trying to catch up on homework, X refused to stop working on his homework and move onto another activity with the rest of the class and had a "very big" reaction. The 2nd School Principal emailed that he had contacted the START (Short Term Assistance Response Team) who opened a file, and he provided Y with links to resources alongside his phone number to reach him at any time.

[96] On June 9, 2021, 2nd School Principal again emailed Y to update her "on some concerning events". He wrote that X had, on two separate days written, "I want to kill myself".

The 2<sup>nd</sup> School Principal wrote that X's "suicidal ideation appears to be increasing and we want to make sure that we're doing all that we can to support him." He encouraged Y to contact the START program and provided their information along with his phone number. The 2<sup>nd</sup> School Principal testified that in his conversations with Y about these comments, she was not overly concerned because X was fine at home and this was only happening at school. Y gave consistent evidence at the hearing.

[97] On June 11, 2021, the Designated EA emailed the 2<sup>nd</sup> School Principal reporting that X had scratched his wrist several times over the day and, at the end of the day, during "appreciations" shared with the class that "he appreciated himself for wanting to kill himself." The 2<sup>nd</sup> School Principal emailed Y bringing it to her attention and again providing the information for START.

[98] On June 16, 2021, the 2<sup>nd</sup> School Principal again emailed Y, advising that X had told his Designated EA during the morning check in that he wanted to slit his throat and that he wanted to learn how to tie a rope around his neck, had been rubbing scissors against his wrist, and drawn pictures of stick figures hanging themselves. The 2<sup>nd</sup> School Principal set out links to a number of resources encouraging her to contact one of them. He testified that, because this was ongoing, it was difficult for the school and it was beyond what they could control or support. He had to leave it to Y to pursue those external resources, but she did not feel the need because, at school, X was under constant supervision and the issue was not happening at home.

[99] Y testified that she did reach out to crisis services and to a Ministry counselling service. She eventually received calls from the Ministry of Child and Family Services about the suicidal ideations, and she had to explain how things were at home and what was happening.

[100] The District LS Principal testified that he was surprised at the severity of X's reaction to the prospect of having to change to a different EA, especially given the progress from September to March. The District LS Principal testified that, during this period, Y blamed X's suicidal feelings on the EA situation, but said that she was not worried X would act on his

feelings as this was not happening at home. The District LS Principal testified that, X's behaviours were very troubling and "showed that he was not okay". He testified that "behaviour is communication" and must be listened to.

[101] In the face of X's reaction to the prospect of losing the Designated EA, the District LS Principal engaged with the Union to seek a waiver to the Collective Agreement requirements to allow her to remain at the 2<sup>nd</sup> School. The Union agreed to allow the Designated EA to remain and the Designated EA agreed to do so. The 2<sup>nd</sup> School Principal testified that, when the District LS principal negotiated for the EA to remain, it felt like a win because he had never seen this happen before.

[102] The District LS Principal noted that it was significant for him to succeed in getting the exception to allow X's Designated EA to remain with him given the hundreds of students who become attached to their EAs, and X's EA had little seniority compared to other staff.

[103] In addition to ensuring continuity in the Designated EA assigned to X, the District LS Principal said, and I accept, that if, X was not at the second school, there would be one less EA assigned there, as a Q designation does not usually attract one-on-one EA support.

[104] The 2<sup>nd</sup> School Principal noted that behaviour is a big piece of what X brings, and when he is triggered, it is not a good time to ask him to work on his learning. He noted that you first have to deal with the behaviour before you can turn to the instructional piece.

[105] The 2<sup>nd</sup> School Principal summarized the support that had been provided to X as: a full-time EA, including coverage for breaks; the classroom teacher and an LST; the counsellor, the Principal, District-level support from the behaviour analyst, the District LS Principal, and toward the end of grade 5, a mental health liaison and district-level resource teacher. He noted that the level of support given to X is unprecedented relative to other Q-designated students.

