

New Brunswick
Child & Youth
Advocate



Défenseur des
enfants et des jeunes
du Nouveau-Brunswick

ON BALANCE, CHOOSE KINDNESS

*The Advocate's Review of Changes to Policy 713 and
Recommendations for a Fair and Compassionate Policy*

Office of the Child & Youth Advocate

Kelly A. Lamrock, K.C.

Child and Youth Advocate (Office)

The Child and Youth Advocate has a mandate to:

- ensure that the rights and interests of children and youth are protected;
- ensure that the views of children and youth are heard and considered in appropriate forums where those views might not otherwise be advanced;
- ensure that children and youth have access to services and that complaints that children and youth might have about those services receive appropriate attention;
- provide information and advice to the government, government agencies and communities about the availability, effectiveness, responsiveness, and relevance of services to children and youth; and
- act as an advocate for the rights and interests of children and youth generally.

P.O. Box 6000
Fredericton, NB
www.cyanb.ca
E3B 5H1

Toll Free: 1.888.465.1100
Local: 1.506.453.2789
Fax: 1.506.453.5599

How to cite this document:

Office of the Child and Youth Advocate, *On Balance, Choose Kindness: The Advocate's Review of Changes to Policy 713 and Recommendations for a Fair and Compassionate Policy*, August 15, 2023.

PDF ISBN: 978-1-4605-3672-8

Hardcopy ISBN: 978-1-4605-3671-1

On June 8, 2023, the Department of Education and Early Childhood Development (hereinafter “the Department”) announced changes to Policy 713 (Sexual Orientation and Gender Identity). Policy 713 (“the Policy”) was initially enacted by the Department under the Minister’s authority pursuant the *Education Act*, Section 6(b.2). The announced changes impacted three areas of the Policy which I will detail later in this report.

On June 15, 2023, the Legislative Assembly by recorded majority vote adopted Motion 50 as amended, which states:

That the Legislative Assembly urge the government to request that the Office of the Child and Youth Advocate conduct a full consultation with relevant stakeholders on any changes to Policy 713 and the impact of such changes and make public the results of all such consultations by August 15, 2023.

The Advocate is an officer of the Legislative Assembly itself. Therefore, there is no procedural need for the legislative branch of government to “urge” that the executive branch of government make a request of the Advocate. The expressed wish of the legislative branch is sufficient to communicate a request to a legislative officer, and the wishes of a majority of the Legislative Assembly is highly persuasive in this context.

On June 20, 2023, I published official Terms of Reference for this review. Those Terms of Reference were published on the Office of the Advocate’s web site along with an invitation for public input.

Methodology and Mandate

Following the publication of the Terms of Reference and public invitation to participate, the Office of the Advocate took further steps to engage a variety of stakeholders. A number of 2SLGBTQIA+ students and their parents were invited to sit for interviews regarding their views and experiences. Other parents who submitted feedback whose children identify as straight and/or cis-gendered were also provided follow-up questions in order to fully engage them on all aspects of the changes. The Advocate affirmatively reached out to a number of stakeholder groups with encouragement to submit briefs, and in many cases these briefs led to follow-up questions and exchanges to ensure that the authors had a full opportunity to address all aspects of the review. As well, the Advocate issued invitations to groups of experts -- on constitutional and human rights law from all three Maritime law schools and on health care, pediatrics, psychiatry, and psychology from both health networks, and to educators who work on the front lines of the school system. At all times, the goal was not just consultation, but engagement. Consultation is waiting until stakeholders talk before giving a decision. Engagement means actually discussing and even debating options with stakeholders so that issues are fully addressed.

It is appropriate to begin this review with a reminder that the Child & Youth Advocate has a statutory role to provide analysis of laws, policies and their impact on children. This function is not designed to be a political one. The Child & Youth Advocate position was created to provide the legislative branch of government with independent, non-partisan analysis of how policies and their implementation affect children. Because children lack formal political power, the role of the Advocate is to provide a voice in

the process which considers the impact of government decisions upon children. That advice is to remain child-focused regardless of partisan impact or even the opinion of voters.

As such, the purpose of this review is not to turn the Advocate into a pollster. The review heard both support for and opposition to the changes through the consultation process, both in significant numbers. Which is larger, I would not claim to know, and my mandate is to leave that to elected officials and their advisors. This is a legal and policy review, from the perspective of the child's best interests. The purpose of engaging the public was not to simply count emails. Rather, by engaging in interviews, follow-up questions and discussion the process was designed to ensure that voices with expertise and experience were learned from, real discussion and debate occurred, and all arguments had been heard in their strongest possible form. The goal is to understand how the changes will impact children, what their needs and rights are, and where the best interests of children lie beyond the polarized political debate. This final report and the recommendations that follow strive to place the child's best interests above concerns over political impact.

In the Terms of Reference, I do make some notes regarding the weight to be given to submissions. Because the purpose of public engagement here is to ensure an informed and rational review of facts and factors, and not to simply count submissions, it seemed appropriate to be transparent regarding the weight to be assigned certain views. No submissions were rejected or ignored. Parents and students with firsthand lived experience in New Brunswick schools could speak more directly to how policies impact them. Citizens with 2SLGBTQIA+ issues allowed me to learn from a perspective other than my own. Those with professional training and experience are persuasive because they better understand how the ideas and policies may play out in the real world.

I also chose to accept all submissions but advise potential contributors that the views of New Brunswick citizens would be given the most weight. This issue has drawn significant interest nationally and internationally, much of it organized and well-funded to intervene in multiple jurisdictions. Any of these submissions I reviewed to hear the arguments and learn from any research sources to which they would refer me. However, I did often request in follow-up activities that they advise which New Brunswick school district they lived in or that they make New Brunswick members of the organization available for an interview. In some cases, this ended the interaction although I read and considered any substantive research and arguments submitted. The Advocate's Office also reached out affirmatively to all 49 Members of the Legislative Assembly to encourage them to refer any of the families they had met with or referenced in legislative debate to participate and share their experiences. The Advocate's Office issued written invitations to professional associations of front-line professionals who work with children and youth.

Following a review of over 400 public submissions and approximately 50 follow-up interviews and exchanges, I am prepared to review each of the changes from the perspective of their compatibility with the law, their impact upon the educational system, and their broader policy implications. I have chosen to provide a recommended version of Policy 713 and steps on how such a policy might be implemented at either the provincial or the school district level.

The History and Status of Policy 713

It appears that Policy 713 began development somewhere prior to 2018. Policy 703, which deals broadly with positive learning environments, had been in place for a number of years. Policy 703 deals with a broad array of behaviours which impact the school learning environment, including inclusion, bullying and harassment. In Section 6.4.1 that Policy imports duties found in the *Human Rights Act* of New Brunswick through the following statement:

6.4.1 The following behaviours, exhibited by any person, will not be tolerated in the New Brunswick public school system.....

..... discrimination on the basis of real or perceived race, colour, religion, national or ethnic origin, ancestry, place of origin, language group, disability, sex, sexual orientation, gender identity, age, social condition or political belief or activity;

Policy 703 also places a positive obligation upon school administration to support the goals of the *Human Rights Act* and to actively provide education and supports which minimize discriminatory behaviour at Section 6.2.4:

6.2.4 The school's plan will reflect the school community's vision for the safe and inclusive learning and working environment it wishes to achieve. It will include the following elements....

..... a school statement on respecting human rights and supporting diversity

At some point, there appears to have been a desire from school and district leaders for guidance on handling emerging issues around gender identity. There was broad agreement from all interviewed that the consultative process lasted many months and included District Education Councils, educators, psychologists and counsellors, and people with lived experience who are, or whose children are, part of the 2SLGBTQIA+ community. A final policy was provided to the Minister of the day, who proceeded to engage his cabinet and caucus colleagues. The internal deliberations of caucuses and cabinet are beyond the Advocate's mandate and not relevant to this review. It will suffice to note that policies can be adopted upon approval by the Minister using the authority granted by Section 6(b)(ii) of the *Education Act* and sometime just prior to the 2020 general election the Minister exercised that prerogative.

When the decision was made to review the policy remains somewhat unclear. As detailed in this Office's review of that decision, there does not appear to have been any criteria established for review of the policy and there was no departmental or district concern provided to the Minister. The Advocate's clear request for a copy of the "concerns and misinterpretations" which were claimed led to four negative emails being provided by the Department. The Minister ultimately did state publicly that he had heard concerns in a number of informal settings and believed that the previous consultation process may have omitted the views of parents who did not fit into one of the targeted categories for consultation. Based upon that belief, the Minister reopened and revised the policy and cited the authority under Section 6 of the *Education Act* in so doing.

This report is not a review of the adequacy of the process of adopting Policy 713 nor the process of amending it. What can be noted is that both the launch of Policy 713 in its original form and the initiation of the review were somewhat muted events without significant media coverage or public awareness. A number of stakeholders and respondents to our process raised concerns that at least one of those processes had not included their views. As such, when the issue did begin to gain public scrutiny, some of the discussion and public education that accompanies a new policy may have been

lacking. The result is that the public debate appeared, at times, to become a Rorschach test of general attitudes towards broader issues rather than a discussion on the actual text of Policy 713. There still appeared to be some confusion in a number of the submissions received during the Advocate's review as to exactly what Policy 713 does and does not do in New Brunswick schools. That lack of public clarity is a factor in some of the recommendations made in this report.

Following a process which was not defined in writing but appears to have involved some meetings and discussions with affected and/or interested parties, the Department unveiled a revised Policy 713 on June 8, 2023. There are three areas in which changes were made:

1. **Section 6.3, Self-Identification:** In both original and revised versions, a child at age 16 has capacity to independently decide to change the official school record to a name and/or pronouns consistent with their gender identity, and to have that name and/or pronoun choice respected in formal and informal communications with school personnel. Language in the original Policy dealt with situations in which a child had independently made the decision to be addressed informally by a name and/or pronouns consistent with their gender identity. That language was as follows:

Before contacting a parent, the principal must have the informed consent from the student to discuss their preferred name with the parent. If it is not possible to obtain parental consent for the use of the preferred first name, a plan will be put in place to support the student in managing the use of the preferred name in the learning environment.

The new version removed that paragraph entirely and replaced it with the following language added to the second paragraph:

If it is not possible to obtain consent to talk to the parent, the student will be directed to the appropriate professional (i.e. school social worker, school psychologist) to work with them in the development of a plan to speak with their parents if and when they are ready to do so. If it is not in the best interest of the child or could cause harm to the student (physical or mental threat), the student will be directed to the appropriate school professional for support.

Most notably, the new Policy removes the explicit guidance to school personnel to use the child's preferred name and/or pronouns in informal interactions absent parental consent, instead directing school personnel to refer the child to a school social worker or psychologist to discuss obtaining parental consent. It also removes the explicit requirement for the child to give informed consent to the school before school personnel can advise parents of the child's wishes.

2. **Section 6.4, Universal Spaces (Private)** maintains the existing language requiring at least one universal washroom in schools that can be accessed in a non-stigmatizing manner. It adds the requirement for private, universal changing facilities.
3. **Section 6.1, Supportive School Environment** maintains most of its original language but eliminates the policy direction that students may participate in extracurricular activities which are "consistent with their gender identity", keeping only the criteria that extracurricular activities are to be "safe and welcoming"

In addition to the written changes, there are some areas where the new Policy is silent but either the Department or the Minister have provided a statement regarding their intentions. Most notably, the

Minister has made various public statements suggesting that teachers may face professional discipline should they refer to students by their chosen name or pronoun unless the student is 16 years of age or older or has received parental consent. I will address these gaps between the written policy and the external statements of officials in the analysis portion of this report.

Summary of Public Submissions

By far, the change regarding parental notification and student self-identification has been the subject of the greatest amount of commentary and reaction in our Office's consultations. A number of citizens have offered submissions supporting the change because of their support for what they call "parental rights". These comments tend to emphasize the important role which parents play in their child's development and the need for the parent's guidance to be part of the child's decision. These commentators stressed the significant factors and impacts of the decision by a child to "socially transition" (that is, to begin interacting with others in a way that affirms their gender identity) and the need for educators to avoid any affirmation of that choice until parents have a say. To these commentators, ensuring a parental veto over their child's social transitioning recognizes the fact that the parent and not the state bears primary responsibility for guiding a child's decisions. A submission from a group called Our Duty Canada makes the point this way:

Considering the enormity of gender social transition, it must be emphasized that children as young as four years old do not have the capacity to understand its potential long-term impacts. As clearly stated in UNCRC Article 5, it is the parent's responsibility, right and duty to provide that guidance to their child.

Teaching and enforcing practices in schools that create secrets, especially from the child's parents, is the opposite of safeguarding. This process not only teaches vulnerable children that keeping secrets from their parents is okay, it also asks teachers and school staff to model that secret keeping, an extremely poor safeguarding practice. This confusion of boundaries can also leave children more vulnerable to predatory individuals and situations. Parental involvement is necessary when a child desires to change their name or pronouns and socially transition. The changes made to Policy 713 are a good approach, allowing the child to explore his or her gender identity, to improve safeguarding, and to ensure that parental rights and responsibilities for the child are upheld. Any steps taken to socially transition a child without parental permission are completely unacceptable and should lead to disciplinary action.

The concern around parental exclusion from their child's decision-making animated most of these concerns. The following submission from a parent would be representative of the concerns that allowing students to choose the name and pronouns their teachers call them would create a situation where the child shared part of their lives with the teacher but not the parent:

I agree 100% with the changes Honourable Blaine Higgs made. I feel that as a parent I have a right to be involved in my kids' lives without the education system encouraging them to keep secrets and making us the parents the enemy before we are even given a chance to support our child. –A Parent

"Consent forms and parent involvement in all aspects of a child's life are so vital and need to be put in place. Let me make the choice for what is best for my child." –A Parent

It should be noted that these submissions were not universally hostile to gender diversity. The review heard from parents who would want to hypothetically support their child if they wished to question their gender identity, in at least one case, a parent who supported parental consent prior to social transitioning had given that consent. In some cases, concern was expressed that the previous Policy 713 made no distinctions for age and capacity. Certainly, some commentators who support the change expressed skepticism or hostility to young people questioning their gender identity at all. There was a continuum of views in that regard. Most of these comments returned to the same principle – that teachers are state actors, and state actors should not allow a child to make a major decision without ensuring that the parent knows about and consents to that decision.

Objections to the changes spoke about both the need to respect the rights of the child to autonomy and privacy, and to the practical impacts of having trusted professionals like teachers refuse to respect the child's wishes as to what to be called. Some noted the difficulty posed by what they saw as selective refusal of children's preferred names. As the New Brunswick Association of Social Workers noted in its submission:

Teachers and all other school personnel should be required to use the preferred names or pronouns for students under 16 without parental consent. It is a matter of respect for students; it is a matter of safety when it comes to LGBTQIA2+ youth. Students have the right to be referred to by their preferred nickname, so why should a preferred name or pronoun be viewed any differently? Having teachers find out whether a name preference is based on gender identity mandates discrimination against LGBTQIA2+ students. This is unacceptable.

Another interviewee noted that the loss of autonomy and privacy can have a significant negative effect upon children wrestling with gender identity questions, stating:

Engaging in structural processes – even ones set up to benefit them – that take away their sense of choice and agency can be something that turns a bad experience into a (re)traumatizing one”

Many of the objections to the changes felt that the emphasis on parental rights had led to an inability to see the child's needs and humanity.

“Implying that parent rights supersede a child's rights implies that children are not their own person. When the reality is, parents do not own their children. You cannot own a person. The best thing a parent can do is talk to their child. Talk to them and let them know you love and support them. If you do this they will tell you when they are ready.” –A teacher

“Is your kid your property or their own person? Do I have the right to read their diary or do they have the right to privacy?” -- A parent

In a small minority of cases, citizens used the submission to call for a broader rollback of 2SLGBTQIA+ rights and to express a desire to see changes to the *Human Rights Act* to remove protections for gender identity. I was unable to assign any weight at all to these submissions, for the simple reason that these views have no place in the discussion around the changes. There is no elected or departmental official who has expressed any support for rolling back the *Human Rights Act* or removing the stated policy goals of having schools which are safe spaces for 2SLGBTQIA+ students and having no tolerance for exclusion or bullying. There may be legitimate criticism that the Policy falls short of the stated goals, but there is no expressed desire from any MLA to change the goals.

In fact, there may be more common ground in the discussion among people of good faith than the public debate reveals. I can say that I have not seen any submission which opposes the involvement of parents in the lives of their children or expresses any desire for parents to be excluded, deleted, or omitted any other way. There is debate over how much the state should do and how much weight to give the child's desires, but there has not been any serious suggestion that parents are unimportant.

Similarly, I do recognize the efforts the Minister of Education and Early Childhood Development has made to state his support for human rights founded upon sexual orientation and gender identity. The Minister has made explicit statements that families and parents come in all forms, that there must be zero tolerance for bullying and harassment on any prohibited ground, and that the goals of Policy 713 remain government policy. None of that means the changes cannot and should not be carefully reviewed and criticized where warranted. It is simply to note that New Brunswick's political leaders have not gone down the road of some jurisdictions where even the maintenance of Gay-Straight Alliances and the teaching of tolerance is being legislatively rolled back.

Of course, the bar is not to simply avoid these egregious uses of state power, but to develop the best policy possible to support the best interests of the child while providing safe schools and access to trusted educators, while supporting parents in meeting their legal obligations to the child. Throughout this process, I have remained hopeful that with careful reflection, active listening and respect for expertise, that can be done in a way that reasonable people can support.

For each of the changes, I will be reviewing the legal, operational and policy dimensions of the change and making recommendations regarding possible policy wording. I will begin with the issues around student self-identification and parental consent.

Student Self-Identification and Parental Consent

As noted above, the stated legislative purpose of the changes to student self-identification is to ensure parental involvement in the student's choice to alter their name and/or pronouns, and more generally within the overall Policy, the purpose of which is to ensure the safety, dignity and access to education of 2SLGBTQIA+ students. Where previously children could determine how they wish to be addressed by others in daily, informal interactions, the policy now removes that language and substitutes a process for steering the student towards making efforts to obtain parental consent.

