

Hay River District Education Authority Investigation Report

Presented to the Minister of
Education, Culture and Employment,
The Honourable R.J. Simpson
September 20, 2021

By Sheldon Toner, Investigator,
Dragon Toner Law Office

Table of Contents

Introduction	Page 3
Terms of Reference	Page 3
Methodology	Page 4
Summary of Evidence	Page 4
HRDEA Meeting Minutes	Page 5
Exchange of Correspondence	Page 9
Financial Documents	Page 11
Analysis	Page 13
Rationale for Decision	Page 14
Impacts on Students	Page 15
Alternative or Mitigating Measures	Page 16
Opinion on Reasonableness	Page 18
The Financial Dimension	Page 18
The Political Dimension	Page 19
Legal Requirements	Page 19
Transportation of Students Regulations	Page 20
Standard of Review	Page 21
Procedural Analysis	Page 21
Reasonableness Analysis	Page 22
Conclusion	Page 23
Executive Summary	Page 24

Introduction:

[1] This report is delivered to the Minister of Education, Culture and Employment (ECE) of the Government of the Northwest Territories (GNWT).

[2] I am appointed by the Minister of ECE (Minister) to investigate whether the Hay River District Education Authority (HRDEA) has fulfilled its duties under the *Education Act* and regulations.¹ The focus of the investigation is the decision of the HRDEA to not offer student transportation for the 2021-2022 school year.

[3] The investigation is mandated under the Minister's authority under section 113 of the *Education Act*. The investigation has been carried out on an expedited timeframe recognizing the 2021-2022 school year started on September 3, 2021. The Terms of Reference for the investigation set a deadline for the conclusion of this report on August 31, 2021. The notice of appointment authorizing this investigation was issued on that same date, however, and the deadline for conclusion was extended to September 17, 2021.

[4] This report sets out a summary of the evidence I have been able to gather, within the expedited timeframe for investigation, along with my analysis and conclusions. Due to the expedited timeframe, this report may include typographical errors or raise further questions. The conclusions outlined in this report are primarily the result of a document review with some follow-up with limited written questions.

Terms of Reference:

[5] The Terms of Reference for the investigation require me to determine the rationale for the HRDEA decision, the impacts of the decision on the student body, alternative or mitigating measures explored by the HRDEA, and any other issues.

[6] The Terms of Reference also require me to provide an opinion as to whether the HRDEA's decision to not employ its discretionary authority to offer student transportation is reasonable. I am asked to consider statutory requirements set out in paragraph 7(1)(a) of the Hay River Education District and Hay River District Education Authority Regulations as well as the Transportation of Students Regulations.²

[7] This report comes with certain qualifications, as follows:

[8] I have not been asked to conduct a financial review or audit in evaluating the HRDEA decision, and I would not be qualified to provide an accounting opinion. I have reviewed and considered financial documents relevant to the decision, which provide important background information. I have focused primarily, however, providing a legal analysis on whether HRDEA's fulfilled its obligations.

[9] In terms of the impacts of the decision of the student body, the timeframe for completion of the investigation has not allowed me to independently canvass students and parents to obtain first-hand information. In providing a legal analysis, I have included an evaluation whether the HRDEA gave adequate consideration, procedural or substantive, to the potential impact of its decision.

¹ *Education Act*, SNWT 1995, c 28

² Hay River Education District and Hay River District Education Authority Regulations, NWT Reg 143-96; Transportation of Students Regulations, NWT Reg 196-96

Methodology:

[10] In conducting this investigation, I have requested and obtained relevant documents from ECE and the HRDEA. This includes minutes of HRDEA meetings, financial documents, correspondence, and e-mails pertaining to the issues of student transportation within the Hay River Education District (the District).

[11] The District is one of five districts within the South Slave Education Division (the Division).³ The South Slave Education Divisional Council (SSDEC) is directly involved in providing expenditure estimates and receiving funds for delivery of the education program in the districts.⁴ I therefore also requested and obtained relevant documents from the SSDEC. This includes relevant financial documents, correspondence, and e-mails with the District and ECE.

[12] The HRDEA and SSDEC were fully cooperative in responding to my request for documents. The expedited timeframe for completion of the investigation did not allow time for follow-up interviews with representatives of the education bodies. The investigation therefore proceeded as a written process, and the HRDEA Chairperson, Mark Harris, was again fully cooperative in respond to written questions rather than attend an interview. I offered representatives of both education bodies to contact me if they had any information they wished to provide for consideration in the investigation.

[13] It is important for the integrity of any investigation that it be conducted objectively, without a pre-determined outcome and in accordance with principles of procedural fairness. Section 113 of the *Education Act* authorizes the Minister to trigger an investigation where he or she is of the opinion that an education body is not adequately exercising its powers, performing its duties or fulfilling its responsibilities. In conducting this investigation, I wish to be clear that did not adopt any opinions formed by the Minister in starting the investigation. I approached the investigation as a neutral and objective observer with no pre-conceived opinions. The analysis and conclusions set out in this report are based exclusively on an independent review of the documents and written responses from the HRDEA.

Summary of Evidence:

[14] The documentary evidence gathered through this investigation indicates there is a long-standing issue regarding ECE's level of funding for student transportation.

[15] The long-standing issue forms part of the context of perceived chronic underfunding in which the HRDEA decided not to offer student transportation for the 2021-2022 school year. Some examples of the evidence providing this background include the following:

- May 3, 2019 – Joint Submission from John Stephenson “on behalf of NWT DEC/DEA Chairpersons” to Caroline Cochrane, then Minister, identifying bussing costs as an underfunded area within the funding formula used by ECE.
- June 30, 2019 – SSDEC Consolidated Financial Statements include, under the headings “Management Discussion and Analysis” and “Operating Environment”, “bussing contracts and repairs” as an underfunded expense that has not been indexed for inflation in over 15 years and has “probably more than doubled in that same timeframe.”

³ South Slave Education Division and South Slave Divisional Education Council Regulations, NWT Reg 139-96, s. 2

⁴ South Slave Education Division and South Slave Divisional Education Council Regulations, NWT Reg 139-96, s. 5

- May 10, 2021 – Letter from the SSDEC Chairperson, Ann Pischinger, to the HRDEA Chairperson, referring to “numerous discussions about bussing and other unfunded and underfunded costs” and attempt to lobby “multiple Ministers over the years.”
- June 17, 2021 – E-mail from the SSDEC Superintendent, Curtis Brown, to the Deputy Minister of ECE (Deputy Minister), Rita Mueller, including a reminder of the Joint Submission in the context of answering questions about the HRDEA decision.
- June 18, 2021 – Letter from the HRDEA Chairperson to the SSDEC Superintendent, stating “Further conversations within the community with former HRDEA board members only highlight the struggles over the past 15-plus years in the underfunding of student transportation services.”

HRDEA Meeting Minutes:

[16] The record of the HRDEA’s decision with respect to student transportation, which was made within the context of this long-standing issue, can be ascertained from a review of meeting minutes from the HRDEA.

[17] The timeframe directly relevant to this investigation begins in January 2021, when the HRDEA started its planning and budget deliberations for the 2021-2022 school year. This was not the first time the HRDEA had grappled, however, with difficult decisions related to student transportation.