## **V ANALYSIS AND DECISION**

[106] As I have said earlier in this decision, to establish a case of discrimination in this complaint, Y must prove that X has a disability, he experienced an adverse impact regarding his education, and that it is reasonable to infer from the evidence that his mental disabilities were a factor in that adverse impact. If Y establishes these elements of the complainant's case, the burden shifts to the District to establish a justification defence.

[107] As stated above, there is no dispute that Y has established that X has mental disabilities. X has been diagnosed with a learning disability for which he requires educational support, and with ADHD, which requires certain behavioural support. I pause to note that, in her closing submissions, Y suggests that X may be on the autism spectrum, have post-traumatic stress disorder, depression and anxiety. I do not have sufficient evidence before me to support a finding, on a balance of probabilities, that X has these disabilities.

[108] It is also not disputed that X has disability-related challenges with self-regulation and academic learning. He often missed class, was consistently academically behind grade level, and experienced challenges interacting with teachers and peers. He was excluded from the classroom in grade 3 for a few days, and experienced distress over the possible addition or substitution of a new EA in grade 4.

[109] The crux of the complaint arises from the steps taken by the District in respect of these challenges, and whether it can justify its conduct in that regard.

[110] Before proceeding, I note that the complaint and Y's evidence referenced various incidents where Y says that adults employed by the District acted in a way that undermined X's trust. In doing so, she says, the District caused X distress and made him not want to go to school. Specifically, she referenced a teacher not giving X a band aid for a papercut; another teacher initially saying X had thrown a rock at another student before apologizing and acknowledging she was in error; and the Behaviour Analyst saying he would run with X only for him to not do so as frequently as X had expected, for example. I accept that these incidents which X relayed to Y were upsetting to X. I appreciate that the interactions may have fed into

X's general feelings of unease at school, but the fact alone that these events may have happened is not enough, in itself, to establish that X's disability factored into them. Not all negative experiences are discrimination. Even accepting that these incidents occurred, I did not hear evidence that could establish, on a balance of probabilities, that X's disability was a factor in the conduct of the adults involved in these interactions.

[111] With it not disputed that X encountered disability-related barriers to his education, the burden shifts to the District to justify its actions. To justify the disability-related adverse impacts that X experienced, the District must prove that (1) they adopted the standard for a purpose rationally connected to the function being performed; (2) they adopted the standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate purpose; and (3) the standard was reasonably necessary in that it took all reasonable and practical steps to accommodate the Student: *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 [**Grismer**] at para. 20.

[112] Accommodation requires a reasonable, not a perfect solution: *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 SCR 970 [**Renaud**]. While there may have been other approaches available to the District, this does not necessarily render the one taken unreasonable. What is reasonable and what constitutes undue hardship is fact specific and will turn on the specific circumstances of a particular case: *Renaud*.

[113] The analysis here arises in the context of access to public education, which was the context in *Moore*. In *Moore*, the Court identified what the mandate and objectives of public education were in British Columbia at the relevant time of that case. While the governing documents were not put before me during the hearing of this case, I note that they do not appear to have changed since *Moore*. As set out in *Moore* at para. 37,

As previously noted, the mandate and objectives for public education during the relevant period were set out in the *School Act*, which stated in its preamble that “the purpose of the British Columbia school system is to enable all learners to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society and a prosperous and sustainable

economy". A related policy document, the 1989 *Mandate for the School System*, O.I.C. 1280/89, said that the government was "responsible for ensuring that all of our youth have the opportunity to obtain high quality schooling that will assist in the development of an educated society" (p. D-96). The *Mandate* said that schools should develop students who are, among other things, "thoughtful, able to learn and to think critically . . . can communicate information from a broad knowledge base . . . [are] creative, flexible, self-motivated . . . have a positive self image . . . [are] capable of making independent decisions . . . [are] skilled and . . . can contribute to society generally, including the world of work" (p. D-96).

[114] Within that context, this case raises the following issues, which I repeat for convenience and address in turn below. Did the District reasonably accommodate X:

- a. during grade 2, in relation to the adequacy of learning support?
- b. during grade 3, in relation to the adequacy of learning support and in removing him from the classroom after the Classroom Incident?
- c. during grade 4, in relation to the adequacy of learning support, consistency in Education Assistant support, and the implementation of the rewards program or "token economy"?