The actual text of the new policy does not offer explicit guidance to educators on how to address a student in the absence of explicit parental consent. The Minister has stated that his desire is that educators will revert to the official name on the school record and birth certificate absent parental consent. The Department, for its part, has stated in response to questions posed in this review that in the francophone sector they have identified 28 students who are currently being called a name of their choice who will "have to revert back to their dead name in the fall unless they get parental consent."¹ Those numbers have yet to be reported in the anglophone sector.

I will address the legislative vagueness of the new Policy in the legal analysis, including whether or not the legislative silence conveys any legally binding direction. For the purposes of this section, I will review the Policy with the assumption it does what the Minister says it will do. After all, the Minister

¹ Department of Education & Early Childhood Development, *Answers to the Child & Youth Advocate's request regarding review of Policy 713*, page 9 question 14.

could provide clarifying language in a new policy under his signature alone, and thus it seems best to provide the Legislative Assembly with a review of the scheme the Department intends to carry out.

In the amended Policy scheme, there are certain critical policy decisions that are at issue. These hallmarks of the new scheme are:

1. Removing direction for teachers to respect the child's stated wishes on what to be called in informal, daily interactions,
2. Requiring teachers to direct the student to a social worker or psychologist to get assistance on talking to their parents and (apparently, although this is not stated explicitly) seeking parental permission to have the school use the student's chosen name and/or pronouns in informal, daily interactions,
3. Withholding any recognition of the child's preferred name and/or pronouns until the child obtains not just parental notification, but parental consent, which grants the parent an effective veto over how the child may be addressed until the child is 16,
4. Removing directive language for educators to not disclose the student's inquiry or request to the parents without the student's informed consent, while providing verbal reassurances that this is not intended to happen, and
5. Establishing a threshold of a risk of "physical/mental harm" for a different, unspecified intervention and referral (though still not waiving the parental consent requirement).

An appropriate legal analysis would be to establish and define the right(s) at stake, to identify how the Policy's new scheme impacts those rights, and to review whether any limits placed upon those rights are appropriate given the Policy's purpose.

Parental Rights at Law

In an ideal world, teenagers would naturally seek their parents' guidance and that guidance would always be patient and wise. We live in an imperfect world. As children mature and begin to wrestle with "adult" issues, they seek a zone of privacy. Indeed, part of becoming an adult is to begin to have an identity and autonomy separate from our parents. Through adolescence, parents struggle with how to allow the child enough autonomy to prepare for adulthood while still providing sufficient guardrails to keep them safe from life-altering consequences. This phase tests parents and children, in part because the perfect balance is so hard to find. Teenagers need space to make their own choices. Teenagers still need guidance and support from adults. This contradiction is part of what makes adolescence a challenging time.

The debate over Policy 713 is challenging for the same reason. Ideally, parents would be aware of their child's questions around gender identity and sexual orientation. However, creating rules and processes to encourage that parental involvement without destroying the teenager's sense of autonomy and trust of adults is not easy. Reasonable people can want contradictory things. We can be uncomfortable with parents not knowing what their child is going through while being uneasy with any processes which force or coerce the child to share. If we are honest, teenagers have always had a desire to keep some private space between themselves and their parents on issues that touch on their personal identity or

their sexual orientation. Parents have always been uncomfortable with this. In healthy parent-child relationships, parents come to accept some necessary privacy in their teenager and teenagers come to accept some parental involvement. Debating how to insert schools and teachers into this process adds another complicated wrinkle. It is a classic clash of rights.

This current issue has placed the phrase “parental rights” at the forefront of the debate. While the phrase has been invoked frequently in our consultations, there is considerable misunderstanding over what those rights are. This public confusion is understandable since there is even some disagreement among courts and legal scholars over the full scope and application of these rights. There certainly are limits on state interference with parental decisions in a family context. It is also true that the family unit has certain rights to be free of unnecessary or arbitrary state interference. That is clear.

It must also be said that the right of a parent to make decisions without state interference is somewhat different from the question of whether a parent has a right to insist that the state force the child to comply with their direction. That is an important distinction, because the child themselves is an independent actor with their own free will and their own rights to autonomy, privacy, expression, and dignity.

It has been a common thing in the debate and consultations around Policy 713 for those advocating a certain view of parental rights to assert that “the state does not own children.” This is undeniably true. There is no basis in law or morality for anyone to assert state ownership of children.

Of course, it must also be added that parents also do not own their children. Nobody owns children. The basis for parental rights is not found in the law around property. It is founded in the rights to privacy, the child’s right to family, and possibly within the law around conscience and expression rights.

The distinction becomes important in the context of Policy 713 because in the most common scenario, the child has made decisions which may conflict with the parent’s wishes. For the purposes of this analysis, I am going to speak to the law as it speaks to cases of children 12 and older who have the capacity to understand the nature and consequences of a desire to use a different name and/or pronouns in daily, informal interactions and has not told their parents. For reasons that will become clear, I will treat the issue of younger children and/or children without the capacity to give informed direction and consent in a separate part of the analysis.

In this scenario (which is the most common scenario impacted by the relevant sections of Policy 713), we have a situation where a child who is over 12 but under 16 has decided that they would prefer to be called a different name and/or pronouns in their informal, daily interactions and they have chosen not to disclose that decision to their parents. What is important to note here is that this situation exists entirely within the family’s circumstances. The conflict exists because of the child’s decision and the family dynamic. The school may become aware of the child’s two choices (to be called something different and not to tell the parent) and have to respond, but the school did not create the situation. In fact, if schools and even the government did not exist, the child would be using a different name in their social interactions and would not be telling the parent. The school has choices in how to respond, and may even have legal obligations, but the family’s private status quo was not caused by state action.

Thus, in this typical scenario of an older child presenting the school with their wishes, we are not only talking about whether or not the state may substitute its decisions for the parents, but whether or not the state and the parent can impose their wishes upon the child. Neither lends itself to an easy “yes or no” answer. The best place to start is by first understanding the law as it applies to limits on state interference with the family, and thus acknowledges the family’s rights and liberties vis-à-vis the state.

The Family's Right to Non-Interference

The *Canadian Charter of Rights and Freedoms* (“the Charter”) does not explicitly mention parental rights. There is no section of the *Charter* that states that parents have certain rights. That does not mean that they do not exist, only that they flow from other rights. There are two sections of the *Charter* which have been plausibly cited as capacious enough to support some rights of parents to guide their children without state interference. The *Charter* rights most commonly cited in support of parental rights are found in Section 7:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Canadian courts have unquestionably found that Section 7 does not only speak to direct state limits on liberty such as imprisonment. Section 7 invocations of liberty and security of the person also speak broadly to the autonomy, privacy, and dignity that human beings deserve. This fundamental autonomy of the individual speaks to the free will that makes each one of us fully human and shields zones of intensely personal endeavor from unjustifiable state interference. The family unit is one area where courts have found that the state must tread lightly.

One of the foundational cases in this regard emanated from New Brunswick.² The New Brunswick government’s failure to provide legal aid to a parent facing removal of her children in a child protection matter was found to violate Section 7 of the *Charter* as it limited the parent’s right to security of the person without providing fundamental justice. The obligations upon the state to provide legal counsel were engaged when a parent is facing loss of custody of their child as they would be when a citizen is facing imprisonment, because both scenarios speak to the security and integrity of the individual. As the majority wrote:

*I have little doubt that state removal of a child from parental custody pursuant to the state’s parens patriae jurisdiction constitutes a serious interference with the psychological integrity of the parent. The parental interest in raising and caring for a child is, as La Forest J. held in B. (R.), supra, at para. 83, “an individual interest of fundamental importance in our society”. Besides the obvious distress arising from the loss of companionship of the child, direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere. Further, the parent is often stigmatized as “unfit” when relieved of custody. As an individual’s status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state’s conduct.*³

It should be noted that the Court did not broadly extend Section 7 protection to all aspects of parental authority. Very specifically, the Court noted that loss of custody and companionship of the child merited some procedural protections because of the psychological impact upon the parent and because child protection matters engage the judicial system.

While the parent may suffer significant stress and anxiety as a result of the interference with the relationship occasioned by these actions, the quality of the “injury” to the parent is distinguishable

² *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 SCR 46, <<https://canlii.ca/t/1fqjw>>

³ *Ibid*, at para 61.

from that in the present case. In the aforementioned examples, the state is making no pronouncement as to the parent's fitness or parental status, nor is it usurping the parental role or prying into the intimacies of the relationship. In short, the state is not directly interfering with the psychological integrity of the parent. The different effect on the psychological integrity of the parent in the above examples leads me to the conclusion that no constitutional rights of the parent are engaged.

I now turn to the question of whether the right to security of the person extends beyond the criminal law context. In both Reference re ss. 193 and 195.1(1)(c) of the Criminal Code, supra, and B. (R.), supra, I held that the restrictions on liberty and security of the person that s. 7 is concerned with are those that occur as a result of an individual's interaction with the justice system and its administration. In other words, the subject matter of s. 7 is the state's conduct in the course of enforcing and securing compliance with the law, where the state's conduct deprives an individual of his or her right to life, liberty, or security of the person. I hastened to add, however, that s. 7 is not limited solely to purely criminal or penal matters. There are other ways in which the government, in the course of the administration of justice, can deprive a person of their s. 7 rights to liberty and security of the person, i.e., civil committal to a mental institution: see B. (R.), supra, at para. 22.

A child custody application is an example of state action which directly engages the justice system and its administration. The Family Services Act provides that a judicial hearing must be held in order to determine whether a parent should be relieved of custody of his or her child.⁴

What is noteworthy in *G.(J.)* is that the state's interference with the family is subject to limits. In that case, the children were young and there is no record of any expressed view of the children. While the family unit certainly has protection from state interference, and thus rights, it does not automatically follow that only the parent can claim those rights. In fact, a more accurate understanding of the law is that every individual within the family has a right to the family unit, although the interests being protected may differ. A parent may have rights to have their family unit protected because of the psychological and emotional devastation that comes from the loss of a child. The child not only gains psychological security from having their family intact, but also has a right to parents because parents provide instruction, guidance, love, support and connection as no others can. Therefore, when we discuss rights in the family connection, we are discussing children's rights. Family rights cannot be properly understood as only speaking to a parent's right to their child. The child has rights to the parent, and to be parented.

To understand the interplay between the family's right to be free of unjustified state interference and the child's right to the love, guidance and support of parents, it is helpful to look at cases where the immediate desires of children may vary from those of their parents. In matters of punishment, there is at least some disconnect between the interests and desires of the parent and those of the child. On its face, the parent may see punishment as necessary in order to guide the child and keep them from doing things that will imperil their safety or development. In the moment, as all children (and former children) know, the punishment is not desired by the child – that is what would make it a punishment. The Supreme Court

⁴ *Ibid* at paras 64-66.

has also applied the *Charter* to the charged issue of when the state may, and may not, interfere with a parent's decisions around corporal punishment and physical restraint.⁵

In weighing the limits a state may place upon parental discretion, the Supreme Court also gave legal recognition to the fact that a child may have a right to the guidance of a parent, and certainly the potential separation of child and parent engages the child's right not to be denied the care of a parent absent a significant and compelling reason.

Children need to be protected from abusive treatment. They are vulnerable members of Canadian society and Parliament and the Executive act admirably when they shield children from psychological and physical harm. In so acting, the government responds to the critical need of all children for a safe environment. Yet this is not the only need of children. Children also depend on parents and teachers for guidance and discipline, to protect them from harm and to promote their healthy development within society. A stable and secure family and school setting is essential to this growth process.

Section 43 is Parliament's attempt to accommodate both of these needs. It provides parents and teachers with the ability to carry out the reasonable education of the child without the threat of sanction by the criminal law. The criminal law will decisively condemn and punish force that harms children, is part of a pattern of abuse, or is simply the angry or frustrated imposition of violence against children; in this way, by decriminalizing only minimal force of transient or trivial impact, s. 43 is sensitive to children's need for a safe environment. But s. 43 also ensures the criminal law will not be used where the force is part of a genuine effort to educate the child, poses no reasonable risk of harm that is more than transitory and trifling, and is reasonable under the circumstances. Introducing the criminal law into children's families and educational environments in such circumstances would harm children more than help them. So Parliament has decided not to do so, preferring the approach of educating parents against physical discipline.

This decision, far from ignoring the reality of children's lives, is grounded in their lived experience. The criminal law is the most powerful tool at Parliament's disposal. Yet it is a blunt instrument whose power can also be destructive of family and educational relationships.⁶

Of course, this did not mean that the state cannot place any limits upon a parent's discretion. Parents may not simply import their views on corporal punishment and physical force into the family domain. The application of physical force to punish behaviour is always going to attract criminal sanction when done in anger, when applied excessively, when causing injury, when applied to older children, when it humiliates a child, and when it falls outside of fairly rigid guidelines. The restraint of a child for their protection is a different matter than punishment but that, too, is bounded by guidelines of necessity and reasonableness. In short, the analysis cannot simply stop at "the parent comes before the state", because the child also comes before the state. The fact that the state has a duty to minimally interfere with the family is not the same as saying that the parent has unlimited rights to interfere with the child.

Any concept of parental rights which starts and stops with asserting that parents should have unlimited control over the child is an analysis too limited to stand. In fact, much of what we call "parental rights" stem from the child's rights. The parent does not have an absolute right to control a child. Rather, the

⁵ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 (CanLII), [2004] 1 SCR 76, <<https://canlii.ca/t/1g990>>

⁶ *Ibid* at paras 58-60.

child has a right to the parent's guidance and support, and the parent has a duty to offer that guidance and support. The parent's rights are a function of the child's right to the parent. This concept is entrenched in international law through the *United Nations Convention on the Rights of the Child*, which provides as follows:

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

The fact that parental rights are also child rights does not lessen their importance. A child has a right to the parent. In the *Canadian Foundation for Children* case, the Supreme Court noted that excessive criminalization of parental conduct could lead to the deprivation of the child because criminal charges often lead to temporary separation of the child from the parent, which can cause trauma. The purpose of the *Criminal Code* section allowing a limited defense for parents did not have the purpose of endorsing corporal punishment, but of recognizing that means other than criminalizing parental conduct may be a more minimal impairment upon child rights than the family separation that comes with criminalization.

Parental rights, then, certainly do exist at law. They are a necessary component of child rights. The family collectively has a right to limited state interference. However, defining the scope of a parent's rights in the context of Policy 713's parental consent clause requires further inquiry.

It is important to note that the *G.(J.)* and *Canadian Foundation for Children* decisions were founded upon the limits of child protection and criminal law respectively. These involve state action which criminalizes parental action and/or directly engages rights against separation of parent and child in the context of Article 9 of the *Convention* and Section 7 of the *Charter*. When the stakes are lower than criminalization and family separation, parental rights are still important but are balanced against other factors, including:

- (a) the best interests of the child,
- (b) the child's other rights such as privacy, equality, autonomy and expression, and
- (c) the evolving capacity of the child for independent decision-making.

In criminal matters there is more emphasis on avoiding family separation as a factor distinct from the best interests of the child. As the Supreme Court noted,

However, the "best interests of the child" fails to meet the second criterion for a principle of fundamental justice: consensus that the principle is vital or fundamental to our societal notion of justice. The "best interests of the child" is widely supported in legislation and social policy, and is

an important factor for consideration in many contexts. It is not, however, a foundational requirement for the dispensation of justice. Article 3(1) of the Convention on the Rights of the Child describes it as “a primary consideration” rather than “the primary consideration” (emphasis added). Drawing on this wording, L’Heureux-Dubé J. noted in Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at para. 75:

[T]he decision-maker should consider children’s best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children’s best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children’s interests are given this consideration.

It follows that the legal principle of the “best interests of the child” may be subordinated to other concerns in appropriate contexts. For example, a person convicted of a crime may be sentenced to prison even where it may not be in his or her child’s best interests. Society does not always deem it essential that the “best interests of the child” trump all other concerns in the administration of justice. The “best interests of the child”, while an important legal principle and a factor for consideration in many contexts, is not vital or fundamental to our societal notion of justice, and hence is not a principle of fundamental justice.⁷

In civil matters where the state is not exercising powers to separate the child and parent, there is greater scope for decisionmakers to apply the “best interests of the child” standard when defining the scope of parental rights. In fact, when determining the criteria to be applied to private custody matters that choose between parental claims, the best interests of the child become paramount. This is the fundamental principle in the *Divorce Act*⁸ and in all provincial statutes⁹ governing private custody. The Supreme Court of Canada has upheld this primacy of best interests of the child, directing lower family courts thusly:

The power of the custodial parent is not a “right” with independent value granted by courts for the benefit of the parent. Rather, the child has a right to a parent who will look after his or her best interests and the custodial parent a duty to ensure, protect and promote the child’s best interests. That duty includes the sole and primary responsibility to oversee all aspects of day-to-day life and long-term well-being, as well as major decisions with respect to education, religion, health and well-being.¹⁰

The example of corporal punishment applies here. While the practice regrettably persists, there is little doubt that the consensus of expert opinion is that the deliberate infliction of pain as a punitive or corrective measure is bad for children. Not only does it inflict trauma upon children and damage their trust in others, it generally fails to impart any meaningful lesson beyond doing what someone big enough to hit you says until you are big enough to hit them back. While the *Charter* allows government to create some zone of non-criminality for the practice, it can be a factor in private custody matters and courts have issued orders enjoining parents from engaging in corporal punishment.¹¹

⁷ *Ibid* at para 10.

⁸ *Divorce Act*, RSC 1985, c 3 (2nd Supp), Section 16, <<https://canlii.ca/t/551f9>>

⁹ In New Brunswick, see *Family Law Act*, SNB 2020, c 23, Section 50, <<https://canlii.ca/t/55gh6>>

¹⁰ *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 SCR 3, <<https://canlii.ca/t/1frwv>>

¹¹ See, for example, *K.K. v M.A.*, 2022 NBQB 30 (CanLII), at para 145, <<https://canlii.ca/t/jnt91>>; and *N.J.P. v. The Minister of Social Development*, 2012 NBQA 3 (CanLII), at para 6, <<https://canlii.ca/t/fppgx>>

In brief, children have a right to their parents, and parents begin with the presumption that they will act in the best interests of the child. The child's right is to have someone who will act in their best interests. Acting in a child's best interests is not simply a matter of not harming the child. As the Supreme Court of Canada has noted:

The best interests of the child cannot be equated with the mere absence of harm: it encompasses a myriad of considerations. Courts must attempt to balance such considerations as the age, physical and emotional constitution and psychology of both the child and his or her parents and the particular milieu in which the child will live. One of the most significant factors in many cases will be the relationship that the child entertains with his or her parents. Since custody and access decisions are pre-eminently exercises in discretion, the wide latitude under the best interests test permits courts to respond to the spectrum of factors which can both positively and negatively affect a child. What may constitute stressful or damaging circumstances for one child may not necessarily have the same effect on another.