[18] In response to written questions, the HRDEA Chairperson outlined history indicating that in \$80,781 was cut from the HRDEA’s school O&M to make up for the bussing shortfall in the 2018-2019 school year. The SSDEC provided a one-time contribution from their 2018-2019 excess surplus fund balance which helped to mitigate this over-expenditure. The documents obtained through the investigation illustrate the evolution of the long-standing issues from 2019.

[19] The following is a summary of relevant decision on student transportation from 2019 and 2020, as recorded in the meeting minutes:

- January 9, 2019 – HRDEA meeting minutes indicate Member of the Legislative Assembly (MLA) R.J. Simpson attended a board meeting where, *“DEA and principals discussed how underfunded areas such as bussing has affected school operations....”*
- February 6, 2019 – Minutes state, *“With the DEA’s current bussing contract due to expire at the end of June 2019, a new Request for Proposal (RFP) is being drafted.”* A committee was formed to review and finalize the RFP for approval.
- June 12, 2019 – The HRDEA approve its 2019-2020 budget, described in the minutes as follows:

Members were presented with the 2019-20 DEA budget for approval which saw an 18% redistribution rate for the underfunded DEA administration and bussing categories. The DEA will also be reducing their accumulated surplus down to the 7% allowable mark as determined by ECE. It was noted that this budget may have to be adjusted depending on the outcome of the student transportation issue.

Minutes from the same meeting indicate the following points under the heading “Action List”:

- *RFP was cancelled as the proposals were outside of the DEA’s financial capabilities.*

- *Buses were inspected in hopes of extending the current contract for one more year. The inspection reports and quotes for necessary repairs were sent to Curtis for follow-up with ECE. It is hoped that ECE will either repair or replace the buses.*
- *The Bussing Committee will report back to the DEA with the recommendation once ECE has responded.*
- June 26, 2019 – Minutes indicate that upon the receipt of inspection reports on the three buses used for student transportation, the HRDEA accepted the recommendation of the Bussing Committee to repair the buses, obtain a second quote (presumably for repairs), extend the current contract by one more year, and move to a user pay system to help close the deficit gap. The Minutes state,

It was noted that the GNWT was unwilling to assist with a bus replacement program or take any responsibility with having the buses repaired.

A note will be sent to all parents/guardians informing them of the user pay system that will be in effect starting September 9, 2019. The DEA's Bussing Committee will meet prior to school start to determine how much to charge and to set up a criteria.

- September 4, 2019 – Minutes indicate the HRDEA Chairperson gave the following update on the implementation of user fees for student transportation:

Most notably, it had become apparent over the summer break, that the Government was unwilling to accept responsibility for their buses and to assist the DEA in paying for the necessary repairs on the [sic] and nor were they willing to replace the buses. Instead, the Minister has put the onus on the SSDEC/DEA to take full responsibility by using their surplus dollars. It is expected that this will be a topic for discussion at the next SSDEC meeting in September.

In the meantime, the HRDEA was left with no other option but to implement a user pay system at a cost of \$325 per student with a family rate of \$800 for those who have three or more children. Ticket sales for priority zone one have been minimal however it is expected to pick up once zone two tickets become available.

In moving forward, the Bussing Committee will work towards an early release for a new RFP. It is expected that the user pay system is here to stay in order to protect school O&M.

- December 4, 2019 – The HRDEA received a delegation from both Hay River MLAs at its meeting, which include discussion about student transportation. Minutes indicate, *“the DEA did note that additional funding had been received from the SSDEC and that the purchasing of new buses was being considered. [The Minister] noted that it was within the DEA's right to purchase buses, which will be confirmed in a letter from ECE.”*
- January 22, 2020 – Minutes state:

After meeting the previous week, the Bussing Committee made the following recommendations:

- *RFP for management services only for a 5 year contract*

- RFP for management and contractor supplies buses for two – 5 year contracts
- DEA tender for the purchase of 1 to 3 buses
- Offer no bussing services at all

Members agreed to follow through with the advertising of an RFP that requests a separate bid for the managements [sic] services only as well as a separate bid for management services plus contractor supplied buses. Members also agreed to tender out the DEA purchasing of 1 to 3 buses.

- February 19, 2020 – Minutes indicate the Bussing Committee planned to meet to finalize the RFP for the purchase of two buses. In addition, the HRDEA Chairperson gave the following report:

Chairperson Mark Harris reported that he did an on-camera interview with CBC regarding the DEA’s user fee for bussing. Mark also met with MLA North RJ Simpson and parent [R.M.], at which time they were able to provide reasonable answers to her questions. [R.M.] requested that a public meeting be held so other concerned parents have a venue to voice their concerns regarding user fees for bussing. A constituency meeting has been organized for Monday, March 23rd. Mark invited other DEA members to attend.

In response to written question, the HRDEA Chairperson advised the meeting did not take place due to the schools being shut down because of Covid-19.

- May 20, 2020– Minutes indicate the RFP for management services had now been advertised. In addition, include the following notes under Bussing as an “Action Item”:

- *Principal [L.B.] expressed concern over the additional funding that is necessary in order to meet financial demands for bussing – Chairperson Mark Harris mentioned that with the collection of user fees the demand on school O&M has lessened and suggested that the SSDEC could possibly assist with additional funding.*

- June 17, 2020 – Minutes indicate that the SSDEC representative Pennie Pokiak reported, among other things, “Discussion of possible SSDEC surplus distribution dollars will take place in September.” The following notes appear under Bussing as an “Action Item”:

- *The RFP is in the evaluation process*
- *Tender has closed for the purchase of two buses. It was noted that the additional funding which was rec’d [sic] from the SSDEC was reserved for the purchase of buses and regardless of what the upcoming school year may look like, it will be in the best interest of the DEA to make the purchase now.*

- September 16, 2020 – Minutes indicate the following notes and motions decision regarding the HRDEA’s budget for 2020-2021, including provisions for bussing:

Now that the DEA’s new bussing contract has been finalized, members were presented with two budget options to choose from. The first option sees the overall revenue being dispersed as received minus a 1.3% redistribution in order to make up for the DEA and Bussing deficit areas also to allow the schools their additional 7% surplus transfer from prior year. This budget option

however leaves the DEA no contingency funding. The second option allows for a DEA contingency fund of 7% by reducing 9.5% out of school O&M.

MOTION 21-054: I MOVE THAT THE HRDEA APPROVE THE 2020-21 DEA BUDGET OPTION 2 AS PRESENTED

Moved by Pennie Pokiak; seconded by Annette Rupert. Carried.

[20] The HRDEA's deliberations on student transportation in 2019 and 2020 provide important background context. It is in this context in which the HRDEA returned once again to the issue in January 2021, as the board began planning for the 2021-2022 school year. The following is a summary of relevant HRDEA discussions and decisions with respect to student transportation for the 2021-2022 school year, as recorded in the meeting minutes:

- January 20, 2021 – Minutes indicate in items to be discussed, “Bussing – anticipated HRDEA \$20K deficit for this year and continual underfunding”.
- May 9, 2021 – The HRDEA Chairperson gave a presentation with both Hay River Members of the Legislative Assembly (MLAs) in attendance, expressing frustration over unsuccessful efforts to obtain financial support for student transportation. Minutes state:

The DEA advised both MLAs that their next course of action will be to send out a notice to parents/guardians that bussing may be cancelled for 2021-22 and that this notice will encourage the public to reach out to their MLAs in hopes that they can lobby our Government to provide the funds needed.