**A. Did the District reasonably accommodate X during Grade 2 in relation to the adequacy of learning support?**

[115] It is undisputed that in X's grade 2 year, he was diagnosed with Dyslexia and ADHD and was having academic and behavioural challenges related to that. At issue is whether the District reasonably accommodated X in grade 2. The complaint alleges three specific shortfalls. It alleges that the learning support was inconsistent, too short, and in a group of 3 students rather than one-on-one. For the following reasons, I am satisfied on a balance of probabilities that the District reasonably accommodated X in his grade 2 year.

[116] The evidence shows that on receiving the Diagnosis Report, the District assembled a support team and prepared an IEP for X that provided for in-class supports, counselling, and pull-out learning support three times per week in a group of three students for reading. This

was the starting point, based on a new diagnosis and recommendations. It was appropriate for the District to take this step. It then monitored X's progress, with check-ins with the team and with Y.

[117] I am satisfied on a balance of probabilities that it was reasonable for the District to have begun with the small-group approach to learning supports, together with the other supports it put in place under the IEP. The evidence shows that by December, X had improved in his reading ability and ability to self-regulate, with his meeting and exceeding expectations in some subject areas.

[118] It was when X stopped taking medication for his ADHD around midway through the grade 2 year that he regressed in his behavioural challenges. On seeing that X was struggling with the small group setting for learning supports, the District pivoted to provide him with one-on-one support. In other words, it continued to monitor and adapt based on X's needs.

[119] I have found above at para. 37 that in grade 2, the District provided learning support to X, and that inconsistencies in pull-out learning support flowed not from the District but from X's willingness to attend. I have considered the steps the District took in grade 2 to deal with X's reluctance. The District introduced a token economy to incentivize participation. Because X's reluctance to attend arose from his wanting to stay in the classroom, finding it boring, or thinking it was too "baby-ish", strategies were incorporated into the classroom to support his learning, such as using an i-Pad to practice alphabet letters. Teachers placed a desk in the hall for X to have a place to go if he needed quiet time. The VP welcomed X in her office when he needed a quiet space to self-regulate and talk to someone. As mentioned above, the District also pivoted to one-on-one pull-out support, which improved his participation.

[120] Ultimately, on a balance of probabilities, I am satisfied that the District discharged its duty to accommodate X in his grade 2 year by reviewing the Diagnosis Report, developing an IEP, making various support people and strategies available that were incorporated into the classroom and outside, reviewing progress and changes, and adapting its approach in response. As noted above, Y acknowledged that she had no particular concerns with the grade 2



education. X's progress report showed that he made progress in both his learning and his behavioural challenges, with him more consistently self-regulating and "solve small conflicts in positive ways."

**B. Did the District reasonably accommodate X during Grade 3 in relation to the adequacy of learning support and his removal from the classroom?**

[121] The complaint alleges that in grade 3, the District again provided inconsistent, insufficient learning support for reading that was not enough to mitigate the disability-related challenges X was facing. The complaint further alleges that falling behind his peers academically had the effect of exacerbating X's ability to self-regulate, leading to behavioural issues. It alleges that the District's removal of X from the classroom following the Classroom Incident was discriminatory.

[122] The District argues that it discharged its duty to X by monitoring his progress and needs, and adapting the supports it had in place to be responsive to them. It argues that it was justified in its response to the Classroom Incident.

*1. The Classroom Incident and removal from the classroom*

[123] It was sometime after the October meeting – in late October or early November – that the Classroom Incident occurred. Y alleges that the District discriminated against X when it removed him from the classroom and required him to spend what I have determined was not more than three days in the Acting VP's office (after Y advised she was unable to keep X at home) after the Classroom Incident in grade 3. The District says that it was justified. At issue here is whether the District took all reasonable and practical steps in the circumstances to accommodate X.