*The most common presumption now governing the best interests test is the primary caregiver presumption. It explicitly restores the values of commitment and demonstrated ability to nurture the child and recognizes the obligations and supports the authority of the parent engaged in day to day tasks of childrearing.*¹²

Beyond simply not harming children, there are a range of factors to be considered in determining the best interests of the child. The new *Child and Youth Well-Being Act* of New Brunswick lists numerous factors to be considered.

5(2) In determining the best interests of the child or youth, the Minister or the Court shall consider all factors related to the circumstances of the child or youth, including

(a) the child or youth's physical, mental and emotional development and needs, the ability and willingness of the parents to meet those needs and the care or treatment required to meet those needs,

(b) the importance of family to the security and well-being of the child or youth and family as the preferred environment for the care and upbringing of children and youth,

(c) the child or youth's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage,

(d) the child or youth's sexual orientation, gender identity and gender expression,

(e) the importance of the child or youth's stability, continuity of care and familial relationships, including with immediate family, and the possible effect of any disruption in that continuity,

(f) the importance of permanency to the security and well-being of the child or youth,

(g) any family violence and its impact on the child or youth, including whether the child or youth is directly or indirectly exposed to the violence,

(h) the child or youth's views and preferences as provided for in section 6,

(i) the impact on the child or youth if there is a delay in taking action or making a decision, and

¹² Young, supra note 10, at paras 6-7.

(j) the nature and impact of past parenting practices that endangered the well-being of the child or youth.

Parents clearly have, at law, a right to be presumed to act in the best interests of their children and to be the best guardian of their rights. As can be seen from the multitude of factors that comprise the best interests of the child, parents are also entitled to a zone of deference in weighing factors and making the many daily decisions a parent must make for their children. On most of these daily decisions, there can be a multitude of reasonable decisions and parents are entitled to deference to decisions that could reasonably be seen as in the child's best interest. This deference does not extend to decisions made which are clearly outside the child's best interests and of a magnitude which can cause harm to the child.

When the parent is making regular parenting decisions and the child cannot make an informed choices or express their own desires due to age and immaturity, the state should adopt a position of deference to the parent unless they are acting upon the state interest in protecting children from harm.

When a child does have capacity to express their own choices and make informed decisions, the child begins to have the competence at law to claim and exercise some of their own rights. At that point, the child can also make demands upon the state as their own agent and as a person with rights in a free and democratic society. The state's obligations and limitations must then be considered in light of both the parent's rights and the child's rights.

The rights a child begins to claim for themselves as their capacity evolves are enumerated in the *Convention* and the *Charter*. It is established at law that international treaties will shape the courts' interpretation of the *Charter*, so the *Convention* does carry legal weight in that it defines and clarifies the content of *Charter* rights. The sections of the two instruments which are relevant in this context follow.

The United Nations *Convention on the Rights of the Child*: In addition to Sections 5 and 9 previously cited, I note the following:

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

The *Charter of Rights and Freedoms*: In addition to Section 7 previously cited, I note the following sections:

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

As the *Convention* and *Charter* show, children have rights which also must be considered in reviewing educational policy. Children have a right to self-expression, to be treated equally, to have a zone of privacy and to their own gender identity. The degree to which they can determine the scope of these rights for themselves rests in large part upon what international law calls “the evolving capacities of the child” and provincial law calls “the child’s age and maturity”.

One of the clear policy choices the Department has made in its changes to Policy 713 is that prior to age 16, all children are to be considered to lack capacity to undertake any public change to their gender identity or self-expression without the consent of the parent. Under the changes, a child at 15 years and 364 days of age has the same legal treatment in choosing their name and pronouns as an infant. It is reasonable to state that, in some cases, the experience, wisdom and judgement of a parent may override the wishes of a child. That zone of parental veto is dependent upon the capacity of the child to

make their own judgement and the impact upon the child's rights. The older the child and the more personal the decision, the weaker the legal case for the assertion of parental rights alone to suffice.

The decisions of the Supreme Court of Canada in the area of mature minors and medical interventions may be helpful in defining the law as it pertains to mature minors and personal decisions.

In the case of *B.(R.) v. Children's Aid Society of Metropolitan Toronto*¹³, parents challenged the decision of the child protection authority to take custody of their infant daughter for the purposes of medical decision making. While the doctors had accommodated the parents' religious objections to blood transfusions in numerous treatments, the medical evidence was that the child would face life threatening heart failure absent treatments that would necessitate blood transfusions.

The Supreme Court unanimously rejected the parents' appeal to allow their religious objections to anchor a refusal of medical interventions for the child. The Court was unanimous on the result but split 5-4 on the issue of whether or not the result was born of the state's reasonable limits on the parents' section 7 right to liberty, or whether the parents' liberty interest simply did not extend to making religious determinations for their infant child. All nine justices, however, agreed that the parents' wishes could not support a decision clearly at odds with the child's established best interests.

Writing for the majority, Justice La Forest noted that the parental right to guide and instruct children in parental values did not extend to the legal presumption that children share their parents' values.

I note at the outset that it is the freedom of religion of the appellants -- Sheena's parents -- that is at stake in this appeal, not that of the child herself. While it may be conceivable to ground a claim on a child's own freedom of religion, the child must be old enough to entertain some religious beliefs in order to do so. Sheena was only a few weeks old at the time of the transfusion.¹⁴

After establishing that there was no breach of the parents' Section 2 rights to freedom of religion, Justice La Forest went on to find that any breach of liberty interests in parental rights could be justified as a reasonable limit under Section 1 of the *Charter*.

I add incidentally that I do not (as my colleagues Iacobucci and Major JJ. appear to suggest) think that liberty is all encompassing. I have been at pains to underline that it is limited to those essentially personal rights that are inherent to the individual which in my view include (and on this I believe we agree) the right of parents to nurture their children. Even as so defined, an interference with liberty may be justified as being in conformity with the principles of "fundamental justice". At bottom, I think "liberty" means the ordinary liberty of free men and women in a democratic society to engage in those activities that are inherent to the individual. These may not be extensive, but where they exist, they must under the Constitution be protected from state intervention unless that intervention can be justified. Sometimes that justification is evident. In other cases, it will require close contextual analysis. Here the security of the child was clearly paramount. What was more difficult, and what in the end the appellants really directed their argument to, is whether the procedures to determine respect for the parents' rights under the Act were sufficient to satisfy ss. 1 and 7 of the Charter. That such procedures must have

¹³ *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115 (SCC), [1995] 1 SCR 315, <<https://canlii.ca/t/1frmh>>

¹⁴ *Ibid* at page 381.

*effect before, and not following the action invasive of the parents' rights, seems to me to be essential and to be clearly required by ss. 1 and 7.*¹⁵

The Chief Justice, joined by three other colleagues, was warier of attaching any Section 7 liberty interest to parental decision-making.

*I am of the opinion that the liberty interest protected by s. 7 has not been infringed because it includes neither the right of parents to choose (or refuse) medical treatment for their children nor, more generally, the right to bring up or educate their children without undue interference by the state. While this type of liberty ("parental liberty") is important and fundamental within the more general concept of the autonomy or integrity of the family unit, it does not fall within the ambit of s. 7.*¹⁶

In the *B.(R.)* case, the decision was about limits on parental authority for a baby who could not make any decisions for herself. The analysis changes considerably when the child is able to articulate their own desires. Eleven years later, the Supreme Court was again dealing with the refusal of blood transfusions which put a child at risk, but the child was 14 years and 10 months old and articulated her own refusal. The Court found that the capacity of a child to present their own wishes in a mature and rational fashion meant that the state now had to consider the child's rights as a limitation upon its own power to act. In assessing whether the statute which allowed a state to assert custody if a minor child's preferences put them at risk violated the *Charter*, the Court determined as follows:

[102] *The inability of an adolescent to determine her own medical treatment, therefore, constitutes a deprivation of liberty and security of the person, which must, to be constitutional, be in accordance with the principles of fundamental justice*

[103] *A.C. argued that if the provisions are interpreted narrowly so that someone under 16 is deprived of the opportunity to demonstrate her capacity, they are arbitrary, and a law that is arbitrary will not be in accordance with the principles of fundamental justice (As the Chief Justice and Major J. explained in Chaoulli: "The state is not entitled to arbitrarily limit its citizens' rights to life, liberty and security of the person" (para. 129). A law will be arbitrary where "it bears no relation to, or is inconsistent with, the objective that lies behind [it]". To determine whether this is the case, it is necessary to consider the state interest and societal concerns that the provision is meant to reflect:*

In order not to be arbitrary, the limit on life, liberty and security requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts. The onus of showing lack of connection in this sense rests with the claimant. The question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair. The more serious the impingement on the person's liberty and security, the more clear must be the connection. Where the individual's very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact,

¹⁵ *Ibid* at pages 389-90.

¹⁶ *Ibid* at page 331.

between the measure that puts life at risk and the legislative goals. [Emphasis added; paras. 130-31.]

[104] *It is therefore necessary to put the analysis into the context of the objectives of the provisions. The overarching goal of statutes such as the Child and Family Services Act is to protect children from harmThe state’s interest in legislating in matters affecting children has a long-standing history. In R. v. Jones, supra, for example, I acknowledged the compelling interest of the province in maintaining the quality of education. More particularly, the common law has long recognized the power of the state to intervene to protect children whose lives are in jeopardy and to promote their well-being, basing such intervention on its parens patriae jurisdictionThe protection of a child’s right to life and to health, when it becomes necessary to do so, is a basic tenet of our legal system, and legislation to that end accords with the principles of fundamental justice, so long, of course, as it also meets the requirements of fair procedure. [Emphasis added; para. 88.]*

[105] *On the other hand, adolescents clearly have an interest in exercising their capacity for autonomous choice to the extent that their maturity allows. And society has a corresponding interest in nurturing children’s potential for autonomy by according weight to their choices in a manner that is reflective of their evolving maturity. In order to promote this objective, “paternalism should always be kept to a minimum and carefully justified” (Fortin, at p. 26).*

[106] *Given these competing values, a problem arises when a child’s interest in exercising his or her autonomy conflicts with society’s legitimate interest in protecting him or her from harm. As Fortin remarks (at pp. 26-27): “The difficulty lies in establishing a formula which authorizes paternalistic interventions to protect adolescents from making life-threatening mistakes but restrains autocratic and arbitrary adult restrictions on their potential for autonomy.”*

[107] *Given the significance we attach to bodily integrity; it would be arbitrary to assume that no one under the age of 16 has capacity to make medical treatment decisions. It is not, however, arbitrary to give them the opportunity to prove that they have sufficient maturity to do so.*

[108] *Interpreting the best interests standard so that a young person is afforded a degree of bodily autonomy and integrity commensurate with his or her maturity navigates the tension between an adolescent’s increasing entitlement to autonomy as he or she matures and society’s interest in ensuring that young people who are vulnerable are protected from harm. This brings the “best interests” standard in s. 25(8) in line with the evolution of the common law and with international principles, and therefore strikes what seems to me to be an appropriate balance between achieving the legislative protective goal while at the same time respecting the right of mature adolescents to participate meaningfully in decisions relating to their medical treatment. The balance is thus achieved between autonomy and protection, and the provisions are, accordingly, not arbitrary.¹⁷*

I have reproduced the Court’s finding at length because this case seems highly relevant to the questions around parental rights, child rights, and Policy 713. Faced with a mature minor of not quite 15 years of age, the Court held that the state may not dismiss her wishes in medical treatment simply because she

¹⁷ A.C. v. Manitoba (Director of Child and Family Services), 2009 SCC 30 (CanLII), [2009] 2 SCR 181, at para 102-108, <<https://canlii.ca/t/24432>>

has not obtained the age of 16 years even though that is what the statute provided. In order for the state to override the wishes of the mature minor, the state must first show that it is acting to further its legitimate interest to shield the child from harm, with the onus upon the state to articulate and lead evidence of the specific serious harm at issue. Second, the state was required to demonstrate that a process existed by which the mature minor could challenge the presumptive restriction on children under 16 making the decision and demonstrate that she had the maturity and capacity to make an informed decision.

Just as notably, once the minor child was sufficiently mature to make decisions, the parents' wishes became secondary. Indeed, the Court only mentioned parental wishes as a possible concern as to the child's independent capacity, speaking to the need to evaluate the issue of undue influence.¹⁸

The clear direction of the Supreme Court is that mature minors should be empowered to make their own decisions when their capacity matches the stakes, and that legal presumptions of an age of maturity should come with a clear process which allows a minor to be evaluated in their own right for the maturity and capacity to make the decision at hand. New Brunswick's *Medical Consent of Minors Act* reflects this need for such a process, in that, while those aged 16 have the decision-making rights of adults, those under the age of 16 also have the decision-making rights of adults if their decision is deemed to be in their best interests.¹⁹ While it is beyond the scope of this review, this raises the question as to whether or not the age prescriptions of 16 years of age in the *Change of Name Act* would withstand similar legal scrutiny given that it lacks an independent review process by which a minor can be assessed for capacity. What is relevant, however, is that the Supreme Court has directed governments to defer to the evolving capacity of mature minors, and that their wishes cannot be constrained by the state or parents.

[87] The more a court is satisfied that a child is capable of making a mature, independent decision on his or her own behalf, the greater the weight that will be given to his or her views when a court is exercising its discretion under s. 25(8). In some cases, courts will inevitably be so convinced of a child's maturity that the principles of welfare and autonomy will collapse altogether and the child's wishes will become the controlling factor. If, after a careful and sophisticated analysis of the young person's ability to exercise mature, independent judgment, the court is persuaded that the necessary level of maturity exists, it seems to me necessarily to follow that the adolescent's views ought to be respected. Such an approach clarifies that in the context of medical treatment, young people under 16 should be permitted to attempt to demonstrate that their views about a particular medical treatment decision reflect a sufficient degree of independence of thought and maturity.

[88] As L'Heureux-Dubé J. said in Young v. Young, [1993 CanLII 34 \(SCC\)](#), [1993] 4 S.C.R. 3, "courts must be directed to create or support the conditions which are most conducive to the flourishing of the child" (p. 65 (emphasis added)). And in King v. Low, [1985 CanLII 59 \(SCC\)](#), [1985] 1 S.C.R. 87, McIntyre J. observed: "It must be the aim of the Court . . . to choose the course which will best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult" (p. 101 (emphasis added)). When applied to adolescents, therefore, the "best interests" standard must be interpreted in a way that reflects and addresses an adolescent's evolving capacities for autonomous decision making. It is not only an option for the court to treat the child's views as an increasingly determinative factor as his or

¹⁸ *Ibid* at para 74.

¹⁹ *Medical Consent of Minors Act*, SNB 1976, c M-6.1, at paras 2-3, <<https://canlii.ca/t/553j5>>

her maturity increases, it is, by definition, in a child's best interests to respect and promote his or her autonomy to the extent that his or her maturity dictates.²⁰

This poses a legal challenge to those submissions which contend simply that the state does not trump the parent. This is true as far as it goes, but such a limited analysis removes and dehumanizes the child. It also makes it somewhat problematic that the Minister of Education and Early Childhood Education stated as part of the process of making changes that “the rights of the parent may have to outweigh the rights of the child.” Rights do not get balanced by simply choosing whose rights matter more; rather, solutions must be found which meet all of government’s obligations.

The state has three obligations here which require careful and thoughtful review in order to be balanced. The state must minimally intrude on the parent’s liberty to provide instruction and guidance to the child and determine their best interests where the child cannot do so themselves. The state must protect children from demonstrable harm. And the state must respect the evolving capacity of children who assert their own rights. That legal obligation to evaluate the capacity of the child may speak to concerns expressed by some citizens, such as the citizen who wrote:

“And yet, for some reason we are saying it is best that the parents be excluded as per the wishes of the child, who has a child’s, not an adult’s, understanding of the implications of their situation and decisions.”

What the law appears to be saying is that children with a “child’s understanding of the implications” may indeed need more decision-making support, but that the child does have a right to have their capacity evaluated. And, of course, not every decision requires the same capacity. Even young children can have informed preferences on some matters, and the older they get the weightier the matters they can decide for themselves. A 4-year-old will have more prescriptive regimens than a 10 year old, who will again have more prescriptive regimens than a 15 year old. Children should have capacity that aligns with the decision to be made, but it is a bit broad to ascribe the same “child’s understanding” to an infant and a teenager alike.

I have been reminded through the consultations that this concept of evolving capacity is exactly what school professionals will do under any iteration of Policy 713. As the New Brunswick Association of Social Workers noted:

As the regulatory body for social work in New Brunswick, the NBASW establishes the social work Code of Ethics, as well as the practice standards and guidelines that social workers are expected to abide by as a condition of licensure. In February 2021, the NBASW Board of Directors adopted the Standards Regarding the Capacity of Minors to Consent to Social Work Services.⁷ These Standards consider the mature minor doctrine, a common law that indicates that minors who are capable of understanding the nature and consequences of the proposed treatment can consent to receiving services.

As per the mature minor doctrine, the Standards Regarding Capacity of Minors to Consent focus on the capacity of a minor to consent to social work services, rather than focusing on the

²⁰ A.C., supra note 17, at paras 87-88.

individual's age. Before an individual can be considered a mature minor, social workers must assess whether the individual has the capacity to consent to services and must ensure that they demonstrate the necessary capacity indicators.