- May 19, 2021 – Minutes state:

Chairperson Mark Harris proposed that a motion be carried directing that notice be given to Parents and Guardians informing them that unless ongoing financial assistance is found, all student transportation services will be cancelled for the 2021-22 school year.

MOTION 21-050: I MOVE THAT HRDEA CANCEL ALL BUSSING SERVICES FOR THE 2021-22 SCHOOL YEAR IN ITS ENTIRETY DUE TO INSUFFICIENT FUNDING.

Moved by Annette Rupert; seconded by Jamie Hunt. Carried

- June 9, 2021- Minutes indicate approval of the HRDEA 2021-2022 budget “...with the elimination of student transportation. Revenues received for student transportation will be redirected to help fund other unfunded areas and to also assist with the projected 2020-21 bussing deficit of \$17,300.”

MOTION 21-054: I MOVE THAT THE HRDEA APPROVE THE 2021-22 SCHOOL YEAR DEA/SCHOOL O&M BUDGET AS PRESENTED

Moved by Pennie Pokiak; seconded by Nikki Ashton. Carried.

- June 23, 2021 – Minutes state:

Chairperson Mark Harris reported that the final bussing cancellation letter going to Parents/Guardians was delayed due to the letter sent from Deputy Minister Rita Mueller to Superintendent Curtis Brown. The DEA provided a response to the DM's questions, stressing that the DEA has exhausted all its efforts to try and make bussing work, but until full funding is provided by ECE, the DEA has no further options but to cancel this service.

- August 24, 2021 – Minutes indicate the approval of a motion terminating services with the contract provider used for student transportation by the HRDEA, as follows:

MOTION 21-073: I MOVE THAT THE HRDEA TERMINATE THE HAY RIVER SCHOOL BUSSING MANAGEMENT SERVICES CONTRACT (SC4253) EFFECTIVE IMMEDIATELY WHEREBY GIVING THE CONTRACTOR THIRTY (30) DAYS WRITTEN NOTICE AND PROVIDE PAYMENT TO THE CONTRACTOR ACCORDINGLY FOR THOSE THIRTY DAYS.

Moved by Pennie Pokiak; seconded by Lisa Ruggles. Carried Unanimously.

The HRDEA concluded that after having exhausted all efforts and having held off as long as possible in an attempt to secure the student transportation program for the 2021-22 school year and beyond, it had become necessary to terminate the Contractor's contract.

[21] In addition to discussion and motions made on the record, the HRDEA passed several *in camera* motions related to student transportation. I was not provided with any record of these discussion held in camera, and given the timeframe for the investigation, did not have time to research whether they might be accessed for this investigation. I have therefore based my assessment only on those discussions and motions noted on the record.

The record of the HRDEA decision includes correspondence sent to parents further to the Board's discussions and motions. The following is a summary of that correspondence:

- May 25, 2021 – Letter to parents/guardians indicating all student transportation will be cancelled “unless ongoing financial assistant is found.” Parents are urged to contact their MLA and ask that they take further action to help secure the additional funds needed.
- June 14, 2021 – Letter to parents/guardians indicating all student transportation will be cancelled, citing that “ongoing discussions with our education partners have told us that no additional funding is available.” Parents are urged again to contact their MLA and ask that they take further action to help secure the additional funds needed.
- August 25, 2021 – Letter to parents/guardians confirming student transportation is cancelled. The letter refers to ongoing negotiations with the Minister of ECE and indicates student transportation may resume depending on the results of this investigation.

[22] The decision that is the subject of this investigation was made, on a conditional basis, on May 19, 2021. I say conditional because it still appears to have been subject to the proviso “unless ongoing financial assistance is found.” The bussing management services contract was not terminated until after the HRDEA passed the resolution to that effect on August 24, 2021. Termination of the contract brought finality to the decision on that date.

Exchange of Correspondence:

[23] Between May 9 and August 24, 2021, the documentary record indicates that ECE officials raised questions about the rationale behind the decision and tried to canvass alternatives or mitigating measures for the HRDEA. Departmental officials appear, without directing the HRDEA, to have been trying to promote re-consideration of the decision before it came into effect leaving students in the District without transportation.

[24] The following is a summary of relevant correspondence from ECE in May and June 2021, during which timeframe the Deputy Minister channeled communications through the SSDEC Superintendent, who in turn relayed questions and answers to and from the HRDEA Chairperson:

- May 31, 2021 – The Deputy Minister, sought answers from the SSDEC Superintendent of regarding his plan to resolve the student transportation issue. She questioned whether he had met with the HRDEA and presented the idea of reducing costs by running a smaller scale bussing service with one or two buses instead of the current arrangement using three buses.
- June 17, 2021 – The Deputy Minister wrote again to the SSDEC Superintendent, once again seeking answers as to whether the SSDEC was working with the HRDEA to resolve the issue and reminding the Superintendent of his responsibility to ensure access to transportation for Hay River students. She presented possible access to Jordan’s Principle funding and presented the idea of sponsorships or partnerships with local businesses.

[25] On June 18, 2021, the HRDEA Chairperson responded directly to the Deputy Minister. It is unclear whether the HRDEA included consideration of the points outlined in the letter before or after the Chairperson addressed them in response to the Deputy Minister. In any event, the exchange or correspondence did not result in any change in direction by the HRDEA.

[26] On July 30, 2021, the Minister of ECE entered direct communication with the HRDEA Chairperson. The Minister wrote to the HRDEA Chairperson, expressing the intention to ensure decisions on bussing did not affect students’ entitlement to access the education program. While acknowledging the HRDEA’s discretion to make decision, the Minister highlighted the requirement to consider factors listed in the regulations and expressed concern the HRDEA had not given those factors adequate consideration.

[27] On August 5, 2021, the HRDEA Chairperson responded directly to the Deputy Minister. It is again unclear whether the HRDEA included consideration of the points outlined in the letter, before or after the Chairperson addressed them in response to the Minister. The exchange or correspondence once again did not result in any reconsideration of HRDEA’s decision.

[28] On August 19, 2021, the Minister notified the HRDEA Chairperson of his decision to appoint an investigator pursuant to section 113 of the *Education Act*. The Minister expressed his concern that the HRDEA was not adequately exercising its powers, performing its duties and fulfilling its responsibilities under the *Education Act*.

[29] The letters of June 18 and August 5 are of central importance in this investigation. They do not strictly form part of the record of HRDEA’s decision to not offer student transportation for the 2021-2022 school year. They are nonetheless the Chairperson’s direct responses to questions presented by ECE regarding the rationales for the decision and include discussion of alternative or mitigating measures explored by the HRDEA.