[124] The circumstances that the District was responding to in temporarily removing X from the classroom involved his physically acting out, jumping from desk to desk and trying to scale a bookcase, yelling and swearing at school staff. It was reasonable, in my view, to remove X from the classroom in these circumstances so that the other students and staff could return to a safe

environment in which they could learn. The manner in which the District approached this on the day of the Classroom Incident was also reasonable. The Acting VP provided X with reassurance, waited for him to calm down, then walked to the Acting VP's office with X following quietly behind.

[125] Y says that rather than being kept out of the classroom, the District should have allowed X to remain and should have 'punished' him differently, like having no recess, or writing an apology, to "make him work for it".

[126] It was reasonable in the circumstances for the District to ensure that X was sufficiently self-regulated to return to the classroom, and that the appropriate supports were in place to support a successful return. I am satisfied that X's removal from the classroom constituted a reasonable and practical approach to accommodating his needs. There does not seem to be a dispute that X's disability may have informed his behaviour during the Classroom Incident. With that in mind, the District's approach was not, in fact, to "punish" X, but rather to provide him with an in-school, quiet, supportive place to go and have access to one-on-one time with a safe adult. He was safe, supported, and learning during this time. The approach was highly individualized and responsive to X's support team's observations of his needs, as are set out in the meeting minutes from the October 1 meeting, his IEP, and his behavioural plan. While X may not have been receiving the same academic teaching as his peers during the time he spent in the Acting VP's office, the purpose of public education is not just matriculable skills. It also involves building broader knowledge and skills: *Moore* at para. 37. X's behaviour plan accounted for the specific skills he needed support with, including self-regulation.

[127] Also consistent with both supporting X's self-regulation and the continued safety of the other students within the classroom, the District used this time to re-assess X's needs by speaking with him and other resources both within and outside the 2<sup>nd</sup> School. As a result of these discussions, the District adapted the plan for supporting X in the classroom by doing things like pairing him with specific kids to foster positive relationships.

[128] The evidence is that while X continued to have behavioural challenges after he did return to the classroom, his skills for managing his challenges continued to develop. His learning continued to progress. Based on the evidence before me, it resulted in his returning to the classroom without further incidents of this type occurring.

[129] For the above reasons, on a balance of probabilities, I am satisfied that the District's approach to removing, supporting, and gradually reintroducing X back to the classroom in response to the Classroom Incident in the Fall of grade 3 was reasonable and did not constitute a breach of the *Code*.

## 2. *Learning supports in grade 3*

[130] On a balance of probabilities, I am satisfied that the District discharged its duty to accommodate X through the learning supports provided in grade 3.

[131] At the beginning of grade 3, the District assembled a support team for X. In early October, the District met with Y and the team to hear Y's concerns about the adequacy of the accommodations in place. The District incorporated some of Y's feedback into an updated plan. That it may not have incorporated all of the feedback does not make it unreasonable – accommodation need be reasonable, not perfect. The District expanded X's support team to include the District LST Principal and the Behaviour Analyst, assigned an extra teacher, developed an individualized IEP as per the recommendation in the Diagnosis Report, alongside a behaviour plan to support X's management of his behavioural challenges. The District increased pull-out LST support from 3 to 4 times per week and increased in-class support assigning an EA to the classroom. The District, as mentioned, created safe places for X to go when he needed to remove himself from the classroom, people to speak with such as the counsellor, and various literacy tools.

[132] At the hearing, Y gave evidence that, as with grade 2, she still did not believe that the pull-out support was happening as often as it was supposed to. However, I have found above that the District provided consistent learning support to address both X's academic and behavioural challenges.

[133] I also note that Y focused a great deal throughout her testimony on X's issues with the Other Student, tying X's reluctance to attend the pull-out learning support to his initially having been placed with the Other Student for the small group. Y characterized the Other Student as having been X's bully, questioned why the 1<sup>st</sup> School paired them together for pull-put learning supports, and contended that X only befriended the Other Student as a strategy to manage the bullying.