To provide further guidance to members on assessing capacity, the NBASW Board adopted the Guideline on Assessing the Capacity of Minors in February 2022.⁸ While both the Standards and Guidelines are relatively new to the Association, it is not a new requirement for social workers to assess the capacity of clients, prior to providing services. This is an ethical principle that is highlighted in the NBASW Code of Ethics (2007) section on informed consent (section 1.4).²¹

Those three obligations of the state will play out slightly differently in different scenarios. Where the child lacks capacity, the parents' rights to guide and make decisions will be paramount short of harm to the child. Where the parent and child present with the same request, the rights of the child will limit the state, but those rights will be defined and asserted by either the parent or the child depending upon the child's capacity. When the state is confronted with a parent and a child asserting conflicting rights, the state must respect and balance both as they exist; however, the child's evolving capacity must be accounted for in determining the state's obligation to respect those rights. A parent cannot order a state to ignore a child's rights, although the child may have a right to their parent's guidance if they lack the capacity to protect themselves from harm.

In the matter of Policy 713 and children's self-identification, we are clearly dealing with the third scenario. The school and the government did not create the family dynamic. The child is choosing to change their name and/or pronouns, and the child is choosing not to tell the parent. Again, that situation arose organically from the family dynamic and not any state action. Therefore, the school and the state cannot be said to have limited any parental right, because at the point of discovering the child's wishes there is no state action which has limited the parent's rights. The child may have made choices that have excluded the parent, but the state at the point of learning the child's wishes has done nothing. The school is confronted with the family dynamic and must balance its competing obligations to determine the scope of the parent's authority, to protect the child from harm, and determine the scope of the child's right to make the decision. (I recognize the possibility that subsequent school actions could do so and will account for that in the analysis to follow).

The legality of the changes to Policy 713 cannot be simply answered by asking if the state or the parent controls the child, because that ignores the obligation to protect the child from harm and the need to evaluate the child's rights. What **may** be a legal avenue for the government in defending its changes would be to define its objective in making the changes, thoughtfully review which rights of the child are being limited and see whether or not those limits upon the child's rights are justified by the objective of ensuring the inclusion of parents in the child's decision-making process.

Essentially, what I am doing here is applying the principles of the *Oakes* test to analyzing if the changes to Policy 713 regarding student self-identification limit the rights of the child and, if so, if they can be justified. The *Oakes* test is the test courts use when evaluating whether or not a government action or policy alleged to be a rights violation under the *Charter* can stand.²² The first step is to define the government's objective and to see if it pressing and substantial.

²¹ NB Association of Social Workers, *Feedback to the Advocate's Review*, p. 5.

²² See *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103, <<https://canlii.ca/t/1ftv6>>

Parental Involvement – A Pressing and Substantial Objective

There are only two possible motives to ascribe to the government’s changes to Policy 713 and the provisions for student self-identification. One is to ensure that parents have the information necessary to be involved in their child’s decisions around gender identity and how the way in which they identify publicly can impact their lives. This is the objective most often cited by the Department and elected officials in the government.

The second possible motive or objective is one cited by some of the citizens expressing support for the changes, which is to ensure that the values of the parent regarding gender identity are respected.

For the purposes of this analysis, I will be ascribing the first objective to the changes. This is both because it is the objective most often claimed by the Department and government officials, and because the second objective could not withstand legal scrutiny. The Supreme Court of Canada has affirmed that gender identity meets the tests relevant to being an analogous ground worthy of protected status under the *Charter*.²³ The Legislative Assembly has affirmed the same in the *Human Rights Act*²⁴ and has placed inclusion rights in the *Education Act*.²⁵ The Supreme Court of Canada has affirmed that human rights legislation has “quasi-constitutional status” and other statutes must be provided an interpretation which conforms with the *Human Rights Act* if any plausible interpretation exists.²⁶

The government was recently reminded by the Court of Appeal that even statutes cannot oust the intention of the *Human Rights Act* without the clearest of language due to this quasi-constitutional status.²⁷ A departmental policy is the least authoritative of the legal instruments available to government, because the Minister enacting or amending a policy can only do so under delegated authority of the Legislative Assembly, in this case through the *Education Act*.²⁸

All of which is to say that the Minister cannot use the unilateral discretion he has when making policies to override statutes, let alone the *Charter*. While a number of submissions in our review process have supported the changes to Policy 713 on the grounds that it will discourage students from exploring or seeking support for their gender identity, this would be an illegitimate purpose at law. Government cannot adopt policy with the express intention of discouraging individuals from accessing their human rights. For example, one written submission in support of the changes wrote, “It is not in your societies (sic) best interest to do anything other than what the majority requires and demands, no matter how big a tantrum a few may throw.”²⁹ Of course, in a constitutional democracy guided by a *Charter*, the individual desire to have personal expressions and identities that differ from the majority is not called a

²³ *Hansman v. Neufeld*, 2023 SCC 14 (CanLII), at paras 84-89, <<https://canlii.ca/t/jx8k0>>

²⁴ *Human Rights Act*, RSNB 2011, c 171, s. 2.1, <<https://canlii.ca/t/53mkm>>

²⁵ *Education Act*, SNB 1997, c E-1.12, ss. 1, 13, 14, 27, 28 and 48, <<https://canlii.ca/t/55ph9>> [all sections affirm the duty to foster inclusion and non-discrimination.

²⁶ *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45 (CanLII), [2008] 2 SCR 604, <<https://canlii.ca/t/1zjpm>>

²⁷ *Natural Resources and Energy Development v. Margaret-Ann Blaney*, 2023 NBCA 61 (CanLII), at paras 44-47, <<https://canlii.ca/t/jz551>>

²⁸ Supreme Court of Canada, “Administrative Tribunals and the Courts: An Evolutionary Relationship: Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada.” <https://www.scc-csc.ca/judges-juges/spe-dis/bm-2013-05-27-eng.aspx>

²⁹ From a submission received through the Office of the Child and Youth Advocate online portal.

“tantrum”. It is properly called a right, and any policy adopted with the goal of forcing the majority’s will on people’s deeply personal choices would be struck down at this first stage of the constitutional test.

That said I do not, as a matter of law, flippantly ascribe the darker motives of certain supporters of the Department’s changes to the Department itself.

The Department is entitled to the benefit of the doubt when defining its objective, and the ground cited by the Minister and departmental officials is that they have the policy goal of encouraging the child to access the guidance and support of parents in personal choices. As noted earlier, the Minister and senior Department officials have been alive to their duties under the *Human Rights Act* and have made public comments affirming their intent to avoid violating human rights statutes. At this stage of the analysis, which is to define the intent of the policy changes, they are entitled to the presumption of good faith and veracity in their stated motives.

I heartily agree that encouraging parental involvement is a valid, pressing, and substantive objective. The child has a right to the parent’s love and support, and international law principles affirm that the parent should be given respect for what they need to meet that responsibility. As noted previously, the parent has some liberty interest in being able to guide children in a manner appropriate to the child’s age, maturity, and development. Beyond this, a broad array of practitioners including teachers and physicians have affirmed that the parental role in a child’s life is essential and when a parent provides wise and loving support it can make a positive difference in a child’s development. There is evidence that when parents support a child’s exploration of their gender identity it can provide more positive outcomes.

My colleague, the Ombud, stated in her Office’s submission that “Maintaining the relationship of trust between parent and teacher is essential to the promotion of the child’s best interests. Therefore, the aims in Policy 713 to support the child in engaging their parents in this important sphere are not without merit.³⁰ I agree. This is a valid policy objective.

In a number of ways, the changes to Policy 713 does place limits on the child’s right. The Minister has publicly affirmed that this is by design, stating on or about May 19, 2023, “If a parent doesn't want their child to be referred to as they ... would prefer for them to be referred to as she or he, you know, that's a parent's right,” and also ““Notwithstanding the rights of people that are protected under the Charter of Rights and Freedoms ... in my community, people believe that they should be informed if their child says all of a sudden they want to be referred to by a different pronoun.”³¹

It is important to define the rights of the child that the Department has chosen to limit “notwithstanding” that they exist at law.

³⁰ Submission of the Office of the Ombud to the Office of the Child and Youth Advocate, August 2, 2023, at page 17.

³¹ Sweet, Jennifer, *NB Education Minister Defends Policy 713 Review as Rallies Continue*, CBC.ca, May 19, 2023, [N.B. education minister defends Policy 713 review as student rallies continue | CBC News](https://www.cbc.ca/news/nb-education-minister-defends-policy-713-review-as-student-rallies-continue-1.6811111)

The Child's Right to Equality

It is established in New Brunswick law that gender identity is a protected ground under the *Human Rights Act*. That is a choice made by the Legislative Assembly in adopting the statute, and a policy cannot ignore that express will of the Legislative Assembly. No matter how many people may informally tell the Minister they would prefer that a child not use pronouns, it is still illegal if the result is discrimination against children because of their gender identity.

Further, it is established law in Canada that Section 15 of the *Charter* places a positive obligation upon provinces to protect any analogous personal characteristics to the ones enumerated in the *Human Rights Act*.³² It would be difficult to justify a removal of that protection in light of the Supreme Court's findings in *Hansman v. Neufeld*³³ regarding the vulnerable status of transgender citizens:

The transgender community is undeniably a marginalized group in Canadian society. The history of transgender individuals in our country has been marked by discrimination and disadvantage. Although being transgender "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities" (J. Drescher and E. Haller, Position Statement on Discrimination Against Transgender and Gender Diverse Individuals, 2018 (online)), transgender and other gender non-conforming individuals were largely viewed with suspicion and prejudice until the latter half of the 20th century.

Indeed, transgender people occupy a unique position of disadvantage in our society, given the long history in psychiatry "of conflating [transgender and other 2SLGBTQIA+] identities with mental illness" and even resorting to harmful "conversion therapy" to "resolve" gender dysphoria, and "recondition" the individual to reduce "cross-gender behavior" (A. Veltman and G. Chaimowitz, "Mental Health Care for People Who Identify as Lesbian, Gay, Bisexual, Transgender, and (or) Queer" (2014), 59:11 Can. J. Psychiatry 1, at pp. 1-2; American Psychological Association, Task Force on Gender Identity and Gender Variance, Report of the Task Force on Gender Identity and Gender Variance (2009), at p. 27). As the British Columbia Human Rights Tribunal has recognized, "[u]nlike other groups . . . , transgender people often find their very existence the subject of public debate and condemnation" (Oger v. Whatcott (No. 7), 2019 BCHRT 58, 94 C.H.R.R. D/222, at para. 61). They are stereotyped as diseased or confused simply because they identify as transgender (Nixon v. Vancouver Rape Relief Society (No. 2), 2002 BCHRT 1, 42 C.H.R.R. D/20, at paras. 136-37).

Transgender people have faced discrimination in many facets of Canadian society. Statistics Canada has concluded that they are at increased risk of violence, and report higher rates of poor mental health, suicidal ideation, and substance abuse as a means to cope with abuse or violence they have experienced (see Experiences of violent victimization and unwanted sexual behaviours among gay, lesbian, bisexual and other sexual minority people, and the transgender population, in Canada, 2018 (September 2020)). Studies have concluded that they are disadvantaged relative to the general public in housing, employment, and healthcare (Department of Justice Canada, A Qualitative Look at Serious Legal Problems: Trans, Two-Spirit, and Non-Binary People in Canada (2022), at p. 10; XY v. Ontario (Government and Consumer Services) (No. 4), 2012 HRTO 726, 74 C.H.R.R. D/331, at paras. 164-66). And despite encountering a higher incidence of

³² *Vriend v. Alberta*, 1998 CanLII 816 (SCC), [1998] 1 SCR 493, <<https://canlii.ca/t/1fgt5>>

³³ *Supra* note 22.

justiciable legal problems, studies have also found that transgender people have traditionally faced greater access to justice barriers than the broader population, in part due to a lack of explicit human rights protections (J. James et al., Legal Problems Facing Trans People in Ontario, TRANSforming JUSTICE Summary Report 1(1), September 6, 2018 (online); see also Department of Justice Canada, at p. 11).

Significant legal advancements in transgender rights have only come in the last 35 years, with most change taking place in the last decade (S. Singer, “Trans Rights Are Not Just Human Rights: Legal Strategies for Trans Justice” (2020), 35 C.J.L.S. 293, at p. 298). Once forced to advance claims of discrimination on the ground of “physical disability” (B. Findlay et al., Finding Our Place: Transgendered Law Reform Project (1996), at pp. 20-21), gender identity and/or expression are now prohibited grounds of discrimination in human rights codes across the country and included within the prohibition against hate speech under the Criminal Code, R.S.C. 1985, c. C-46 (see Alberta Bill of Rights, R.S.A. 2000, c. A-14; Human Rights Code, R.S.N.B. 2011, c. 171; Human Rights Act, 2010, S.N.L. 2010, c. H-13.1; Human Rights Act, R.S.N.S. 1989, c. 214; Human Rights Act, S. Nu. 2003, c. 12; Human Rights Act, S.N.W.T. 2002, c. 18; Human Rights Code, R.S.O. 1990, c. H.19; Human Rights Act, R.S.P.E.I. 1988, c. H-12; Charter of human rights and freedoms, CQLR, c. C-12; Human Rights Act, R.S.Y. 2002, c. 116; The Human Rights Code, C.C.S.M., c. H175; The Saskatchewan Human Rights Code, 2018, S.S. 2018, c. S-24.2; An Act to amend the Canadian Human Rights Act and the Criminal Code, S.C. 2017, c. 13).

In the wake of this legislative progress, judicial recognition of the plight of transgender individuals in Canada is growing (see XY, at para. 164; see also Oger, at para. 62; Vanderputten v. Seydaco Packaging Corp. (No. 1), 2012 HRTO 1977, 75 C.H.R.R. D/317, at para. 61; JY v. Mint Tanning Lounge, 2018 BCHRT 282, at para. 32 (CanLII); J.Y. v. Various Waxing Salons, 2019 BCHRT 106, 94 C.H.R.R. D/11, at para. 33; X v. Hot Mess Salon, 2019 BCHRT 24, at para. 11 (CanLII); T.A. v. Manitoba (Justice), 2019 MBHR 12, at para. 24 (CanLII); A.B. v. Correctional Service Canada, 2022 CHRT 15, at para. 41 (CanLII)). And in 2021, the Superior Court of Quebec held that “[g]ender identity is analogous to the grounds listed at s. 15(1) of the Canadian Charter” because “[g]ender identity is an immutable personal characteristic” (Centre for Gender Advocacy v. Attorney General of Quebec, 2021 QCCS 191, 481 C.R.R. (2d) 273, at paras. 104 and 106).

Yet individual courts and tribunals have also recognized that, “despite some gains, transgender people remain among the most marginalized in our society” (Oger, at para. 62), and continue to live their lives facing “disadvantage, prejudice, stereotyping, and vulnerability” (C.F. v. Director of Vital Statistics (Alta.), 2014 ABQB 237, 587 A.R. 332, at para. 58).

These findings of our highest court are borne out in New Brunswick-specific data as well. The evidence of vulnerability is clear, and the need for heightened protection of minors has been clear in Supreme Court of Canada jurisprudence: “Recognition of the *inherent* vulnerability of children has consistent and deep roots in Canadian law.”³⁴ Queer and trans youth are already vulnerable because they are children, and even more so because of their gender identity.

³⁴ A.B. v. Bragg Communications Inc., 2012 SCC 46 (CanLII), [2012] 2 SCR 567, <<https://canlii.ca/t/fstvg>>

In an analysis of discrimination, courts will take “judicial notice of reliable social research and socio-economic data.”³⁵ The Department needed to look no further than its own evidence, as found in its Student Wellness Surveys and school Exit Surveys, to establish the vulnerability of LGBTQ+ students.

The 2021-2022 Student Wellness Survey shows the following for students in grades six to twelve in NB schools.³⁶

Lonely, most or all of the time:

Average 28%

LGBTQ+ 51%

Difficulty sleeping, most or all of the time:

Average 65%

LGBTQ+ 80%

People in communities can be trusted:

Average 55%

LGBTQ+ 42%

Can ask for help from neighbours:

Average 66%

LGBTQ+ 53%

And the New Brunswick Child Rights Indicator Framework for 2021 shows the following for students in grades six to twelve, all of which is based on Student Wellness Surveys.³⁷

Percentage of students with a moderate to high level of resilience:

Average 71%

LGBTQ+ 54%

Percentage of students with a moderate to high level of mental fitness:

Average 77%

LGBTQ+ 62%

Percentage of students who report having people they look up to:

³⁵ *Willick v. Willick*, 1994 CanLII 28 (SCC), [1994] 3 SCR 670, <<https://canlii.ca/t/1frq8>>

³⁶ New Brunswick Health Council, ‘2021-2022 Student Wellness Survey’, <https://nbhc.ca/surveys/2021-2022-student-wellness-survey>

³⁷ Office of the Child and Youth Advocate, The Child Rights Indicator Framework 2021, November 2021. <https://static1.squarespace.com/static/60340d12be1db058065cdc10/t/619391850979f2244938dd19/1637061439161/2021+Child+Rights+Indicator+Framework>

Average 45%

LGBTQ+ 36%

Percentage of students who report they are treated fairly in their community:

Average 37%

LGBTQ+ 25%

Percentage of students who agree or strongly agree they feel safe in their school:

Average 83%

LGBTQ+ 74%

Percentage of students who report something will often or always be done if they complain to an adult at school about bullying:

Average 42%

LGBTQ+ 35%

Percentage of students who report having been bullied at school in the past couple months:

Average 50%

LGBTQ+ 64%

Percentage of youth who report having been bullied at school with physical attacks in the past couple months:

Average 12%

LGBTQ+ 17%

Percentage of youth who report having been bullied at school with verbal attacks in the past couple months:

Average 37%

LGBTQ+ 48%

Percentage of youth who report having been bullied at school by exclusion in the past couple months:

Average 32%

LGBTQ+ 43%

Percentage of youth who report having been bullied at school with sexual jokes, comment, or gestures in the past couple months:

Average 17%

LGBTQ+ 28%

Percentage of students who report their family stands by them during difficult times:

Average 53%

LGBTQ+ 39%

Percentage of students who have their mental fitness needs highly satisfied by their families:

Average 78%

LGBTQ+ 62%

Percentage of students who report having had symptoms of anxiety in the past 12 months:

Average 37%

LGBTQ+ 58%

Percentage of students who report having had symptoms of depression in the past 12 months:

Average 37%

LGBTQ+ 60%

Percentage of grades 6-12 students who report they feel they belong at their school:

Average 27%

LGBTQ+ 17%

And this last statistic from the New Brunswick Child Rights Indicator Framework for 2021 is based on school Exit Surveys

Percentage of grade 12 students who feel respected at school:

Average 81%

LGBTQ+ 71%

Added to these disturbing indicators, Canada's suicide rate for those aged 15-19 is higher than the vast majority of OECD countries.³⁸ And "transgender and sexual minority adolescents were at increased risk of suicidal ideation and attempt compared with their cisgender and heterosexual peers."³⁹

The disturbing picture continues into postsecondary education. Statistics Canada states that close to half of students at Canadian postsecondary institutions witnessed or experienced discrimination on the basis

³⁸ Organization for Economic Development, OECD Family Database, Social Policy Division - Directorate of Employment, Labour and Social Affairs, <https://www.oecd.org/els/family/database.htm>

³⁹ Kingsbury, Mila, *et al.*, *Canadian Medical Association Journal*, "Suicidality among sexual minority and transgender adolescents: a nationally representative population-based study of youth in Canada," June 6, 2022, <https://www.cmaj.ca/content/194/22/E767>

of gender, gender identity or sexual orientation. And students who experience discrimination based on gender and gender identity are less likely to feel safe.⁴⁰

It is hard to imagine that there would not be a duty at law under the *Vriend* test for the Department to take affirmative steps to protect these children. I do not need to decide that question, because the Legislative Assembly has chosen to place that directive in the *Human Rights Act*

Children have human rights from the moment they are born. Their need for adult support may lead to reasonable limits upon those rights, but the Department cannot simply wave them aside because of parental discomfort or disapproval, or to appease voting-age constituents. The right must be acknowledged, and the onus is upon government to justify the limit.