[30] In response to written questions, the HRDEA Chairperson confirmed the rationales set out in the letters were strong considerations of the HRDEA in the decision to cancel bus services after a long and arduous process over three years culminating in the final decision. The Chairperson's responses in these letters therefore offer the best available secondary source of information to supplement the record of decision in the board minutes and to ground an opinion on the HRDEA's decision is reasonable.

[31] In response to written questions, the HRDEA Chairperson further expressed concern that ECE was grasping for solutions and trying to force a different decision knowing the HRDEA could not afford an alternative. In providing responses, the Chairperson was forthcoming in indicating the HRDEA did not appreciate what appeared to board as tactics on the part of ECE.

Financial Documents:

[32] In addition to meeting minutes and correspondence, HRDEA complied with requests for budget and financial documents relevant to this investigation. The following is a summary of information that provides useful background context to the HRDEA decision that is the subject of this investigation:

- The HRDEA approved budget for 2020-2021 allocates revenue of \$85,449 to bussing, and forecasts expenses of \$158,100. The total revised budget forecasts revenue of \$751,743 and expenses of \$824,276, leaving a projected deficit of \$72,533.
- The HRDEA draft budget for 2021-2022 (with bussing) allocates revenue of \$81,032 to bussing, and forecasts expenses of \$151,803. The total revised budget forecasts revenue of \$559,084 and expenses of \$559,084, reflecting a balanced budget.
- The HRDEA approved budget for 2021-2022 (without bussing) allocates revenue of \$81,032 to bussing while forecasting no bussing expense. The total revised budget forecasts revenue of \$526,070 and expenses of \$511,158, leaving a projected surplus of \$14,912.
- In response to written questions, the HRDEA Chairperson indicated his understanding all education bodies in the Northwest Territories are given funding for bussing as per formula funding regardless of whether they provide a transportation service or not. He indicated that five out of thirty-three communities provide bussing and offered the position that nothing in the *Education Act* mandates or legislates education bodies to provide transportation.
- Before the HRDEA started charging student fees and charges, the HRDEA carried operating deficits for student transportation between \$62,930 in 2015 and \$75,085 in 2018.
- After the HRDEA started charging student fees and charges, the HRDEA carried operating deficits for student transportation of \$62,953 in 2020 and \$36,613 in 2021.
- The HRDEA's financial position is that, as of June 30, 2021, it held fund balance of \$260,967, as compared with a fund balance of \$367,894 in 2020.
- The HRDEA's unaudited Statement of Operations indicates the HRDEA had an operating deficit of \$72,533 for the year ended June 30, 2021.

[33] The HRDEA makes its financial and budgetary decisions within the context of being a district within the SSDEC. The SSDEC also complied with requests for meeting minutes, as well budget and financial documents relevant to this investigation. The following is a summary of information that provides useful background context to the HRDEA decision that is the subject of this investigation:

- January 23, 2021 – The SSDEC Superintendent reviewed the draft (Divisional) budget for the 2021-2022 school year. He indicated that a deficit budget was forecast for the year “to spend down surplus below the 7% maximum mandated by the GNWT.”
- In this meeting the HRDEA’s SSDEC representative Pennie Pokiak addressed concerns about underfunded areas including student transportation.
- The SSDEC consolidated financial statements for 2019 includes the following notes under the heading “Financial Condition”:

For the year ended June 30, 2019 the Council had an operating surplus of \$998,146 inclusive of DEA surpluses and deficits. This was higher than the projected deficit of \$914,428...

...

The accumulated uncommitted fund balance for the Council now sits at \$3,445,942 (see chart below) which is \$1,516,653 above the Council maximum fund balance of \$1,929,289 spelled out in policy DFAA – Financial Surplus. The Council’s budget for 2019/20 is a deficit budget of \$850,951 that, if realized, would bring the accumulated fund balance down to \$2,594,991.

- The SSDEC consolidated financial statements for 2020 includes the following notes under the heading “Financial Condition”:

For the year ended June 30, 2020 the Council had an operating surplus of \$434,054 inclusive of DEA surpluses and deficits. This was lower than the projected deficit of \$1,523,443...

...

The accumulated uncommitted fund balance for the Council now sits at \$2,756,047 (see chart below) which is \$852,679 above the Council maximum fund balance of \$1,903,368 spelled out in policy DFAA – Financial Surplus. The Council’s budget for 2020/21 is a deficit budget of \$1,366,653 that, if realized, would bring the accumulated fund balance down to \$1,389,394.

- May 10, 2021 – The SSDEC Chairperson wrote to the HRDEA Chairperson, providing the following financial response in declining the HRDEA’s request to for a special meeting:

The SSDEC’s current year deficit budget and surplus spending plan is expected to put our consolidated surplus at less than 7% of annual allocations by this June 30, 2021, even with all of the DEA and school surpluses included. Add to that the SSDEC’s decision to approve a deficit budget for 2021-22, is projecting the SSDEC’s surplus to be reduced to less than \$500,000 by the end of the school year. This is very low and already puts the SSDEC at risk of not being able to meet payroll in months when ECE contributions are smaller than payroll (cash flow issue), and/or in the case of unexpected and uncontrollable costs next year (such as casuals/substitute teacher over-expenditures).

- The SSDEC maintains a policy that states, “Council will not budget for, or accumulate a fund balance of less than \$500,000 or greater than 7% of its last annual revenue figure.”⁵
- August 11, 2021 – The Minister of ECE wrote to the SSDEC Chairperson, confirming contributions in the amount of \$24,101,634 for the 2021-2022 school year.

⁵ SSDEC Education Policies Manual, Policy DFAA Financial Surplus, Regulations, s. 2

- The SSDEC consolidated financial statements for 2021 were finalized during this investigation. The statements include the following notes under the heading “Financial Condition”:

For the year ended June 30, 2021 the Council had an operating surplus of \$30,924 inclusive of DEA surpluses and deficits. This was lower than the projected deficit of \$1,020,666...

...

The accumulated uncommitted fund balance for the Council now sits at \$2,624,908 (see chart below) which is \$442,361 above the Council maximum fund balance of \$2,182,587 spelled out in policy DFAA – Financial Surplus. The Council’s budget for 2021/22 is a deficit budget of \$1,031,450 that, if realized, would bring the accumulated fund balance down to \$1,593,458.

- The SSDEC Super intended provided the following information in an e-mail attaching the Division’s financial statements for 2021:

The SSDEC meets this weekend to approve the financial statements and decide what to do about the excess surplus. Below is the email to the members I sent last week and attached is the Budget Assumption #6 that Council uses as a guide. I will be advocating the distribution of up to \$1,000,000 to the DEAs/schools accordingly at the meeting, and advocating that it be distributed by ECE funding formula, meaning mostly based on student enrollment. This could result in Hay River receiving an additional \$300,000 or \$400,000 as a one-time lump sum depending on what Council decides.