[134] I accept that there were more likely than not instances where the Other Student was an aggressor in interactions with X, including in the physical altercation in grade 1 that I referenced early in this decision. However, I also accept the evidence of the District's witnesses, who observed X and the Other Student's interactions on a daily basis that the two were friends who would choose to spend time with one another. I also accept that X was paired with the Other Student for only a few weeks for learning support. Y acknowledged in her evidence that she did not raise her concerns about the Other Student's potential impacts on X's learning. On the whole, I do not find on a balance of probabilities that the District failed in its duty by initially placing X with the Other Student for small group learning.

[135] In addition to pointing to the Other Student as a source of X's reluctance to attend the pull-out sessions, Y also seemed concern about the perceived social consequences of the pull-outs. She often referenced X as being "a spectacle", and referenced X's general sense of social ostracization as being another reason he did not want to go. However, she acknowledged that "spectacle" was her own word, not that of X. She shared her own experiences as a child in school and expressed concern about X encountering the same challenges, saying that other kids would sometimes "pick on" X.

[136] The District's witnesses testified that X was not the only child who received such pull-out supports, such that it would not have been particularly unusual to the other students. Y did not question the legitimacy of pull-out supports as an approach that was consistent with the IEP and the Diagnosis Report. Y's own concerns about X being "made a spectacle" do not, in my view, make the pull-out learning support provided by the District unreasonable.

[137] Y expressed concern that the District would again advance X to the next grade when his reading was still not at grade level. I appreciate Y's concerns about X not being at the same level as many of his peers. Yet as noted in *Moore* at paras. 35-36,

[...] As with many public services, educational policies often contemplate that students will achieve certain results. But the fact that a particular student has not achieved a given result does not end the inquiry. In some cases, the government may well have done what was necessary to give the student access to the service, yet the hoped-for results did not follow. Moreover, policy documents tend to be aspirational in nature, and may not reflect realistic objectives. A margin of deference is, as a result, owed to governments and administrators in implementing these broad, aspirational policies.

But if the evidence demonstrates that the government failed to deliver the mandate and objectives of public education such that a given student was denied *meaningful* access to the service based on a protected ground, this will justify a finding of *prima facie* discrimination.

[138] Ultimately, X's report card for the end of grade 3 showed that he had "made satisfactory progress in all areas of the curriculum". It set out areas for continued work over the summer. On the whole, the District has satisfied me on a balance of probabilities that it discharged its duty to accommodate X by providing him with a network of support people; learning support and behavioural support to ensure he continued to develop skills; learning tools and strategies; behavioural tools and strategies; which all culminated in providing meaningful access to educational services. As Y raised concerns and as the District identified X's needs changing, the District adapted the accommodations in response. While X may have been behind some or even many of his peers academically in some areas, he did make ongoing progress in building skills and tools. While he may not have met or exceeded the academic targets Y expected or hoped, the District reasonably accommodated X to provide him with meaningful access to the education services it provides.

**C. Did the District accommodate X during grade 4 in relation to the adequacy of learning support, the consistency in Education Assistant support, and the token economy?**

[139] With the move to the 2<sup>nd</sup> School for grade 4, Y and the District team were hopeful that X would find yet more support and become more comfortable in the school environment. In the complaint, Y acknowledged that the District provided more support for X. However, at the hearing, Y explained that X was a very happy little boy at home, but school was a volatile environment for him.

*1. Learning support*

[140] On a balance of probabilities, I am satisfied that the District reasonably accommodated X to provide meaningful access to education. I have described the measures put in place earlier in this decision. In summary, in grade 4, the District again developed an individualized IEP and behaviour plan for X. The District dedicated resources to X beyond his classroom teacher, including LST teachers, the school counsellor, the 2<sup>nd</sup> School Principal, the District LST Principal, the school psychologist, the Behaviour Analyst, and the District Mental Health Liaison. The District retained X's preferred individual Designated EA who continued to work with X on a one-on-one basis, negotiating with the union in order to ensure continued access to the specific person he preferred. It monitored X's progress and adapted as things changed.