Further, the Department cannot pay lip service to the protected status of gender identity while removing its tangible expression in daily life. It is established consensus in Canadian human rights law that the use of preferred pronouns and name is a deeply personal part of one's identity. In our consultations, this came through loud and clear in many voices of queer and trans youth and their families. The New Brunswick Human Rights Commission has already been explicit on this point, that the use of a person's pronouns is an intrinsic part of avoiding discrimination.⁴¹ New Brunswick is not alone in this regard. Explicit statements that denying someone their preferred pronoun can be found in guidance from human rights commissions and government agencies federally⁴² in British Columbia⁴³, Alberta⁴⁴, Saskatchewan⁴⁵, Manitoba⁴⁶, Ontario⁴⁷, Quebec⁴⁸, and, as we shall see, all three other Atlantic Provinces.

Our consultations involved interviews with trans people who shared their personal experience with us. Their descriptions of their experience shed light on what it means to have your preference respected during the difficult process of questioning your gender identity. Those who have not had that experience should reflect before dismissing it as hyperbole. It should not be hard to imagine that

⁴⁰ Statistics Canada, Juristat Bulletin, "Students' experiences of discrimination based on gender, gender identity or sexual orientation at postsecondary schools in the Canadian provinces, 2019,"

<https://www150.statcan.gc.ca/n1/pub/85-005-x/2020001/article/00001-eng.htm>

⁴¹ New Brunswick Human Rights Commission, *Guideline on Gender Identity or Expression*, May, 2017, page 6, [Guideline-on-gender-identity-or-expression.pdf \(gnb.ca\)](https://www.gnb.ca/0000/guidelines/gender-identity-or-expression.pdf)

⁴² Government of Canada, Department of Justice, *Gender Identity and Gender Expression*, <https://www.canada.ca/en/departement-justice/news/2016/05/gender-identity-and-gender-expression.html>

⁴³ Government of British Columbia, *Human Rights in British Columbia - Discrimination based on gender identity or expression fact sheet*, <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/human-rights/human-rights-protection/discrimination-gender-identity-expression.pdf>

⁴⁴ Alberta Health Services, *Diversity & Inclusion - Best Practice Guide: People's Pronouns*, [Diversity & Inclusion - Best Practice Guide: People's Pronouns \(albertahealthservices.ca\)](https://www.albertahealthservices.ca/diversity-inclusion/best-practice-guide-people-s-pronouns/)

⁴⁵ Government of Saskatchewan, *Public Service Commission, Gender Transition Guidelines*, <https://taskroom.sp.saskatchewan.ca/Documents/GenderTransitionGuidelines.pdf>

⁴⁶ Manitoba Human Rights Commission, *Discrimination based on Gender Identity: Your Rights and Responsibilities – A Guideline Developed under the Human Rights Code*. [guideline_genderid.pdf \(manitobahumanrights.ca\)](https://www.manitobahumanrights.ca/guidelines/genderid.pdf)

⁴⁷ Ontario Human Rights Commission, "Policy on preventing discrimination because of gender identity and gender expression," April 14th, 2014, page 38, <https://www.ohrc.on.ca/en/policy-preventing-discrimination-because-gender-identity-and-gender-expression>

⁴⁸ An Act to strengthen the fight against transphobia and improve the situation of transgender minors in particular, SQ 2016, c 19, <https://canlii.ca/t/52rr8>

anyone would feel disrespected if you asked someone to call you by your preferred name and they simply refused. When this disrespect is shown someone who is going through the universal insecurities of adolescence and wrestling with issues that others say are wrong, unnatural, or born of mental illness, it becomes easy to see how devastating it would be to be ordered to spend most waking hours in a place where people refuse to call you what you want to be called.

Consider these quotes from our interviews with trans youth:

“Being allowed to be called by your chosen name and pronouns is suicide prevention.”

“The issue is broader than names and pronouns; they’re sending a message that people of the LGBTQ community don’t deserve the same human rights as everyone else”

“School will become like a toxic work environment. You spend half your waking hours in school.”

Or these observations from a teacher who has worked with trans students:

“I don’t feel that this (deadnaming students) should be part of a teacher’s role. Teaching is hard enough and this would be a very large burden. It would affect my relationships with students where they wouldn’t confide in me again. It would also put them off going to a counsellor.”

“(Policy 713) keeps kids in school where they are affirmed; if they are respected in school, they will want to go”

And these comments from parents of trans teens:

“I guarantee this will have serious ramifications for the LGBTQ community...safety, mental health, grades, futures, suicidality.”

“Over the past 6 weeks, my kid has been asking if we can move out of N.B. so he can go to school abroad. He’s aware [this review] is stirring anti-trans sentiment and is fearful now even though he has a supportive family and school.”

These personal statements on the emotional impact of deadnaming are also backed up by objective expert submissions. I note the statement provided to me authored by the New Brunswick Association of School Psychologists, the very people the Department would refer students to in matters of gender identity:

School psychologists are committed to providing gender affirming care to transgender and gender diverse students and advocating for their rights. Misgendering transgender and gender diverse people increases risk of self harm, suicidal ideation, and other mental health concerns. As such, it is imperative that students’ names and pronouns be respected and used in the school environment regardless of their age. School psychologists will not be complicit in creating harm by deadnaming and misgendering the

*students with whom we work.*⁴⁹

The other group of professionals to whom the Department will now refer students, social workers, is equally clear in their submission:

*Teachers and all other school personnel should be required to use the preferred names or pronouns for students under 16 without parental consent. It is a matter of respect for students; it is a matter of safety when it comes to LGBTQIA2+ youth. Students have the right to be referred to by their preferred nickname, so why should a preferred name or pronoun be viewed any differently? Having teachers find out whether a name preference is based on gender identity mandates discrimination against LGBTQIA2+ students. This is unacceptable.*⁵⁰

The importance that trans youth and those who love them attach to this basic show of respect and acceptance is clearly high. For those of us who faced the turmoil of our teen years with at least the security of having a gender identity that matched the majority of our peers, this may seem hard to imagine. Yet each of us want respect and autonomy". I would invite the reader to take the advice of fictional coach Ted Lasso and be "curious, not judgmental about the stakes of withholding basic respect from these children. The law requires us to weigh the impact of withholding that respect against the impact of some limits on the parent's right to be informed. We need to understand those experiences from those who live them.

Even if one insists that the consensus from trans youth, their parents, their doctors, their psychologists and their social workers is unpersuasive, the Department has a significant operational problem that renders the new Policy somewhat ineffectual. Taking the Department's position on its face, they are insisting that children should not be called their preferred name and pronouns without parental consent. They will withhold that accommodation until the child speaks to social workers and psychologists about speaking to their parents. The social workers and psychologists are advising that they will start by using the child's preferred name and pronouns.


Insisting on a process whereby the child is sent to professionals whose first recommendation is to ignore the process renders the new Policy 713 somewhat performative. Rather than a coherent operational policy, it is reduced to political onanism whose only tangible outcome is to inflict extra bureaucracy upon child and school personnel before rendering itself somewhat moot. The only real change is a period of uncertainty and embarrassment which doctors, psychologists and social workers agree is bad for the child.

Speaking further to the equality rights of the child, the Department's failure to communicate some benchmark for students' right to use alternate names for non-gender identity purposes raises serious questions of discrimination.

In the classic comic strip *Calvin and Hobbes*⁵¹, little Calvin is fond of playing Calvinball, a game defined by its complete lack of consistent rules. If you don't like how the game is going, you call out a new rule to suit your short-term desires. As a child's pastime, Calvinball works well. The reference is also shorthand for situations where governments simply change principles conveniently when they want a

⁴⁹ Statement by the N.B. Association of School Psychologists, for Advocate's Review, p.2.

⁵⁰ New Brunswick Association of Social Workers, *Feedback for the Advocate's Review* at pp. 2-3.

⁵¹ If you know, you know .

given result. When applied to the rights of vulnerable minorities, Calvinball is a terrible idea. Consistency in principle is how we know whether or not we are allowing personal biases to colour the rules we apply to a minority group. A court will consider whether a law or policy treats a person differently than others either in purpose *or effect*. It will also consider “whether it fails to take into account the claimant’s already disadvantaged position within Canadian society, thereby giving rise to substantively differential treatment.”⁵² If differential treatment is based on a protected ground listed in the *Charter*, or an analogous ground, a court will then determine whether the differential treatment discriminates,

*“by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration.”*⁵³

With the changes to students’ ability to ask how to be addressed informally, the Department is clearly playing Calvinball. The Department could not point me to any existing guidance regarding school personnel calling students by nicknames in their informal, daily interactions.⁵⁴ No educator interviewed could point to past restrictions. The general practice has been, if the request comes from a student with seriousness and maturity, other names can be used. Many an “Anthony” has been called “Tony”. I attended school with at least one “Thomas Jack” who preferred “T.J.”. Students whose names may be culturally unfamiliar or commonly mispronounced in Canada are allowed to use abbreviated or Westernized names in daily interactions.

This matters, because *prima facie* discrimination exists when the rules around a student request suddenly change based upon who is making the request and why. In this matter, I can find no previous departmental concern about students exercising their own agency in choosing how they are addressed. It is a common courtesy, and certainly a good practice for anyone trying to build a trust relationship with a person, to call them what they wish to be called.

The same Calvinball concern exists in the absence of a clear benchmark for parental rights. It would be fair to say that there is not a clear, principled standard for when parents should be notified of a school’s action, when they should be consulted, and when they must affirmatively grant permission. There are a few recurring themes, to be sure. Few of these seem consistent with the principles which appeared in the changes to Policy 713.

The Department referred me to certain policies which mandate some kind of parental notification or engagement. In Policy 703, regarding Positive Learning Environments (Policies beginning with “7” are grouped together as “Health and Safety” policies and thus share the most similarities with Policy 713), the Department notes that parents are notified if a student is intoxicated on school grounds, or if their behaviour negatively affects the learning environment to the point an intervention plan is needed. These, however, are for breaches of school rules. Wishing to be called by a different name is not a

⁵² *Quebec (Attorney General) v. A*, 2013 SCC 5 (CanLII), [2013] 1 SCR 61, <<https://canlii.ca/t/fvsc0>>

⁵³ *Ibid.*

⁵⁴ Departmental responses to the Advocate’s questions.

breach of the learning environment or the rules. Policy 712 mandates parental notification when a child is subject to a search or a law enforcement request, but this is, again, for disciplinary reasons.

Some parents have noted that there is an apparent inconsistency in the use of permission slips in some areas of endeavour, but not this seemingly important one. The original version of Policy 713 may have lacked clarity of why this seeming departure is tolerated. As one parent wrote:

“Consent forms and parent involvement in all aspects of a child’s life are so vital and need to be put in place. Let me make the choice for what is best for my child.”

There are provisions for parents’ permission for children to receive medical interventions. Certainly this analogy has been drawn by some submissions to our consultations and in public debate around Policy 713. A common phrasing has been to note that the school requires permission to give a child Tylenol, and thus this relatively minor intervention must surely set a standard where parents must consent to everything more significant than a Tylenol.

This is an understandable first impulse, but the Department’s reply to the Advocate shows why it is not an appropriate comparison. The Department notes that Policy 704 creates a parental consent process for health services because health services are not part of the parental consent given for educational services. The registration of a child in school grants consent for the school to provide educational services consistent with the goals of public education. The administration of medicine, even a relatively benign case, is not an educational service. Thus, the school must ask because the parent’s consent to public education services does not cover medical treatments. It is the category and not the gravity of the intervention which necessitates the request. The same logic applies to field trips beyond the established school campus (and, again, schools do not notify parents when older students exercise their own choice to leave the school campus at break times, only when the school itself provides the means of transit).

Public education services, however, are exactly what the parent consents to when registering their child in the public school system. On this point, it is legally and regulatorily clear that public education includes a mandate for the school to provide inclusive accommodations and to follow the principles of non-discrimination. The *Education Act*, as I noted earlier, provides mandates for inclusive education in no less than five sections.⁵⁵ Policy 703 affirms the accommodation of gender identity and incorporates the *Human Rights Act* by reference as follows:

Superintendents will ensure the development of a plan of assistance to ensure positive learning and working environments in their districts in consultation with their District Education Council. This plan promotes a learning environment that is inclusive, safe, respects human rights, supports diversity and addresses discrimination regardless of real or perceived race, colour, religion, national or ethnic origin, ancestry, place of origin, language group, disability, sex, sexual orientation, gender identity, age, social condition or political belief or activity. 6.1.2 The District Positive Learning and Working Environment Plan will include strategies for managing inappropriate behaviour by students as well as by parents or visitors when interacting with the school and school personnel, consistent with the Education Act, the New Brunswick Human

⁵⁵ See note 25 for the specific sections.

*Rights Act, the Workplace Harassment Policy from the Administration Manuel (sic) System of the New Brunswick government, Policy 322 on Inclusive Education and this policy.*⁵⁶

I also note that the required provincial education plan⁵⁷ in each sector has language which defines the educational services. The Anglophone Sector's plan⁵⁸ establishes the following goals of the public education system:

Our children and youth live in a constantly evolving, knowledge-based society. To be successful in both the present and the future, learners require the global competencies necessary to be open and engaged citizens. The acquisition of these competencies occurs in an early learning and education system that evolves with them and that is responsive to their needs but is also valued by society all along the continuum, where young and old alike remain actively engaged in their learning....

Priorities, determined through an examination and clustering of the report's findings and recommendations, are as follows:

- ***Establishing a culture of belonging and valuing diversity;***
- *Ensuring pre-school children develop the competencies they need;*
- *Improving literacy skills;*
- *Improving numeracy skills;*
- *Improving learning in, and application of, the arts, science, trades and technology;*
- *Meeting the needs of First Nation children and youth;*
- *Nurturing healthy values, attitudes and behaviours;*
- *Ensuring learners graduate with fundamental French language proficiencies; and*
- *Fostering learner leadership, citizenship and entrepreneurial spirit*

The Francophone Sector plan⁵⁹ sets out its mission and goals of public education as follows:

Each person, from early childhood to adulthood, develops and realizes his or her full potential. As an engaged citizen who is open to the world, she or he contributes to the vitality, the

⁵⁶ Department of Education and Early Childhood Development, Policy 703, Fostering a Positive Learning and Working Environment, Sections 6.1.1 and 6.1.2,

<https://www2.gnb.ca/content/dam/gnb/Departments/ed/pdf/K12/policies-politiques/e/703A.pdf>

⁵⁷ Section 6(a.1) of the *Education Act* requires the Minister to define the educational goals in a plan.

⁵⁸ Department of Education and Early Childhood Development, Anglophone Sector, *10-year education plan – Everyone at their best*, August, 2016.

<https://www2.gnb.ca/content/dam/gnb/Departments/ed/pdf/K12/EveryoneAtTheirBest.pdf>

⁵⁹ Department of Education and Early Childhood Development (Secteur Francophone), *Plan d'éducation de 10 ans – Donnons à nos enfants une longueur d'avance*, Aout, 2016,

<https://www2.gnb.ca/content/dam/gnb/Departments/ed/pdf/K12/DonnonsANosEnfantsUneLongueurDavance.pdf>

development and the influence of the Acadian and Francophone community and New Brunswick society.

The Acadian and Francophone education system provides each person, from early childhood to adulthood, with quality education contributing to his or her educational success and to the development of his or her linguistic and cultural identity.

Given that learners are the focal point of the Acadian and Francophone education system, the key objectives of the education plan are centred on activity areas that are directly related to those objectives. Consequently, the outcome of all activities and initiatives stemming from the education plan will continue to be the success of all learners in the following eight areas:

- *Career and life readiness;*
- *Wellness;*
- *Identity building;*
- ***Citizenship education and diversity;***
- *First Nations;*
- *School and life readiness;*
- *Literacy;*
- *Numeracy and science, engineering and technology. (Emphasis added)*

The explanation for parental consent to Tylenol is that Tylenol is not part of the public education services agreed to at registration. Diversity, inclusion and adherence to human rights clearly are.

It is further established at law that public education services will include the principle that the school community will include a student population as diverse as society itself, and that registration of a child in a public school carries with it an acceptance that children may see views their parents disagree with accommodated as they would be in the broader society. As Ontario's highest court has stated, referring to the Supreme Court of Canada:

[29] In S.L. v. Commission scolaire des Chênes, parents asked to have their children exempted from Quebec's mandatory Ethics and Religious Culture ("ERC") Program that had replaced Catholic and Protestant programs of religious and moral instruction. The parents objected that the ERC Program would expose their children to "a form of relativism, which would interfere with [their] ability to pass their faith on to their children" (at para. 29) because it presented different beliefs on an equal footing. The Supreme Court accepted the sincerity of the parents' religiously based objection to the nature of the ERC program, but held that sincerity of belief was insufficient to make out a s. 2(a) Charter claim of infringement of religious freedom. Writing for the seven-judge majority, Deschamps J. accepted, at para. 26, that "[t]he appellants sincerely believe that they have an obligation to pass on the precepts of the Catholic religion to their children" but she then held, at para. 27, that "[t]o discharge their burden at the stage of proving an infringement, the appellants had to show that, from an objective standpoint, the ERC Program interfered with their ability to pass their faith on to their children."