Of course this depends on the decision of the SSDEC this weekend, and then the potential follow up decision of the HRDEA thereafter. Note that once the SSDEC approves the financial statements they go to the Minister with signatures. Note also that excess surplus is expected to be spent within the year (by June 30, 2022), so can't be spread over multiple years according to GNWT Policy, which is unfortunate because the HRDEA could go another 3 or 4 more years with the existing bussing contract if they and the SSDEC were not feeling pressured to spend their surplus all at once. Note also that excess surplus spending is still also subject to Ministerial approval but I don't anticipate that will be a problem, and may come in a more timely manner this year if the HRDEA is planning to resurrect and spend on bussing.

[34] The volume of documentary evidence provided by ECE, HRDEA and SSDEC in this investigation is considerable. The summary of evidence provided in this report cannot touch on every part of the extensive discussions and deliberations that have taken place to address the long-standing issue of student transportation in the Hay River Education District. Relevant excerpts from the documentary evidence are therefore addressed as appropriate in the analysis.

Analysis:

[35] The decision to not offer student transportation for the 2021-2022 school year is a multi-faceted decision. The decision could be characterized as simultaneously legal, financial, and political. In evaluating the decision, I have considered what the record indicates in terms of how the HRDEA applied legal, financial, and political considerations in reaching its decision.

[36] My assessment begins with some observations regarding the rationale for the HRDEA decision, the impacts of the decision on the student body, alternative or mitigating measures explored by the HRDEA, and any other issues.

Rationale for Decision:

[37] The key rationale behind the decision was to affect a solution to the long-standing issue of perceived historic underfunding of student transportation.

[38] The HRDEA did not issue a single set out reasons for decision, as other types of administrative decision-makers might be expected to do in a more straightforward case. The record of decision can nonetheless be found in the HRDEA's meeting minutes. These minutes are primary source of information setting out the HRDEA's rationale of decision.

[39] Minutes from 2019 and 2020 provide useful background in that they define the issue the HRDEA sought to address not only in the 2020-2021 school year but again in budgetary planning for the 2021-22 school year. Before the HRDEA turned its mind to the decision at issue in this investigation, it had already made significant changes to student transportation by purchasing buses and introducing user fees. While adopting these measures, the record also shows the HRDEA had flagged bussing as a chronically underfunded area and joined other education bodies in lobbying ECE to address the issue.

[40] The Terms of Reference for this investigation to not require or provide enough scope for me to address the long-standing issue, or to determine whether bussing student transportation is underfunded. Likewise, I do not propose to make any comment on negotiations between ECE, the HRDEA and the SSDEC regarding this issue. What is clear from the minutes, and from correspondence, is that the HRDEA Chairperson and presumably the board experienced frustration with this issue and wanted more funding.

[41] Minutes from January 22, 2020, provide the recommendation from the Bussing Committee that the HRDEA consider to "Offer no bussing services at." The recommendation is made in conjunction with other options, and without any explanation in the minutes of the rationale behind it. In any event, the HRDEA did not act upon this recommendation until the idea re-surfaced in May 2021.

[42] Minutes from January through August 2021 speak directly to the rationale of addressing the perceived long-standing issue. In January, the HRDEA forecast a \$20,000 deficit and "continual underfunding." In May, the HRDEA resolved to cancel bussing while at the same time advising parents and guardians this would happen "unless ongoing financial assistance is found."

[43] It is not difficult to infer where the HRDEA hoped to find assistance. Notices sent to parents and guardians in May and June encourage them to reach out to their MLAs and encourage them to lobby the government for more funding. In August, the HRDEA wrote to parents and guardians indicating student transportation may resume depending on the results of this investigation, which perhaps projects a hope or expectation for funding above and beyond funds available through the regular formula financing.

[44] There are no immediate financial rationales set out in the HRDEA minutes to support the decision to not offer student transportation. In response to written questions, the HRDEA could not point to any administrative or teaching positions or programs it would have to cut or that it sought to add resulting from the decision to cancel bussing in 2021-2022.

[45] The financial rationale underlying therefore more general, namely that transportation funding is inadequate within the operating context of the District. When the HRDEA implemented user fees in the previous school year, minutes from September 2019 indicate that the rationale in order "to protect school O&M." Based on correspondence and documents provided by the HRDEA, the general concern that

delivering student transportation comes at the expense of school operations and maintenance, and that the HRDEA finds itself having to make hard choices the SSDEC does not have to make while withholding support on the long-standing issue.

[46] In terms of legal rationales, it does not appear the HRDEA directly applied the Transportation of Students Regulations in reaching its decision. The Chairperson's letters to the Deputy Minister and the Minister provide background information about the numbers of students, I assume to be from updated information from prior years when transportation was offered.

[47] The HRDEA does not appear to have solicited any new information regarding the factors set out in the Transportation of Students Regulations and does not suggest that any of those factors have significantly changed as justification for withdrawing transportation which had in previous years been provided. Nothing in the documentary record speaks directly to rationales based on travel distanced, safety concerns, climate or age and health of students.

Impacts on Students:

[48] The HRDEA appears to have made its decision having generally considered the overall impacts on all those required used student transportation.

[49] The minutes of HRDEA meetings do not address potential impacts on students, except indirectly in the approval of letters to parents. The HRDEA Chairperson acknowledges the impact, however, in his letter of June 18 and August 5, 2021. I take these letters to be representative and reflective of consideration given to the topic by the HRDEA.

[50] In the letter dated June 18, 2021, the Chairperson refers to a list of 125 students who would be impacted "for obvious reasons." He further states, "all are a priority." In response to written questions, the HRDEA Chairperson confirmed the decision to cancel student transportation impacted all Hay River students, including students who used bussing to attend schools of the Commission scolaire francophone Territoires du Nord-Ouest (CSFTNO).

[51] In his letter dated August 5, 2021, the Chairperson indicated HRDEA ridership of 122 students in 2020-2021, representing 25% of the student population requiring bussing "assuming all these students have no alternate means of transportation."

[52] In the same letter, the Chairperson characterizes the impact as one of inconvenience for parents and guardians and disagrees with the Minister's proposition that the decision to cancel student transportation will have an impact on student attendance.

[53] The Chairperson's qualifications regarding the impact on students are positional statements and do not, in my view detract from his statement that "all are a priority." What the correspondence makes clear is that the HRDEA felt it had to prioritize potential impacts elsewhere in its programming by eliminating student transportation.

[54] In making this determination, The HRDEA does not appear to have solicited any specific information on impacts or consulted parents or guardians of HRDEA or CSHTNO students regarding their views on impacts such as attendance. Instead, the HRDEA Chairperson provided written responses indicating that the board's approach was instead to have parents and guardians contact their MLAs.

[55] The HRDEA Chairperson indicated that the HRDEA received no feedback from in response to notifications urging parents to contact their MLAs. The Chairperson provided information letters from West Point First Nation, Hay River Métis Governance Council, Soaring Eagle Friendship Centre were written at the urging of MLA South Rocky Simpson to persuade the GNWT or SSDEC to fund student transportation. He advises the letters were never received by the HRDEA.

[56] In terms of assessing impacts outlined in the legislation, nothing in the documentary record indicates the HRDEA addressed the specific factors set out in the Transportation of Students Regulations, namely the following: travel distance, safety concerns, climate or age and health of students.