[141] I acknowledge that X continued to struggle with not finding school a happy place to be and that a consequence of this has been persistent challenges for Y in getting X to attend. I acknowledge that X continues to not read at grade level. However, the District has not withdrawn, but rather has expanded, diversified, layered and adapted the accommodations it has had in place for X. In some aspects, these have "worked", as they have allowed X to progress toward learning and behavioural goals, as Y herself acknowledged in her evidence. In others they have not, as X remains reluctant on some days to attend school at all. Y acknowledged at several points in her evidence that the District "threw everything at" the situation, giving layers of accommodations and adapting them to X's needs.

[142] Y has said that the learning support provided throughout X's education has not been enough for X to "reach the same level as his peers or possibly excel". The District's obligation is reasonable not perfect accommodation. As I have said above, reasonable accommodation is not necessarily measured by whether a student is meeting or exceeding certain standardized learning goals but rather by whether barriers have been removed to provide meaningful access to education.

[143] X's needs go beyond learning support to accommodate his learning disability. They also include support regarding his behavioural challenges. It is reasonable for the District to address those as a package of accommodations that is tailored to the whole of X's needs. It is understandable that X's learning in the area of reading, for example, will be impacted by the challenges that he faces in remaining engaged and in the classroom. The District cannot focus on one of these challenges at the expense of another but must accommodate X as a whole person in the context of the various challenges he faces. With regard to X's challenges in remaining in the classroom or becoming overwhelmed and disengaging, for example, the District has created safe spaces for him to retreat to – both in the classroom so that he can continue to listen, and outside of the classroom. It has been thoughtful in the creation of these spaces – for example, by placing X's desk beside the cloakroom so he can slip into the cloakroom quietly without being particularly noticed by his peers. The District has provided a number of safe adults and has given X time to build relationships with them. The District has employed a number of strategies for fostering healthy relationship-building with peers, as I will discuss below in respect of the token-economy.

[144] On the basis of the whole of what is before me, I am satisfied that the District has reasonably accommodated X and as such has not breached the *Code* in respect of the learning supports provided to X in his grade 4 year.

## 2. *Consistency of EA support*

[145] I turn next to the allegation that the District discriminated against X when it decided to incorporate a second EA into X's learning support team. Y testified that she spoke with X

everyday and saw that he was frustrated, felt he had no friends and could not do the work, and would get angry. Y said that X “really needed an anchor” and to “not feel like an alien”. X seemed to have found that anchor in the Designated EA. Y said that she tried to tell the District not to bring in someone else but they did not listen. She said that X needed to work with one person “until he felt ok” given his negative experiences at the 1<sup>st</sup> School.

[146] Y explained that, “[X] depended heavily emotionally on the [Designated EA] that was assigned to [X] for much of his grade 4 year. I am grateful she was there for [X] at school. He needed somebody kind and talented to help him with emotional and learning aspects.”

[147] The District explained that many children develop strong bonds with their EAs making this situation not unusual. I do not find that Y’s stating X’s attachment to the Designated EA and wish to continue with her should have led the District to understand that X would have the strong negative reaction that he did. The accommodations he required related to supporting his learning and his behavioural challenges. It is not apparent to me from the evidence that X required specifically the Designated EA to accommodate his disabilities in a way that would ensure meaningful access to education.

[148] It was reasonable for the District to propose transitioning in a second, new EA. This would represent an additional layer of support to ensure accommodation would be in place if the Designated EA were unable to return either because of union seniority or choice; and to assist X in developing independence, which is consistent with the educational mandate that governs the District in providing its services and with the skills the District was trying to support X in developing under his IEP and behaviour plan. I cannot find that the District knew or should have known that this would lead to X’s experiencing suicidal ideations.

[149] In finding that the District did not breach the *Code* in its approach to the EA issue, it is significant that in the face of X’s negative reaction, the District stopped the transition plan. It then promptly took the extraordinary step of securing the Designated EA’s tenure at the 2<sup>nd</sup> School to ensure ongoing stability in that relationship for X in the grade 5 year. There was no reason for the District to approach the union for an exception earlier than it did, given that



aside from X having a heavy reliance on the Designated EA, there was little reason to expect the reaction that X had to the prospect of a new person.