[30] Deschamps J. rejected the assertion that exposing children to contrary views, without more, amounts to an infringement of freedom of religion, at para. 40:

Parents are free to pass their personal beliefs on to their children if they so wish. However, the early exposure of children to realities that differ from those in their immediate family environment is a fact of life in society. The suggestion that exposing children to a variety of religious facts in itself infringes their religious freedom or that of their parents amounts to a rejection of the multicultural reality of Canadian society and ignores the Quebec government's obligations with regard to public education. Although such exposure can be a source of friction, it does not in itself constitute an infringement of s. 2(a) of the Canadian Charter and of s. 3 of the Quebec Charter.

[31] Deschamps J. drew support for this conclusion from the judgment of McLachlin C.J.C. in *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710, where the Supreme Court of Canada considered a challenge to a school board's decision to refuse to approve books suggested by a teacher depicting same-sex parented families for use at the kindergarten-grade one level. The Supreme Court held that, given the Board's statutory mandate of secularism and tolerance, its decision was unreasonable. The Board had failed to proceed on the basis of respect for all types of families and had instead proceeded on an exclusionary philosophy, responding to the concerns of certain parents regarding the morality of same sex relationships. This approach failed to consider the right of children of same-sex parented families to be accorded equal recognition and respect in the public school system.

[32] As McLachlin C.J.C. pointed out, at paras. 64-67, the "cognitive dissonance" that a child might experience from learning about things that do not correspond to the views of the child's own parents is part and parcel of growing up in a diverse society committed to the acceptance of the fact of differences in lifestyles and moral and religious views. "[S]uch dissonance", wrote McLachlin C.J.C., "is neither avoidable nor noxious" but rather something children encounter every day as members of a diverse student body in a public school system. This kind of cognitive dissonance "is simply a part of living in a diverse society" and "a part of growing up" and "arguably necessary if children are to be taught what tolerance itself involves." She went on to write:

[T]he demand for tolerance cannot be interpreted as the demand to approve of another person's beliefs or practices. When we ask people to be tolerant of others, we do not ask them to abandon their personal convictions. We merely ask them to respect the rights, values and ways of being of those who may not share those convictions. The belief that others are entitled to equal respect depends, not on the belief that their values are right, but on the belief that they have a claim to equal respect regardless of whether they are right. Learning about tolerance is therefore learning that other people's entitlement to respect from us does not depend on whether their views accord with our own. Children cannot learn this unless they are exposed to views that differ from those they are taught at home.

[33] Here, while E.T. has made out a sincere religious belief, his subjective belief that he must shield his children from hypothetical "false teachings" does not gain absolute protection. The onus remains on E.T. to proffer evidence that, from an objective standpoint, the instruction and

*activities to which his children are in fact exposed interferes with his ability to do so. E.T. has failed to satisfy that onus.*⁶⁰

To sum up, it is difficult to see any precedent for the Department's sudden proclamation of a parental rights policy founded on "parents want to know". Where teenagers are involved, it is possible to imagine any number of scenarios where a parent might want to know – from a Muslim student removing her hijab against her parents' wishes to a child rejecting the use of a name with cultural or family import to the parents to a student expressing political views their parents may abhor to a student drinking several chocolate milks a day in the school cafeteria. The Department has acknowledged in its submission to this process that students may access other accommodations, such as a Muslim not participating in gym class during the Ramadan fast without parental notification or consent. The Department has never made potential parental interest the standard for a parental veto over the daily choices of older students, or a duty of the teacher to advise.

In fact, it is noteworthy that the Department recently proposed Bill 46⁶¹ in the Legislative Assembly, which presented an entirely rewritten version of the *Education Act*. Despite opening the statute to amendment in numerous areas, there was no effort by the Department to propose any changes affecting parental rights or notifications, even though:

- The *Education Act* does not list the "parents would want to know" standard, or any duty to advise parents at all, in the duties of teachers in Section 27,
- The *Education Act* only mentions Parent-School Support Committees and a general report to all parents in Section 28 prescribing duties of a principal. (The duty to provide for students' health, well-being, and learning environment is mentioned in both sets of duties).
- The Minister's policymaking authority under Section 6 does not grant the Minister any authority to make policies whose pith and substance is defining the rights of parents, only "the health and well-being of students" would apply to the Minister's exercise of this authority to change Policy 713.

In short, there is little evidence of any departmental interest in defining or amending parental rights until the Department turned its mind to queer and trans students. This does raise a *prima facie* specter of discrimination, in that the principles and preoccupations of the Department appeared to change only when it considered the rules applying to queer and trans students.

This change of focus by the government as a whole was so sudden that it contradicts law they adopted just last year. As noted earlier, the new *Child and Youth Well-Being Act* specially lists "the child or youth's sexual orientation, gender identity and gender expression" as one of the child's best interests which the Minister of Social Development and the courts must make when making decisions around custody, access and placement.⁶² Upon proclamation of that *Act*, government will now have a legislative scheme in which the Minister of Social Development must consider parental rights in the context of supporting the child's gender identity and expression, yet the Minister of Education is by

⁶⁰ *E.T. v. Hamilton-Wentworth District School Board*, 2017 ONCA 893 (CanLII), at paras 29-33, <<https://canlii.ca/t/hnz2n>>

⁶¹ Introduced for first reading on May 9, 2023, when the Policy 713 review was well within the contemplation of the Department.

⁶² Section 5(2) of that *Act*.

policy stating that the child's gender identity and expression must be subservient to a parental veto. It is hard to imagine a more sudden onset of legislative whiplash.

We live in an era where a number of groups are appearing claiming to advocate "parental rights" where they have no evident interest in parents being informed about test scores, school performance, student achievement, school safety, or any pedagogical issue at all. A number of these groups appear to have no involvement in whether or not their own children are learning to read, but whether or not other people's children in a jurisdiction where they do not live are allowed to change their pronouns. Avoiding the appearance of "Calvinball-like" discrimination and anti-2SLGBTQIA+ animus would be immeasurably helped by some interest in parental rights on educational issues besides the right to withdraw accommodations from trans children.

Of course, these groups are often open about their preoccupations. I do not intend to ascribe those darker motives to the Department or the government. As I noted in previous reports, governing is a busy, hectic affair and sometimes issues arise so quickly they do not get the careful consideration they deserve. This is why I took pains to call these changes "inadvertently discriminatory", because I do accept the Department officials' assertion that the intent was not to roll back human rights. Discrimination by oversight, though, is still discrimination. Intent to discriminate need not even be demonstrated. If the impact of the action or failure to act had a distinct negative impact on a protected group, it is discriminatory.⁶³

It is clear that there was a different decision-making process and a different standard applied to the exercise of choice of informal address by students when their preference stems from their gender identity. That is discrimination. Whether or not the Department can justify it as a reasonable limit or undue hardship will be dealt with in that section of this report.

The Child's Right to Privacy

The changes to Policy 713 purport to direct teachers to override a student's preference to be called by their preferred name and pronouns and instead revert back to the name on the official register. Clearly, this will entail public disclosure, on an ongoing basis, of the name that exists in the official register.

I am concerned that the Department has failed to review the *Right to Information and Protection of Privacy Act*⁶⁴ If they had, they may have noticed the inconvenient fact that the name in the official register is considered personal information and grants the child some privacy interests. I note the following language in Section 1:

1 "personal information" means recorded information about an identifiable individual, including but not limited to, (renseignements personnels)

(a) the individual's name,

⁶³ *Ont. Human Rights Comm. v. Simpsons-Sears*, 1985 CanLII 18 (SCC), [1985] 2 SCR 536, <<https://canlii.ca/t/1ftxz>>

⁶⁴ *Right to Information and Protection of Privacy Act*, SNB 2009, c R-10.6, <<https://canlii.ca/t/55w2c>>

(c) information about the individual's age, gender, sexual orientation, marital status or family status,

If a student with the maturity and capacity to make an informed decision about what they want school personnel to call them in public, and thus revokes their consent to the public disclosure of the name and gender on the official record, it would appear that any teacher using the information in the official record in a school setting may be committing an offence under the *Right To Information and Protection of Privacy Act*. This is not idle speculation, as the matter has come up under Alberta's privacy legislation using analogous language.

In its 2016 Order issued to the Edmonton Public School District no. 7, Alberta's Information and Privacy Commissioner found that the district had breached the privacy of a female transgender student by calling out for attendance her legal name at birth, which was a typically male name. The adjudicator found that the public body had disclosed the student's personal information (consisting of her legal name, sex, and the fact that her gender identity was different than her sex at birth) in violation of Alberta's Freedom of Information and Protection of Privacy Act.

The facts of the case were that the student and her parents had accepted that the school administration, upon her transfer to the school that year, might inform staff that she was transgender, but they were requested to keep this information confidential and not disclose it to the student body and to use her preferred name and pronouns in class. Teachers were given an attendance sheet with this information. However, teachers in the school often use a program called Power Teacher to take attendance and supply teachers often used this system or asked students to take attendance from it for them. The system used the girls legal name registered at birth. She had not yet legally changed it. On six occasions her name was called out in this way by various teachers. On one occasion the teacher loudly requested the student to have her name changed legally.

The adjudicator found there was a breach of section 40 of the Act which provides that:
40(1) A public body may disclose personal information only
(b) if the disclosure would not be an unreasonable invasion of a third party's personal privacy under section 17,
(c) for the purpose for which the information was collected or compiled or for a use consistent with that purpose

...

(4) A public body may disclose personal information only to the extent necessary to enable the public body to carry out the purposes described in subsections (1), (2) and (3) in a reasonable manner.

The adjudicator reasoned that disclosing the student's personal information in the manner described was an unreasonable invasion of her privacy in breach of paragraph 40(1)b). The Complainant conceded that the disclosure may have been for a consistent use with the purpose of collection (confirming attendance) but the adjudicator agreed there was also a breach of subsection 40(4) of the statute in that the public body did not disclose the information for the intended purposes in a reasonable manner.⁶⁵

⁶⁵ I am appreciative to my colleague the Ombuds and her team for their drafting of this case summary.

I have been reminded in the submission of the Ombud that the New Brunswick statute imposes an obligation on public bodies (which school districts are) to only use information for the purposes for which the information was given to them. As the Ombud notes in her submission:

Section 44 of the Act explains that a public body may use personal information only for the purpose for which the information was collected or compiled under subsection 37(1) or (2) or for a use consistent with that purpose. It also explains that a public body may use the personal information if the individual the information is about has consented to the use.

Section 46 goes on to explain that a public body may disclose personal information only if the individual the information is about has consented to the disclosure. It may also disclose personal information for the purpose for which the information was collected or compiled under subsection 37(1) or (2) or for a use consistent with that purpose. Here, the individual's personal information (i.e., their chosen name, gender identity, pronouns) would be collected by school officials directly by the transgender or nonbinary students or by their parents, for the purpose of identification, attendance, etc., of the student at school. Therefore, as per sections 44(a) and 46(1)(b) of the Act, the school would be authorized to use and/or disclose the student's personal information for those same purposes.

Use and disclosure of the student's preferred name, gender identity, and/or pronouns to their parents would likely not be a use or disclosure consistent with the purpose of the collection (i.e. identification/attendance of the student at the school). Therefore, the Act would not necessarily authorize this use or disclosure as contemplated by section 6.3.2 of Policy 713.

I have considered the application of Section 79 of the *Right to Information and Protection of Privacy Act*, which allows a parent to consent to the release of information if it would not constitute an unreasonable invasion of the minor's privacy. Practically, this will not always apply, because Policy 713's requirement for teachers to publicly use the dead name in the official record arises when the parent has not been asked for consent by the student, and the school will not advise the parent of the request without the student's consent, which seems to place schools in a hopeless situation. Even if the parent does consent or is deemed to consent by providing the school with the official record name, the wishes of a mature minor in this matter will have to be given the weight the Supreme Court has advised. The overriding of a mature minor's explicit refusal to consent will tend to be unreasonable. As in the case of mature minors and health procedures, the Supreme Court has signaled that in matters of identity the personal nature of the information will give primacy to the consent of the person whose identity is at stake. It is difficult to imagine that an older child with capacity will not have their consent directives respected. I note the Supreme Court's words on privacy and identity.

These privacy concerns are at their strongest where aspects of one's individual identity are at stake, such as in the context of information "about one's lifestyle, intimate relations or political or religious opinions": Thomson Newspapers, supra, at p. 517, per La Forest J., cited with approval in British Columbia Securities Commission v. Branch, [1995] 2 S.C.R. 3, at para. 62.

The significance of these privacy concerns should not be understated. Many commentators have noted that privacy is also necessarily related to many fundamental

human relations. As C. Fried states in “Privacy” (1967-68), 77 Yale L.J. 475, at pp. 477-78:

To respect, love, trust, feel affection for others and to regard ourselves as the objects of love, trust and affection is at the heart of our notion of ourselves as persons among persons, and privacy is the necessary atmosphere for these attitudes and actions, as oxygen is for combustion.... This Court recognized these fundamental aspects of privacy in R. v. Plant, [1993] 3 S.C.R. 281, where Sopinka J., for the majority, stated, at p. 293:

In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s.8 of the Charter should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual. [Emphasis added.]

That privacy is essential to maintaining relationships of trust was stressed to this Court by the eloquent submissions of many interveners in this case regarding counselling records. The therapeutic relationship is one that is characterized by trust, an element of which is confidentiality. Therefore, the protection of the complainant’s reasonable expectation of privacy in her therapeutic records protects the therapeutic relationship.

...

Many interveners in this case pointed out that the therapeutic relationship has important implications for the complainant’s psychological integrity. Counselling helps an individual to recover from his or her trauma. Even the possibility that this confidentiality may be breached affects the therapeutic relationship. Furthermore, it can reduce the complainant’s willingness to report crime or deter him or her from counselling altogether. In our view, such concerns indicate that the protection of the therapeutic relationship protects the mental integrity of complainants and witnesses. This Court has on several occasions recognized that security of the person is violated by state action interfering with an individual’s mental integrity: New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 S.C.R. 46, at paras. 58-60; Mills v. The Queen, [1986] 1 S.C.R. 863, at pp. 919-20, per Lamer J.; Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123, at p. 1177, per Lamer J.; R. v. Morgentaler, [1988] 1 S.C.R. 30, at pp. 55-56, per Dickson C.J., and p. 173, per Wilson J. Therefore, in cases where a therapeutic relationship is threatened by the disclosure of private records, security of the person and not just privacy is implicated.⁶⁶

I note that these comments in *Mills* flow from a case where a witness’s records from her therapy sessions were compellable under law, and the law was challenged. The Court’s comments regarding the vital nature of disclosures made in a trust relationship may be applicable to the privacy expectations a child has confiding in a teacher. I also note that the right being balanced in this case was the Section 7 fundamental justice right of the accused to make full reply in trial with their liberty at stake, a liberty interest more established and compelling than any parental rights engaged in Policy 713.

Put simply, the Minister cannot make policy which contradicts legislation passed in statute by the Legislative Assembly. By ordering school personnel to repeatedly disclose a student’s official record

⁶⁶ R. v. Mills, 1999 CanLII 637 (SCC), [1999] 3 SCR 668, <<https://canlii.ca/t/1fqkl>>

name and gender over their objections, the Minister may have done just that and opened schools up to the same consequences as the Alberta school district who deadnamed a teenager without her consent. If a student gives informed and written revocation of consent to release the name and/or in the official record, I do not see how a school can ignore that revocation without legal consequence.

In matters of a student's privacy, I would again note that in the case of Policy 713, it is not altogether clear that the child's desire to keep a zone of privacy, even from the parent, is legally illegitimate. Teenagers are forming a sense of who they are and wrestling with their identity. As Professor A. Wayne MacKay (whose counsel I gratefully sought and received) notes, cases where the child is at risk of harm or of causing harm to others, or where the child may be engaged in criminal liability do require parental notification.⁶⁷ In more personal matters, as Professor MacKay notes, teachers have a trust relationship with children and breaching that trust too easily can destroy the trust the child has with the school and even with adults generally. The judgement of professional teachers may well be too tightly regulated in Policy 713's changes, which make no provision for the teacher's observations about the child in front of them and their individual needs, emotional state, and capacity.

I also note the input of the New Brunswick Medical Society in regards to the need of teenagers to have some zone of privacy for reflection when they wrote in their submission:

It is our clinical judgment, based on evidence and experience, that the process to require parental consent or to be directed to professionals to obtain consent will effectively pathologize normal exploration of identity of children

This ability to confide in other trusted adults, even if those trusted adults are not their parents, is an important bulwark against the feelings of isolation and alienation that put many trans children at risk. I also want to address a common theme in the consultation from citizens who support the changes because they are uneasy with the idea that teachers might "keep secrets" from parents. As one submission stated:

"This is a very slippery slope. This issue needs to be looked at more holistically, and what we are teaching our children is that it is okay to keep secrets with untrained adults. This is an extremely dangerous lesson, and has detrimental effects in areas outside of this one issue and outside of the schools."

Let me say immediately that objectively as a professional and subjectively as a parent, I understand the importance of a trust relationship between teacher and parent. I can also understand the intuitive unease at the idea that any other adult, even a well-meaning teacher, might have confidences from my child that they do not want to share with me.

However, I would say that a professional respecting the privacy rights of someone to whom they have a professional responsibility is not keeping secrets from others. They are acknowledging that it is not their secret to share. If a client gives a lawyer \$1,000 in their trust account and someone else, even a family member, asks for that money, the lawyer is not "keeping" the money from the third party. They are respecting the fact that it is not theirs to keep or give. We cannot keep what is not ours.

⁶⁷ MacKay, A. Wayne, Lyle Sutherland and Jennifer Barnett, *Teachers and the Law: Diverse Roles and New Challenges, 4th Edition*, Emond Publishing, February 2020, pp. 207-209.