[57] The HRDEA Chairperson explained that the HRDEA chose to exercise its rights under the paragraph 8(1)(e) of the Hay River District Education Authority Regulation and to exercise its discretion as a duly elected board to be fiscally responsible to the community that had elected it. In response his written response, the HRDEA Chairperson states:

The DEA was fully aware of the impact such a decision would have on students and subsequently why it took 3-years for this decision to be made. The financial strain on the system, had the DEA kept its bussing, would have had a far greater impact on our students' education.

[58] While understanding the potential impact on students, the HRDEA Chairperson shared the unanimous board's perspective that, "in a system that does not fund properly for education a tough decision was required to be made."

Alternative or Mitigating Measures:

[59] The HRDEA considered numerous alternative or mitigating measures before deciding not to offer student transportation, considering the HRDEA's deliberations going back to 2019.

[60] Minutes from 2019 and 2020 indicate that the long-standing issue became acute in the HRDEA's planning for the 20220-2021 school year. The HRDEA responded by running an RFP process, and when this did not generate satisfactory results, the HRDEA pivoted and secured a one-time funding grant to purchase two buses and contract for the use to three buses to transport up to 210 students.

[61] According to correspondence from the SSDEC Superintendent, the HRDEA was able to secure \$400,000 of the Division's \$1 million surplus for bussing. This was an alternative financial option secured by the HRDEA above and beyond the formula financing allocation for student transportation.

[62] Minutes from 2019 and 2020 also indicate that the HRDEA implemented user fees for student transportation, which the HRDEA implemented by identifying priority zones and by setting annual fees of \$325 per student and \$800 for families. The notice sent to parents and guardians advised parents they may seek reimbursement from the Income Assistance Program, the local Band Office, or the Jordan's Principle Program.

[63] In response to written questions, the HRDEA Chairperson summarized the results of the user fee system as follows:

In the 2020-21 school year user fees and CSFTNO fees dropped quite significantly from a projected revenue budget of \$51,000 down to an actual of \$33,700 resulting in a \$17,300 unexpected deficit.

...

During the 2020-21 school year the CSFTNO implemented their own user fee to which they kept the funding from to help offset what the DEA would charge them to use the DEA bussing system. This resulted in a significant drop in ridership from the CSFTNO from 34 riders in 2019-20 down to only 10 in 2020-21.

[64] Minutes from 2021 convey the sense that the Board felt it had no option but cancel bussing unless ongoing assistance could be found. The HRDEA did not consider the alternative implemented in 2020-2021 a viable solution to the long-standing issue.

[65] In the flurry of correspondence that ensued after the board made its conditional decision in May 2021, representatives of the SSDEC and ECE presented many further suggestions for alternatives or mitigating measures to the HRDEA through its Chairperson. The correspondence indicates some of these had been presented in earlier talks and negotiations or were explored without success. For example, he indicates the HRDEA discussed possible cost-savings with the contractor, approached the Town of Hay River to look for possible partnerships, and discussed possible corporate sponsorships at the District level before concluding this was “not an appropriate path to a long-term solution.”

[66] The SSDEC Superintendent, in his correspondence dated May 10, 2021, urges the HRDEA to consider that two of the other four districts within the Division have combined their school secretary and secretary treasurer positions. It is not clear whether the HRDEA Chairperson took this suggestion back to the board. Whether he did or did not, the HRDEA’s minutes and correspondence make it clear this is the type of reduction in school operations the HRDEA was not de-prioritize positions or other aspects of school operations in favour of student transportation.

[67] In response to written questions, the HRDEA Chairperson confirmed that all the noted questions in the Deputy Minister’s and Minister’s correspondence were considered. The HRDEA, however, considered itself bound by a contract that serviced all eligible students and did not have the option to deviate, for example by changing the level of student transportation services under the contract.

[68] I accept at face value that the HRDEA considered all options presented by the SSDEC and ECE, in addition to whatever the HRDEA had considered in three years of grappling with the long-standing issue, and that reports of these efforts from the Chairperson and other board members informed the HRDEA’s discussions and deliberations. Whether or not the correspondence was tactical, it appears to have at least combined some re-packaged options along with eleventh-hour brainstorming that did not appear novel to the HRDEA.

[69] The HRDEA’s minutes and correspondence refer to the decision in question as terms of a last resort, when all other options had failed, including efforts to lobby and negotiate with ECE and the SSDEC. The timelines for this investigation have not allowed for a detailed inquiry into those negotiations, in which other alternatives and mitigating measures may have been aired.

Opinion on Reasonableness:

[70] The question as to whether the HRDEA's decision is reasonable turns on whether the focus is on the legal, financial, or political dimension.

[71] If the decision is viewed from its legal dimension, it can be reviewed against the governing legislation applying statutory interpretation and standards of review. This will be the focus of my analysis, subject to some comments about its financial and political aspects.

The Financial Dimension:

[72] If the decision is viewed from its financial dimension, there are legislative provisions the HRDEA is required to follow.⁶ The HRDEA is an elected body with considerable latitude to set financial priorities within the District. It is accountable to the government and the public for how it allocates and spends its financial commitments, and the HRDEA can be held accountable under the legislation or upon seeking re-election.

[73] When it comes to deciding about whether to fund student transportation, the costs will inevitably be a factor to consider in addition to all those factors set out in the Transportation of Student Regulations. In this case, it is fair to say the cost of transportation, relative other operational priorities of the HRDEA, was the predominant factor the board considered.

[74] I have already indicated that my report is not a financial review or audit and that I would not be qualified to provide an accounting opinion. My observation with respect the financial aspect of the decision is that the HRDEA does not appear to have faced a terminal loss of funding. There appears to be more than enough money available at both the District and Division to provide student transportation.

[75] Both the District and Division carry positive fund balances sufficient to cover the projected deficit for transportation services for 2021-2022. There appears to be enough money to fund student transportation, but the HRDEA and SSDEC were unable to agree on whose budget should be affected. The documentary evidence raises questions as to why the SSDEC declined to meet with the HRDEA (as set out in the letter of May 10, 2021), and whether the SSDEC is perhaps adhering too tightly to the goal of maintaining a \$5000,000 surplus. The financial concerns used by the SSDEC to rationalize not meeting with the HRDEA were not, in the end, borne out once the 2021 financial statements showed there are funds available to provide the HRDEA a one-time payment of \$300,000 to \$400,000.

[76] There are clearly elements of a turf war in terms of financial control and accountability for student transportation. This is not a dispute that can be resolved by reliance on discretion to set financial priorities. The HRDEA's financial discretion does not extend so far as to justify a decision made without considering factors set out in the Student Transportation Regulations. Neither the regulatory context nor the financial situation justify a purely financial decision.

⁶ See, for example, Hay River Education District and Hay River District Education Authority Regulations, NWT Reg 143-96, s. 7(1)(k)

The Political Dimension:

[77] The HRDEA decision can perhaps be most readily understood from its political dimension. The conditional decision, in May 2019, sought to resolve the long-standing issue by enlisting parents to advocate with their MLAs.

[78] If successful in obtaining greater long-term funding from the government, the HREA will achieve something beyond the financial accountability mechanism that currently constrains the HRDEA within the SSDEC. This is the ultimate objective of the HRDEA, and the means of attaining that includes creating expectations amongst parents and guardians that change may finally happen after this investigation.