[150] Y expressed concern and disappointment that the Designated EA referred X to the school counsellor when he expressed emotional distress, including in respect of his talk of self-harm, but this was not discriminatory. There is no evidence that EAs have the training or skillset to manage such situations. It was appropriate for the EA to refer X to the appropriate resources to try to address his needs in those instances.

[151] Y testified that the Designated EA's only wanting to work with X part-time rather than full time made X feel "unimportant". I understand how this would have an emotional impact on X and on Y who wants deeply to see her child supported and thriving. However, as outlined above, it is not apparent to me that providing two rather than one consistent EA was unreasonable in the circumstances. The District was still providing X with one-on-one EA support, and quickly took steps to change the approach and address the new challenges that arose.

[152] For the above reasons, on a balance of probabilities, I am satisfied that the District reasonably accommodated X in respect of its approach to providing EA support in grade 4.

### *3. Token Economy*

[153] In respect of the token economy, Y alleges that the manner in which the 2<sup>nd</sup> School rolled out the token economy led to X's losing friends which in turn exacerbated his behavioural challenges, including his not wanting to go to school. She said, "[X] first started at [the 2<sup>nd</sup> School] being a likeable kid, [X] made friends easily. Once those friends came to know that [X] was getting rewards in this program, he was ostracized by the people he had found friendships with." She argued that it set X up for social failure and ostracization, which made his whole school experience worse than it otherwise would have been.

[154] I accept Y's evidence that the token economy may have caused some friction with some of X's peers. However, on the whole of the evidence on a balance of probabilities, I am satisfied

that the District took a number of reasonable and practical steps to help X build social tools and connections that could support a more positive learning environment overall to mitigate the social challenges associated with the token economy.

[155] The District worked with X to support his developing skills to work through social issues. The Behaviour Analyst began providing weekly support to X for his social issues and helped X develop friendships. The District developed a friendship club, which Y acknowledged helped a bit.

[156] The 2<sup>nd</sup> School Principal testified that the team was trying to teach X some “perspective-taking” to manage his challenges with social situations. He observed that X would get stuck with his perspective of the social situation and needed to learn how to take another perspective of an issue that needed to be resolved. His primary strategy was avoidance, and the second school tried helping him understand that this can sometimes make the problem bigger. When something triggered him, X would often just run away, or he would go in the cloakroom, or he would pull up his hood and not engage. It would take time for him to share what happened and what he was reacting to.

[157] The 2<sup>nd</sup> School Principal would bring the kids together to work through issues as they arose. He noted that they could not always get X to join them to talk through issues, though eventually he began joining and they were able to work through issues and reach peer understanding when conflict arose.

[158] The District also had plans and strategies in place to support X when he would retreat under his desk or bolt from the classroom. These plans and strategies were employed in order to help minimize the “social cost” X was experiencing in relation to these behaviours. They positioned his desk near the cloakroom so he could discretely exit the classroom to the cloakroom or hall if he needed to, and also had a process whereby if X retreated under his desk, his EA would intervene first, followed by the 2<sup>nd</sup> School Principal, followed by LST or counsellor to support him to emerge.

[159] The District cannot control all social interactions between students and is not obligated to provide perfect accommodation. It is obligated to take all reasonable and practical steps to remove the disability-related barriers to X's meaningful access to education. Insofar as X may have experienced some social friction with peers related to the token economy, I am satisfied on a balance of probabilities, that the token economy was part of a broader package of accommodation that was reasonable, and that the District took reasonable steps to address the social challenges X was experiencing.

## **VI CONCLUSION**

[160] I acknowledge the ongoing challenges X is facing and appreciate that the steps taken by the District have not resolved them to the extent Y would hope. However, for the reasons set out above, I have found that the District has not breached the *Code* in its efforts to support X in accessing education.

[161] For the above reasons, the complaint is dismissed under s. 37(1) of the *Code*.

Emily Ohler  
Tribunal Chair