As we have seen, older students do have some expectation of privacy. A teacher may, and in most cases should, explore the reasons why the child is not telling the parent and encourage and facilitate that vital communication. However, wresting control of the process from the child can be against the teacher's statutory duty under the *Education Act* to maintain professionalism, because professionals do not arrogate to themselves the right to disclose secrets from those who rely upon their professional judgement.

The associations representing school psychologists and doctors have noted the professional obligations to respect the confidence of those who rely upon them and the harm that can flow from breaching that confidence. As a lawyer, I understand this. Those who consult a lawyer also have a right to attorney-client privilege, and the lawyer who breaches it is facing serious discipline. This is because a client must be able to tell their lawyer details even when they are embarrassing or they could be damaging. Sometimes, a lawyer cannot offer proper advice or represent the client competently if they do not know all the details. If a client, for example, needs to tell a lawyer where evidence may lie and that evidence flows from an activity they want to conceal from a spouse or parent, the lawyer is not "keeping" the secret from the parent or spouse. They are acknowledging that they are not the owners of the client's disclosure. Teachers are not bound by all the same rules as doctors or lawyers, but they undeniably have a trust relationship.

This is one reason why I believe it may have been ill-advised for the Department to remove the clear direction for teachers to not "out" a student without their consent. Clear guidelines for professionals establishing confidentiality are a good way to protect the trust relationship with the parent. If a minor who was my client confided in me as a lawyer that at a relevant time they had snuck out after curfew, a parent asking me if the child was out after curfew could get an honest answer – "I cannot answer that". By removing the clear guideline (but still informally saying he does not want children outed), the Minister has taken away that direction to the honest answer. Now, a teacher has no written prohibition on disclosing a student's personal confidences, which leaves only options of violating the child's trust or giving the parent an answer that obfuscates or deceives. And I do think it is a good rule, one which could be made clearer in the Policy, that teachers should not actively deceive parents or help the student conceal things. True non-interference with the family likely means both refusing to help the child deceive the parent and refusing to disclose the child's confidences to the parent. "I cannot answer that" may be unsatisfying to hear, but it has the benefit of being honest, and that benefit which existed before the Policy changes no longer exists.

In closing, it is my finding that the changes to Policy 713 are inconsistent with privacy law. They also, in offering no definition of a child's reasonable expectation of privacy, are incompatible with the best interests of children. Foreclosing safe spaces where children can express thoughts in the name of parental rights does not take into account the need of older and/or mature children to have some zone of private exploration.

The Child's Right to Accommodation

Moving to the child's rights to educational accommodations under Section 15 of the *Charter*, the Supreme Court has affirmed that the duty to accommodate applies to any characteristic protected from discrimination at law if it poses a barrier to meaningful access to a public service.

(T)o demonstrate prima facie discrimination, complainants are required to show that they have a characteristic protected from discrimination under the Code; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a prima facie case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

There is no dispute that Jeffrey’s dyslexia is a disability. There is equally no question that any adverse impact he suffered is related to his membership in this group. The question then is whether Jeffrey has, without reasonable justification, been denied access to the general education available to the public in British Columbia based on his disability, access that must be “meaningful”: Eldridge v. British Columbia (Attorney General), 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624, at para. 71; University of British Columbia v. Berg, 1993 CanLII 89 (SCC), [1993] 2 S.C.R. 353, at pp. 381-82. (See also Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City), 2000 SCC 27 (CanLII), [2000] 1 S.C.R. 665, at para. 80; Council of Canadians with Disabilities v. VIA Rail Canada Inc., 2007 SCC 15 (CanLII), [2007] 1 S.C.R. 650, at paras. 121 and 162; A. Wayne MacKay, “Connecting Care and Challenge: Tapping Our Human Potential” (2008), 17 E.L.J. 37, at pp. 38 and 47.)

The answer is informed by the mandate and objectives of public education in British Columbia during the relevant period. 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.⁶⁸

The *Moore* decision saw the Supreme Court clearly establish that there is a duty upon governments to provide services to allow students to overcome any barrier that may keep them from having “meaningful access” to all of the outcomes established for public education, which means the accommodations necessary to reach their full potential. Accommodation is not only a legal obligation when it responds to a disability. It is relevant to the review of Policy 713.

In *Moore*, the Court asserted that the right to accommodation is not only applicable to accommodations for disability, but the same principle would apply to enumerated grounds in Section 15 of the *Charter*,

⁶⁸ *Moore v. British Columbia (Education)*, 2012 SCC 61 (CanLII), [2012] 3 SCR 360, at paras 33-36, <<https://canlii.ca/t/ftp16>>

and to any characteristic which might meet the “analogous grounds” test applied in *Vriend v. Alberta*. At a minimum, this would almost certainly involve grounds enumerated in Canadian human rights statutes. Thus, equality rights will require some analysis to be given to accommodations needed by students whose barriers flow from their status as newcomers, as gender-diverse students, or who have barriers flowing from social condition. The questions to be asked would be similar to those posed in the accommodation of disability. New Brunswick has already provided some progressive guidance in these areas through measures such as the recognition of First Nations cultural needs in Section 10 of the *Education Act*, support of 2SLGBTQIA+ students, and programming designed to assist new Canadians. The steps remain similar – any personal characteristic which presents barriers to the student achieving their full potential in the educational services available to their peers should have its barriers identified, and efforts should be documented to show that educators sought to provide necessary accommodations.

Trans youth themselves, and their parents, have provided during this review personal submissions stating that the accommodation of respecting their autonomy in the choice of names and pronouns, and providing that example to their peers, is essential in allowing them to fully access educational services and participate in the school community. They have also given personal testimony in interviews that the social permission that deadnaming provides for bullying and harassment is a barrier to their full participation in school.

“The fact that my safety can be taken away. I’m going to high school in September and I don’t know who’s safe yet.” – A Student

“The animosity has increased tenfold out of nowhere. I’m a little worried every time I step outside. The world is more hostile now.” – A Recent graduate who is transgender

“Bullying has intensified in the last 8 weeks and is unbearable. My child is regularly told they should kill themselves and how they should do it. There’s an attitude of emboldenment and that it’s okay for people to say these things. My kid is followed in the parking lot, through town, on social media, at school. There’s also vitriol aimed at us as parents. I’ve been called a pedophile, a groomer. I’ve been told I should be shot and hung from a bridge. It takes a toll and weighs heavily on me as a parent; I’m afraid to look at my phone. I don’t know if it’s safe for my child and their friends to go places – every time they leave my sight I’m afraid for their safety.” – A Mother

“Children are going to hide, skip school, socially isolate and use unhealthy coping mechanisms” – A Parent

The public perception of transgender people varied from being a novelty to a punch-line in movies....and even as an abomination. All I could do was hide myself. This put me in a dark place for a large part of my life....and, on the surface, I may have come across as an angry, misanthropic person, no one knew that I was a woman, dealing with a lot of internal pain. This also led to more than one suicidal ideation over the course of my life (five times in total...two of them led to actual attempts). Had the supports like (the original) Policy 713 existed, I may not have suffered as much as I did. My hope is that the younger folks don't have to suffer.” – A Trans Adult

These firsthand accounts of harm and trauma are backed up by expert advice. Doctors from the Vitalité Health Network stated in an interview the “loss of autonomy and control” that comes from deadnaming will increase student dropouts, victimization, and suicidality. While they expressed sensitivity to parental concerns and support professionals exploring ways to encourage parent-child connection, they also said that a harm reduction approach would dictate not doing so by inflicting harm upon children by removing their autonomy, dignity and feeling of belonging in the school community. The New Brunswick Medical Society notes that:

- a) *The reviewed policy is harmful for normal exploration, a necessary step in identity construction.*
- b) *It undermines the scientific principle that a child’s development is dependent on a variety of systems that are responsible to support and validate exploration.*
- c) *It contradicts the importance to respect the child’s wishes and personal rhythm with whom and how he wishes to express all aspects of his identity.*
- d) *It could prevent the child the opportunity to have a variety of safe spaces to explore identity.*
- e) *It could promote delay of development or even encourage identity foreclosure instead of normal exploration and eventual attained commitment to a clear identity.*
- f) *These changes cause harm to normal development to all children.*⁶⁹

If a student’s gender identity and the stigma and alienation that often accompanies it poses a barrier to their meaningful access to education and respecting their autonomy to choose names and pronouns in their daily interactions will help achieve this access, then the accommodation must be provided. At the very least, the school must evaluate the individual student’s needs and weigh the benefit of that accommodation against any countervailing issues raised by the lack of parental input. Even if the revised Policy 713 has a legitimate concern in asking the school to consider the benefits of parental involvement, it has a blanket ban on using a child’s name and pronouns informally **even if the qualified psychologists and social workers determine that the accommodation is necessary**. In this way, the hyperprescriptive nature of the change may be its legal undoing. It is irrational to refer a child to a school psychologist and then restrict the ability of the school to follow the psychologist’s advice. It is a nonsensical cycle that will be hard to justify.

As pointed out by the Ontario Human Rights Commission: “There is no set formula for people who might require accommodation because of their gender identity and expression. Each person’s needs are unique and must be considered when an accommodation request is made.”⁷⁰ Under the New Brunswick *Human Rights Act*, schools, being service providers, have a legal duty, procedurally and substantively, to accommodate the needs of students because of their gender identity or gender expression, unless it would cause undue hardship.

There is a counterpoint raised by a parent of a trans child and by one of the group submissions we reviewed which deserves consideration. These submissions asked me to consider the proposition that

⁶⁹ Submission of the N.B.. Medical Society to the Advocate’s Review, *supra*, at page 8.

⁷⁰ Ontario Human Rights Commission, “Policy on preventing discrimination because of gender identity and gender expression,” April 14th, 2014, page 25. <https://www.ohrc.on.ca/en/policy-preventing-discrimination-because-gender-identity-and-gender-expression>

social transitioning (the act of changing one's public presentation of gender identity through changes in name, pronouns, dress and appearance) is itself a medical or psychological intervention, one which should only be carried out by medical or mental health professionals under those rules of consent. In this argument, teachers who agree to change a child's name and pronouns in accordance with their wishes are carrying out a procedure beyond their scope of their training and practice and thereby circumventing the process for medical consent of minors.

For this argument to be accepted, one would have to accept that social transitioning is not a school-based accommodation, but the first step in a medical process that has no place in a school. As one group argued in their submission:

Gender social transition is a serious psychological intervention that can have life altering effects on children. It can have lasting psychological effects, taking what might have been a short period of self-exploration to a heightened level rife with long-term mental and physical struggle or adversity. When school policies require that teachers and other school staff participate in gender social transition for students, it is more likely to lead to medical transition that may later be regretted. Social transition at school can make it difficult for children to move away from an adopted gender identity, should they change their mind, and there are currently few supports in place that present this as a viable option. Many detransitioners struggle to re-assimilate upon desisting from a trans identity and are often met with rejection from those they were closest to while trans-identified. Considering the enormity of gender social transition, it must be emphasized that children as young as four years old do not have the capacity to understand its potential long-term impacts. As clearly stated in UNCRC Article 5, it is the parent's responsibility, right and duty to provide that guidance to their child.

Teaching and enforcing practices in schools that create secrets, especially from the child's parents, is the opposite of safeguarding. This process not only teaches vulnerable children that keeping secrets from their parents is okay, it also asks teachers and school staff to model that secret keeping, an extremely poor safeguarding practice. This confusion of boundaries can also leave children more vulnerable to predatory individuals and situations. Parental involvement is necessary when a child desires to change their name or pronouns and socially transition. The changes made to Policy 713 are a good approach, allowing the child to explore his or her gender identity, to improve safeguarding, and to ensure that parental rights and responsibilities for the child are upheld. Any steps taken to socially transition a child without parental permission are completely unacceptable and should lead to disciplinary action.⁷¹

I should also note that, while most New Brunswick parents of trans children opposed the policy changes, one parent submission did support the changes on similar grounds – that their child's social transitioning was the first step in medical transitioning and, while they were loving and supportive throughout the transition, they did not think the school should have started that process without her.

I have reflected seriously upon this proposition in this review. There are four reasons why I do not believe that the practice of accepting a mature child's name and pronoun preferences is a medical intervention beyond the scope of practice of schools, and why I believe it is an inclusive education intervention that schools have a duty to provide when it helps a student access educational services as per the test established in *Moore*.

⁷¹ Our Duty Canada submission to the Advocate's Review, at pages 3-4.

The first is a simple logical problem with the argument. If an educator's decision to respect the student's choice of names and pronouns is a medicalized intervention, so too would the decision to withhold that respect. The decision is equally weighty whatever the outcome. It is a logical impossibility, I think, to argue that a school team lacks the qualifications to respect the student's name and pronouns but is at the same time eminently qualified to reject them.

Second, I think this argument mistakes correlation for causation. As the saying goes, lunch usually follows breakfast, but breakfast does not cause lunch. It is logical that students who socially transition are more likely than students who don't to then make more escalated and permanent medical decisions. That is because social transitioning is the natural place for exploration because it is non-permanent, and those who do not socially transition are likely those who have no interest in transitioning at all. I expect people who test drive cars are more likely to buy a car than those who have no interest in looking at cars, too, but test drives do not irrevocably cause purchases. (I could also make the point that one weakness of the change to Policy 713 is that, if a student does receive parental consent to socially transition with a new name and pronouns, and then wishes to revert to their previous gender identity, the new policy would seem to suggest that they again need parental consent to socially de-transition, because the agency no longer rests with the student. Being over-prescriptive does lead to unintended consequences.)

Third, this argument ignores the reality of educational interventions. Many conditions requiring educational accommodations in the school also have other qualities that require further accommodations by other professionals such as doctors and psychologists. This does not require an "all-or-nothing" approach where no school personnel are allowed to offer the accommodations they can provide. Certainly, there is always a mental health component to even the most basic kindnesses and accommodations. A student who becomes pregnant will certainly require medical advice. However, teachers at the school can provide supports and kindnesses such as non-judgmental support, physical comforts in the learning environment, and protection from bullying or shaming. Yes, the student's outcome will be affected by whether or not the teacher is kind or cruel, but that does not mean the correct choice is not within the teacher's grasp. Students with complex needs, or who are on the autism spectrum, or who are deaf, or have ADHD, all may see doctors and psychologists. When at school, they also get accommodations that the school can give, often following recommendations of those doctors and psychologists. What principal has not, by times, offered temporary kindness, support and referral to a student whose depression or anxiety has put them into crisis, not because the principal fancies themselves a doctor but because they are the one who is there when the student needs someone to be kind and caring?

Finally, even if the basic accommodation of respecting student autonomy in name and pronoun changes is a medicalized intervention, this is not a conclusion which has been adopted by the actual New Brunswick medical community. The medical community in New Brunswick stresses that teachers and other supportive adults in the school have a role to play, just as they do in accommodating a number of individual children's needs. Again, I quote the New Brunswick Medical Society's submission:

Children and youth should be recognized as proper human beings and, by definition, should be viewed as being actively in development. The child is dependent on all the systems that surround and affect them. Their development is therefore vulnerable to these environments. Data supports the shared clinical notion of co-responsibility of the different systems to offer support in

the proper development of a child. Ideally, these systems do not necessarily have the same purpose but are complementary.

In the child's highest interest, all normal steps of development should be respected and validated to achieve their full potential. Developmental experts stress the importance that any exploration of gender identity or sexual orientation are an integral part of healthy development, and that each child's rhythm should be respected.

The need for children and youth to express themselves freely, authentically, and safely is imperative for a healthy society.

- *The reviewed policy is harmful for normal exploration, a necessary step in identity construction.*
- *It undermines the scientific principle that a child's development is dependent on a variety of systems that are responsible to support and validate exploration.*
- *It contradicts the importance to respect the child's wishes and personal rhythm with whom and how he wishes to express all aspects of his identity.*
- *It could prevent the child the opportunity to have a variety of safe spaces to explore identity.*
- *It could promote delay of development or even encourage identity foreclosure instead of normal exploration and eventual attained commitment to a clear identity.*
- *These changes cause harm to normal development to all children.*⁷²

It is also not an opinion shared by New Brunswick's school psychologists, as their brief states:

We are especially concerned with the plan to direct transgender and gender diverse students to mental health professionals (e.g., school psychologists, school social workers) for help engaging their parents. Requiring students to see a professional in these situations pathologizes gender identity, increases stigma, and can lead children and youth to believe there is something wrong with them for trying to live authentically as themselves.

Nor is it shared by the Horizon Health Network's community care team of professionals, who write in their brief:

Studies show that using requested names and pronouns greatly improves the mental health of trans students and encourages all students to respect the identities of their peers.

Nor is it shared by the doctors in pediatrics and youth mental health from the Vitalité Network, who stated in their interview:

"Not all gender diverse children need mental health interventions because it is not a mental illness. We follow the child where they are."

Nor is it shared by social workers, who see the decision as having implications where the expert direction to teachers has a clear consensus:

⁷² NB Medical Society, Submission to the Advocate's Review, pp. 2 -5.

*Countless studies have found that affirmation can offset the negative psychological effects of social oppression and is a predictor of lower rates of depression and higher levels of self-esteem, while no affirmation is associated with greater rates of depression and suicidal ideation.*⁷³

Again, this consensus of professionals poses an operational and a legal problem for the Department. I have addressed the operational problem – the new policy depends upon the expertise of psychologists and social workers whose unequivocal expert advice is that the policy does not work and that they have ethical guidelines which will require them not to follow it. As one experienced psychologist stated,

“A psychologist who begins treatment by refusing to respect their choice of what to be called will face questions of their professional competence”

It is difficult to imagine what the operational wisdom is in basing a policy around referrals to experts who ethically cannot execute the policy. I would note that as a question of law, the Minister cannot use policy to override statutory law, and professional bodies’ establishment of ethical codes is done under the deferred authority of statute.