[79] I offer no opinion on the HRDEA's decision politically. It is within the purview of an education body to advance the interests of students politically. The decision may be unreasonable if it is unidimensional and political to the exclusion of meeting statutory requirements.

Legal Requirements:

[80] The HRDEA is not only an elected body but also a creature of statute. As decision-maker established by administrative law, it is required to interpret and apply law according to established legal principles and observe procedural fairness. Its decisions made pursuant to legislation may be subjected to judicial review or to Ministerial direction under *Education Act*.

[81] The HRDEA is required under paragraph 7(1)(a) of the Hay River Education District and Hay River District Education Authority Regulations to provide education for all students in accordance with the *Education Act* and regulations.⁷ This provision is framed in mandatory language.

[82] The HRDEA has delegated authority from the Minister, under paragraph 8(1)(e) of the Hay River Education District and Hay River District Education Authority Regulations, to provide transportation to students to enable them to have access to the education program.⁸ The same provision authorizes the HRDEA to fix fees for transportation.

[83] The Transportation of Students Regulations require education bodies to consider certain factors when making policy regarding student transportation. The regulations are brief, consisting of a single section, as follows:

1. An education body shall consider the following factors when making a policy regarding the transportation of students:
 - (a) the distance students must travel to attend school;
 - (b) any safety concerns that exist regarding the students;
 - (c) the climate in the education district;
 - (d) the age and health of students.

[84] There is no obligation on the part of the HRDEA to provide student transportation. Paragraph 8(1)(e) of the Hay River Education District and Hay River District Education Authority Regulations is discretionary. There does not seem to be any contention on this point, which ECE and the SSDEC both appear to acknowledge in their correspondence.

⁷ Hay River Education District and Hay River District Education Authority Regulations, NWT Reg 143-96, s. 7(1)(a)

⁸ Hay River Education District and Hay River District Education Authority Regulations, NWT Reg 143-96, s. 8(1)(e)

[85] This is different from the conclusion the HRDEA is not mandated to provide student transportation, which is a characterization offered by the HRDEA Chairperson in his letter dated June 18, 2021. The HRDEA had historically exercised its mandate to provide student transportation, such that decision to cancel the service was a reversal or withdrawal from that mandate.

Transportation of Students Regulations:

[86] The Transportation of Students Regulations only apply if the HRDEA was “making policy” when it decided not to offer student transportation for the 2021-2022 school year.

[87] I do not expect the Board viewed its decision as one of making policy regarding transportation. The minutes indicate the focus was on addressing the long-standing issue of perceived underfunding, as evidence by phrases like “*unless ongoing financial assistance is found*” and “*until full funding is provided by ECE*”. (Minutes of May 19 and June respectively)

[88] The messaging conveyed to parents and guardians was not that the HRDEA wanted to get rid of student transportations. On the contrary, the objective was to cancel it to get the government’s attention and affect a long-term solution.

[89] Can this be considered making policy? It does not appear the HRDEA approached the decision as a matter of making policy, since they did not expressly consider the factors in regulations. This interpretation has intuitive appeal, in that the HRDEA was effectively un-making policy. The difficulty is that this is a distinction without meaning under principles of statutory interpretation.

[90] Courts and administrative decision-makers throughout Canada observe the “modern method of interpretation” to the task of interpreting legislation. The modern method requires the words of any Act or regulation are to be read, “in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the act, the object of act and the intention of Parliament.”⁹

[91] The Transportation of Students Regulations may be brief, but they nonetheless set out a scheme for principled decision-making about student transportation. The factors must be considered, and the list of factors provides a rational set of criteria that can be used to prioritize how an education body allocates transportation.

[92] The HRDEA was making unwritten policy when it decided not to offer student transportation. It would be an absurd result to interpret the legislation as applying when policy is being created but not when it is being dissolved. Any decision which will impact student transportation is therefore an act of “making policy” with the result being to determine a range of transportation from none to bussing for everyone. The term policy has a broader meaning in ordinary use and includes unwritten policy.

[93] The HRDEA had a statutory obligation to consider the factors set out in the regulations. While the HRDEA appears to have considered impacts on students, broadly and abstractly, the lack of any indication the board addressed the regulatory factors directly raises questions as to the adequacy of consideration.

⁹ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; 1998 CanLII 837. The method has been applied to legislation passed by provincial and territorial assemblies as well as the federal Parliament.

Standard of Review:

[94] The assessment I am required to provide is to opine on whether the HRDEA's decision to not employ its discretionary authority to offer student transportation is reasonable. The way this requirement is framed implies that my task is to apply one of two standards of review commonly used in administrative law. The standards of "correctness" and "reasonableness" imply differing levels of scrutiny with respect to decisions made under legislative authority.

[95] The law in this area is complex, but the recent Supreme Court of Canada trilogy of cases on standard of review has established, basically, that the presumed standard on appeals is correctness whereas the presumed standard on judicial review is reasonableness.¹⁰ The latter standard is more flexible in that it allows decisions within a range of reasonable outcomes to remain undisturbed. It is more deferential to the decision-maker.

[96] I provide this outline of the standard of review because there are elements of the HRDEA decision that arguably call for the application of the higher standard of correctness. Section 113 of the *Education Act* allows the Minister to appoint an investigator, "where the Minister opinion that an education body is not adequately exercising its powers, performing its duties or fulfilling its responsibilities under this Act or the regulations."

[97] In this case, the ultimate decision to not offer transportation services can (and should) be assessed on the standard of reasonableness. This is because of the nature of the HRDEA as an elected body with broad discretion to determine its budget and how best to deliver the education program. The HRDEA has procedural powers, duties and responsibilities which must, however, be correctly applied.

Procedural Analysis:

[98] The HRDEA's decision is procedurally flawed because it addresses the issue of a student transportation in a way that only indirectly flows from the education body's powers, duties and responsibilities.

[99] The issue for the HRDEA was to address the long-standing underfunding of student transportation. While this may be a valid long-term goal for the HRDEA to advance politically, the HRDEA advanced its position on this issue by making a decision that constituted "making policy" under the Transportation of Students Regulations. It was legally required for the HRDEA apply the factors set out in those regulations.

[100] The HRDEA considered impacts, broadly and abstractly, but in my opinion, something more was required. The documentary record in this matter includes references to students having to come from outside the Town of Hay River and that approximately 25% of students in the District had used student transportation prior to 2021-2022. It can be reasonably inferred that the cancellation of bussing was a matter of some public interest.

[101] More importantly, it could be inferred that some level of student transportation is necessary for the HRDEA is to fulfill its mandate, under paragraph 7(1)(a) of the Hay River Education District and Hay

¹⁰ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII), at paras 91 to 98.

River District Education Authority Regulations, to provide education for all students in accordance with the *Education Act* and regulations.¹¹

[102] I hesitate to make that inference because it does not necessarily follow that student transportation is necessary just because it has always been provided. There are apparently precedents in the Northwest Territories for the cancellation of bussing services, and correspondence from the SSDEC posits cancellation as a viable option.

[103] The Student Transportation Regulations guide important decision-making on student transportation and mandate consideration of criteria that will allow an education body to decide whether transportation is necessary fulfill the mandate under 7(1)(a) of the Hay River Education District and Hay River District Education Authority Regulations.

[104] The HRDEA erred procedurally in failing to address specifically the factors set out in the regulations, namely, travel distance, safety concerns, climate, age and health of students. By focusing on the global impact of historic underfunding, the HRDEA neglected to apply mandatory criteria which would have enabled the education to make an informed decision for the current school year.

[105] The HRDEA further erred by conducting inadequate consultations with parents and guardians before making policy that substantively changed the practice up until this year. As a matter of procedural fairness, and considering the potential impact of the decision, which is acknowledged in HRDEA materials, parents and guardians should have been given the chance for meaningful consultation and input into the decision.

Reasonableness Analysis:

[106] The effect of inadequately applying the factors in the regulations, and inadequately observing procedural fairness, is that the HRDEA arrived at a decision that is more arbitrary than reasonable.

[107] The hallmarks of a reasonable decision are that the decision follows logically from the evidence and shows that the decision-maker heard relevant and reliable evidence, weighed that evidence, tested the facts, and made a decision that is just, clear, and logical.¹²

[108] The record of decision in this case, drawn primarily from meeting minutes of the HRDEA, fails to show a coherent and rational chain of analysis to justify the cancellation of student transportation. On the contrary, the rationale of cancelling bussing to secure funding for bussing, makes no logical sense in the context of setting priorities for 2021-2022.

[109] Student transportation cannot be so critically important as to prioritize long-term funding while at the same time withdrawing the service completely when short-term funds are available within the District and the Division. The rationale behind the HRDEA decision is inherently contradictory.

[110] None of this is to suggest the HRDEA failed to take the impact on students seriously or that the HRDEA failed to consider alternatives or mitigating measures. The HRDEA appears to be legitimately concerned with addressing student transportation in the long term, and the District genuinely experimented with alternatives by implementing user fee system with mixed results. The HRDEA cannot

¹¹ Hay River Education District and Hay River District Education Authority Regulations, NWT Reg 143-96, s. 7(1)(a)

¹² See *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII).

realistically have been expected to simply adopt one of the solutions offered in correspondence this summer.

[111] The HRDEA s required to act, not only as an elected body but also as administrative decision-maker, and to directly examine the impact on students upon giving parents and guardians notice and the opportunity to be heard. The HRDEA has the discretion as an elected body to make decisions that fiscally responsible to the community, but this discretion does not supersede or displace the legal duty to consider regulatory factors, or the responsibility to hear directly from parents and guardians.

[112] The HRDEA decision may make sense as a political statement to get the Minister's attention, but it does not fall within the range of acceptable outcomes as a decision requiring the consideration of regulatory factors in the making of policy.

Conclusion:

[113] The HRDEA made a difficult decision on student transportation on the premise that it had no other option. The decision is fundamentally a political one based on frustration with being unable to resolve the long-term issue of perceived underfunding.

[114] The HRDEA prioritized the larger issue over the immediate questions of student transportation for 2021-2022. In doing so, the HRDEA failed to meet its legal and procedural obligations in making policy under the Transportation of Students Regulations and delivered a decision that fails to meet the standard of reasonableness.

Sheldon Toner

Sheldon Toner

Hay River District Education Authority – Investigation Report

Executive Summary

Due to the expedited timeframe for completion of this investigation, the investigation report may include typographical errors or raise further questions requiring follow-up.

The conclusions outlined in the investigation report are primary the result of a document review with some follow-up with limited written questions.

The documentary evidence gathered through this investigation indicates there is a long-standing issue in that the HRDEA perceives student transportation as a chronically underfunded budget item.

The long-standing issue forms part of the context in which the HRDEA decided not to offer student transportation for the 2021-2022 school year.

The decision that is the subject of this investigation was made, on a conditional basis, on May 19, 2021, subject to the proviso “unless ongoing financial assistance is found.”

The bussing management services contract was not terminated until after the HRDEA passed the resolution to that effect on August 24, 2021.

The decision to not offer student transportation for the 2021-2022 school year is a multi-faceted decision with legal, financial, and political dimensions.

The key rationale behind the decision was to affect a solution to the long-standing issue of perceived historic underfunding of student transportation.

There are no immediate financial rationales set out in the HRDEA minutes to support the decision to not offer student transportation.

The record does not indicate any administrative or teaching positions or programs the HRDEA would have to cut or that it sought to add resulting from the decision to cancel bussing in 2021-2022.

In terms of legal rationales, it does not appear the HRDEA directly applied the Transportation of Students Regulations in reaching its decision.

The HRDEA does not appear to have solicited any new information regarding the factors set out in the Transportation of Students Regulations.

The HRDEA appears to have made its decision having broadly and generally considered the overall impacts on all those required used student transportation.

The HRDEA does not appear to have addressed the specific factors set out in the Transportation of Students Regulations, namely travel distance, safety concerns, climate or age and health of students.

The HRDEA considered numerous alternative or mitigating measures before deciding not to offer student transportation, considering the HRDEA’s deliberations going back to 2019.

The HRDEA considered all options presented by the SSDEC and ECE this summer, in addition to having implemented the option of user fees with mixed results in 2019-2020.

The HRDEA is an elected body with considerable latitude to set financial priorities within the District. It is accountable to the government and the public for how it allocates and spends its financial commitments.

Both the District and Division carry positive fund balances sufficient to cover the projected deficit for transportation services for 2021-2022.

The HRDEA's financial discretion does not extend so far as to justify a decision made without considering factors set out in the Student Transportation Regulations.

The HRDEA decision can perhaps be most readily understood from its political dimension. The conditional decision, in May 2019, sought to resolve the long-standing issue by enlisting parents to advocate with their MLAs.

The HRDEA is not only an elected body but also a creature of statute. It is required to interpret and apply law according to established legal principles and observe procedural fairness.

The HRDEA was making policy on student transportation when it decided not to offer bussing for 2021-2022. It was therefore legally required to consider the factors set out in the Transportation of Students Regulations.

The HRDEA erred procedurally in failing to address specifically the factors set out in the regulations, namely, travel distance, safety concerns, climate, age and health of students.

By focusing on the global impact of perceived chronic underfunding, the HRDEA neglected to apply these mandatory criteria to make an informed decision for the current school year.

The HRDEA further erred by conducting inadequate consultations with parents and guardians before making policy that substantively changed the policy of providing bussing up until this year.

As a matter of procedural fairness, and considering the potential impact of the decision, parents and guardians should have been given the chance for meaningful consultation and input into the decision.

The HRDEA decision is inherently contradictory. The long-standing issue for student transportation is not resolved by withdrawing a service the District and the Division can afford to deliver in 2021-2022.

The decision is fundamentally a political one based on frustration with being unable to resolve the long-standing issue of perceived underfunding.

The decision does not fall within the range of acceptable outcomes as a decision made pursuant to statutory authority and requiring consideration of factors set out in the Transportation of Students Regulations.