Even if the Department insists that there is value in marching students to professionals who disagree with the process and will ignore it, there is an immediate *Charter* issue with the wording of the new Policy 713 in this directive:

*If it is not possible to obtain consent to talk to the parent, the student will be directed to the appropriate professional (i.e. school social worker, school psychologist) to work with them **in the development of a plan to speak with their parents** if and when they are ready to do so. (emphasis added)*

If a child has a right to accommodations, and the substance of those definitions are reliant upon expert advice, I have serious reservations about the use of language which restricts the scope of the expert’s treatment and advice at the outset. Language which restricts the expert’s freedom to explore all areas of the child’s needs and limits them to parental notification seems to be a *prima facie* violation of the child’s right to accommodation. The duty of the expert and the Department in accommodation is to the child, not the parent, and the Department cannot direct the expert to deal with the parent’s desire to know before assessing the needs of the child without pre-directed limits.

As well, the experts are now saying that their first recommended accommodation will be to respect the child’s name and autonomy when they have capacity, which then means the school must provide that accommodation or immediately be in violation of the *Charter*.

The fact that the child will be put through a bureaucratic, big government process causing them uncertainty, embarrassment and alienation from trusted adults, all to be sent to a professional who will immediately do the one thing the government claims that it was trying to avoid really does make the changes to Policy 713 seem performative, rather than effective.

If asked to define the line between a medical intervention and a school-based accommodation, I would trust the consensus of doctors and school psychologists. I would urge elected officials to do the same. The finding for the purposes of this review is that the changes to Policy 713 place limits upon the child’s

⁷³ New Brunswick Association of Social Workers, submission to the Advocate’s Review, *supra*, at p.3.

legal rights to equality, privacy and accommodation and constitute a *prima facie* violation of not only the statutory conditions of the *Human Rights Act*, the *Education Act* and the *Right to Information and Protection of Privacy Act*, but also of the child's rights under Sections 7 and 15 of the *Charter of Rights and Freedoms*.

The Governmental Case for Reasonable Limits on Children's Rights

The Supreme Court of Canada has set out the framework for deciding whether a policy, even if discriminatory, is legitimate in the circumstances. The organization instituting the policy has the legal obligation to show on a balance of probabilities (i.e. that it is more likely than not) that the requirement:

1. Was adopted for a purpose that is rationally connected to the function being performed (e.g. education)⁷⁴;
2. Was adopted in good faith, in the belief that it is necessary to fulfill the purpose, with no intention of discriminating⁷⁵; and
3. Is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible for the organization to accommodate those being discriminated against without the organization experiencing undue hardship.⁷⁶

As noted, these have some similarity to the *Oakes* test, and I will also look at issues of minimal impairment and proportionality because these will allow me to review the operational strengths and weaknesses of the changes to Policy 713 and to consider other routes the Department could have considered in meeting its legitimate objective of maximizing parental involvement and support in children's decisions.

Ultimately, the body – such as the Department of Education – that wants to justify a discriminatory requirement, rule or standard must show that accommodation was incorporated into the standard to the point of undue hardship. This means the requirement was designed to ensure that individual needs have been accommodated, short of undue hardship.

The burden of proving undue hardship lies on the discriminating organization, and the organization cannot establish undue hardship by relying on “anecdotal evidence or after-the-fact justifications.”⁷⁷ If a decision made by an administrative body has a human rights dimension, the amount of deference which a Court is willing to accord the decision is generally lessened.⁷⁸

⁷⁴ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 SCR 3, at para 57, <<https://canlii.ca/t/1fgk1>>

⁷⁵ *Ibid*, at para 60.

⁷⁶ *Ibid*, at para 62.

⁷⁷ *Buttar v. Halton Regional Police Services Board*, 2013 HRTO 1578 (CanLII), at para 132, <<https://canlii.ca/t/g0nj9>>

⁷⁸ *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86 (CanLII), [2002] 4 SCR 710, <<https://canlii.ca/t/1g2w5>>; *Ross v. New Brunswick School District No. 15*, 1996 CanLII 237 (SCC), [1996] 1 SCR 825, <<https://canlii.ca/t/1frbr>>

I believe this is an important analysis, not only because the human costs of bad policy are high but also because the Province and its employees could be amassing legal liability if they are found to have carried out discriminatory policies after being advised of that risk, especially if they do not have demonstrable signs of having considered reasonable alternatives. Both the organization that sets out discriminatory conditions, in this case the Department of Education, and the person that carries out this discrimination, in this case the teacher or school administrator, can be held jointly responsible in a human rights claim. A person commits an offence punishable under the *Provincial Offences Procedure Act* if they violate or fail to comply with various sections of the *Human Rights Act*.⁷⁹ However, the New Brunswick *Human Rights Act* protects against retaliation on a person who refuses to discriminate against another person.⁸⁰ These considerations must be contemplated in any policy development involving potential discrimination. Furthermore, the responsibility and culpability of schools for peer-to-peer harassment is well-founded in law, leading to a positive obligation on schools to prevent discrimination and gender or sexual orientation-based harassment.⁸¹ The Department has seemingly not considered the legal ramifications of its policy changes, and has left teachers and administrators legally vulnerable.

As stated by the BC Human Rights Tribunal four years ago:

This is a significant time for trans and gender diverse people. Their long fight for equality is bearing some fruit, as society begins to adjust its traditionally static and binary understanding of gender, and its tolerance for people to identify and express their gender authentically.⁸²

As I said at the outset, I take the government at its word when they state that they did not intend to violate anyone's human rights. If my trust is justified, and the Department can meet the "good faith" test, then the Department leadership will be open to reasoned discussions of these issues:

- Will the policy changes actually work?
- Were there other, less intrusive ways to achieve their goal that were not considered?
- Will the harm to children outweigh the benefits of parental involvement in practice?

Will The Department's Changes Work? – The "Rational Connection" Test

The goal of the changes to Policy 713 is to increase the involvement of parents in the children's decision making where there is no risk of harm to the child. The chosen means – in fact, the only major change offered to support that goal – is a prohibition on school personnel respecting the child's wishes for their informal terms of address in names and pronouns until the child engages the parents and obtains their consent. This denial will be done even in the case of students under 16 who can demonstrate the maturity and capacity for decision making.

If a rational connection is to be proven, then, the Department would have to believe and demonstrate that denying these requests for informal accommodations can be reasonably predicted to increase the number of children changing their gender identity who voluntarily engage their parents. The onus does

⁷⁹ *Human Rights Act*, RSNB 2011, c 171, s. 25, <<https://canlii.ca/t/53mkm>>; *Provincial Offences Procedure Act*, SNB 1987, c P-22.1, <<https://canlii.ca/t/55gsr>>

⁸⁰ *Human Rights Act*, *supra* note 79.

⁸¹ *School District No. 44 (North Vancouver) v. Jubran*, 2005 BCCA 201 (CanLII), <<https://canlii.ca/t/1k376>>

⁸² *Oger v. Whatcott (No. 7)*, 2019 BCHRT 58 (CanLII), at para 60, <<https://canlii.ca/t/hzdgk>>

not require the Department to show absolute certainty, but they do have an onus to provide some evidence that this is a reasonable prediction.

I should point out an important nuance in how I have framed this question, and I believe it is legally correct. It is possible that one could alternatively predict that the result will not be more students engaging their parents, but simply a decrease in the number of students being informally called by their chosen name and pronouns without their parents' consent. This will not discharge the onus because gender identity is a protected status, and a legitimate objective cannot be reducing the number of children exercising their rights to gender identity. Reducing the number of people in a protected group is not a legitimate objective, even if the decision maker secretly believes that it is a trend that must be combatted or even if the existence of the minority group offends members of another group, such as parents or cis-gendered people or Christians. The objective that could be legitimate is the increased access of children to beneficial and helpful parent interactions and the increased engagement of parents motivated by the best interests of the child.

The rational connection test is quite simple. The Supreme Court has explained it this way:

The question is whether the means the law adopts are a rational way for the legislature to pursue its objective. If not, rights are limited for no good reason. To establish a rational connection, the government need only show that there is a causal connection between the infringement and the benefit sought "on the basis of reason or logic" ⁸³

The question, then, is whether or not directing teachers and other school staff to withhold the courtesy of using a child's preferred name and pronoun is likely to cause that child to switch tracks and begin the task of talking to their parents. To test this question, I placed significant weight upon the input received from queer and trans citizens who had lived with this question, the parents who had firsthand experience with supporting children in this area, and experts who provide services to those young people. Their stories taught me a lot. In particular, these stories often suggested that confiding in other trusted adults was not the alternative to parental involvement that the Department assumes it is. Rather, in many cases the path to a parental conversation was to start with other trusted adults.

"My experience working with young people and being a transgender person myself informs me that the stakes often feel lower coming out to those outside your household; it can take a lot of courage to be vulnerable with the people who have known you since the moment you were born without knowing exactly how they will react, and it is not at all uncommon for young transgender people to inform friends, teachers, coaches, or counsellors of their identities before informing their family, even if they do not come from an overtly homophobic or transphobic household." – A Trans Adult

"All I can give is how a policy like 713 would have helped me when I was growing up. I've been having feelings of gender dysphoria since I was around 4 years old. Because there was no policy 713 when I was going to school, there was no one to talk to about it. I certainly could not talk to my parents about any of this." -A Trans Adult

⁸³ *Carter v. Canada (Attorney General)*, 2015 SCC 5 (CanLII), [2015] 1 SCR 331, at para 99, <<https://canlii.ca/t/gg5z4>>

“With many kids, it’s not about a safety concern at home with coming out, but rather changing the relationship with their parents and how their parents perceive them. That’s a hard thing for kids to get ready for. My kid says it’s easier to come out to people “you don’t care about”, like at school – you’re not invested in their response.” -- A Mother whose child came out to her but not her father

“It’s been good for me to be safe and try things out at school, even if home was safe, I wasn’t ready.” -- A Trans Student

“Children have the right to explore and learn who they are at their own pace. If you provide a safe, supportive and loving home, your child will come out to you when they’re ready.”-- A Parent

“I went through several names before I found one that worked for me. I didn’t tell anyone except for my friends at first.”-- A Student

Repeatedly, the feedback from families who had lived experience was that the child’s confidence in trusted adults besides their parents was not to exclude or delete parents. In many cases, first confidences in other trusted adults was a step towards involving their parents. The chronology of their coming out was not because parents were unimportant. Children explored and talked before talking to their parents **because parents were the most important conversation.**

If adults stop to reflect for a moment, we might see that this is not that different from our own process of talking with family about significant developments in our lives. A parent who is telling their children about a new romantic relationship and partner in their lives will often confide in other adults before telling their children. Someone who has been offered a promotion that involves moving may confide in a close friend before broaching the subject with their spouse. Adult children about to speak with an aging parent about accepting support or limitations on activities like driving may first talk with each other about how to approach the parent. These preliminary conversations are not because the family is less important – they are because the family conversation is so important that it deserves some reflection and engagement of others to get it right.

Many queer and trans youth we spoke to, and those educators and experts who support them, said that the biggest factor in children delaying the conversation with parents is the sense that the conversation may permanently alter the most important relationship in their lives – their relationship with their parents. They want to first be supported and safe and to get a sense of how their identity works in school because a good experience there will make them confident to then share the identity with the most important people in their lives – their parents. They want to settle on how their identity works in the school setting because they need to be sure it works before altering the home environment and the family dynamic.

Some may notice that this process – get support from professionals at school to prepare to talk to parents – sounds a little like the prescriptive aspect of the new Policy 713. Certainly, the idea that school professionals can assist the child in approaching their parents is part of the new Policy. The difference is twofold – the Department’s proposal is that if they replace a child’s normal rhythms with a prescriptive policy drafted in a central office, tell educators to withhold the courtesy of calling the child what they want to be called, and narrow the child’s choices in who they can confide in, the child will

happily skip their own process and trust the new regulatory process with their most personal and intimate thoughts and reflections.

The Department's change seems like a policy dreamt up in a laboratory where no one had come in contact with an actual human teenager. Essentially, finding the rational connection in the government's Policy revisions requires one to hold conflicting two beliefs simultaneously:

- (A) Parents dislike government interfering with the personal details of family life and want government to leave the family alone, yet
- (B) At the same time, teenagers will delight in having the government regulate what they can be called and who they can talk to and will respond to big government regulation with renewed trust in adults.

I cannot achieve enough gymnastic flexibility in my reasoning to accept this premise. The Department is essentially saying that the way to reduce the state role in the family is to subject children to a more prescriptive, big-government regime that coerces children by disrespecting their preferences until they accept a government-regulated program for how to come out to their parents.

Of course, if the experts were telling me this all made sense, I would reflect upon and reconsider whether this is all as self-defeating and ineffectual as it sounds. The experts have advised me that it is exactly as ineffectual and self-defeating as it sounds. The New Brunswick Medical Society clearly warns against the disruption of the child's rhythm in coming out.

Review of Policy 713 and its impact

The New Brunswick Medical Society is concerned about the lack of clinical consultation and evidence-based data that supported the changes and offers the following points:

- 1. Regarding identity construction and normal development:***
 - a. The revised policy may be harmful for normal exploration, a necessary step in identity construction.*
 - b. It undermines the scientific principle that a child's development depends on a variety of systems responsible for supporting and validating exploration.*
 - c. It contradicts the importance of respecting the child's wishes and personal rhythm with whom and how they wish to express all aspects of their identity.*
 - d. It could prevent the child from having the opportunity to have a variety of safe spaces to explore identity.*
 - e. It could promote delay of development or even encourage identity foreclosure instead of normal exploration and eventual attained commitment to a clear identity.*

2. Regarding stigma and discrimination

- a. The revised policy and public uncertainty/discourse that has resulted from the debate are a social cause of minority stress.*
- b. The review was not based on scientific consultation or evidence-based data that is widely accepted by international medical expert opinion and research.*
- c. It is our clinical judgment, based on evidence and experience, that the process which requires parental consent or to be directed to professionals to obtain consent will effectively pathologize normal exploration of identity of children.*

d. These decisions contribute to maintaining and exacerbating stigma within the population which has a profound documented effect on the mental and physical wellbeing of gender diverse individuals.

3. Regarding safety and security

a. Although it is in the best interest of the child to be supported by all systems, it is imperative that we recognize as health care professionals that not all systems will be supportive.

b. There is a risk that it also undermines the opinion and the judgment of other adults in the various systems who also have the child's best interest at heart.

c. The policy does not permit individualization of the needs and appropriate conduct to support the child.

d. With the changes to Policy 713, there is risk of causing prejudice to the safety and security of gender diverse children and youth.⁸⁴

The New Brunswick Association of Social Workers sounds the same alarm:

“Not respecting people’s preferred names, pronouns and misgendering them as a result is a form of discrimination. At the same time, children shouldn’t be forced to come out to anyone, including their parents, until they are ready to. There is the potential for parents to have a wide range of reactions to having their child come out, some positive and others not. Children should be supported in disclosing this personal information to their parents only when they are ready and able to do so.”⁸⁵

As did the pediatric medicine team at the Vitalité Health Network in their interview with the Advocate:

“It is good to encourage parental conversations, but a loss of autonomy and control will have the opposite effect. Allowing children to explore their identity first is the best way to build the trust needed for parental conversations”

The medical literature provided to this review raised the risk of “minority stress”, where behaviours that stigmatize and alienate a child from their community may increase the risk that the child will suffer harm because they are distrusting of all interpersonal relationships.

“Minority stress is unique.... socially-based and chronic, and may make TGD individuals more vulnerable to developing mental health concerns such as anxiety and depression. In addition to prejudice and discrimination in society at large, stigma can contribute to abuse and neglect in one’s interpersonal relationships, which in turn can lead to psychological distress”⁸⁶

The New Brunswick Women’s Council notes with considerable evidence that the result of an overly-prescriptive policy might just be to cut trans youth off from any support from educators and trusted adults, which is unacceptable and may be an obvious enough consequence to raise issues of bad faith changes:

⁸⁴ NB Medical Society, *Submission to the Child & Youth Advocate*, pp 6-7

⁸⁵ NB Association of Social Workers, *Submission to the Child & Youth Advocate*, p.3

⁸⁶ E. Coleman *et al*, *Standards of Care for the Health of Transgender and Gender Diverse People* (2022) *International Journal of Transgender Health*, 23sup1, pp. 55-56.

It is important to recall that under the Minister's vision for the implementation of the policy, this item lays out the only path for trans students under age 16 to have their pronouns and chosen first name used by school personnel. While it is positive for resources to be made available to all students who may need them, it is stigmatizing for trans students to be directed to social workers and psychologists en masse, especially as school personnel continue to deadname and misgender them. This approach risks pathologizing trans identities by addressing them as a clinical issue to be treated or a risk to be mitigated rather than as identities to be respected. This borderline coerced engagement with social workers and psychologists may result in trans students refusing to seek professional mental health support in the future should they need it.

Even if referrals to school social workers and psychologists were an appropriate course of action, this path forward is not being offered in good faith as these resources will largely be inaccessible to trans students under 16. There is a social worker shortage in New Brunswick and school psychologist positions are significantly understaffed. Students who do have access to these in-school professionals may not be able to see them without parental consent, however. As per the Standards of Practice for New Brunswick School Psychologists, parental consent is required for direct interventions with students by school psychologists under the age of 16. School social workers follow the New Brunswick Association of Social Worker's Standards Regarding the Capacity of Minors to Consent to Social Work Services to determine whether they can provide services to those under age 19 without parental consent. Trans students under 16 who are not ready to come out to their parents will thus be in a position where either parental consent is still an issue or they will, frustratingly, be deemed mature enough to consent to services but not to determine their own pronouns and chosen first names.⁸⁷

Even the one professional psychologist who wrote to support the need for some government regulation of educators encouraging gender identity exploration had some reservations about the active rejection of the child's wishes as a way to force parental conversations:

I don't mean to suggest that we should be actively rejecting youth's pronoun and name choices. In a forensic interview, professionals would routinely ask young people what they would like to be called and would use that name. Many people go by nicknames, which aren't the name on their birth certificate, and most of us refer to others in their preferred way very regularly in daily life, as a sign of respect. I am not against the use of preferred pronouns – I think use of preferred pronouns is simple, respectful communication. Before pronouns and name changes garnered such attention in schools, teachers were already calling children by (preferred) nicknames. --But they were not making an effort to conceal it from the children's caregivers, and they were not routinely encouraging children to make explicit their fluctuating identities; it is these aspects that are of concern for me.

I thought this was a helpful way of articulating the concerns that might motivate the desire for some change to the original Policy 713 and I will return to this submission in my recommendations. However, the active rejection of the child's chosen name and pronouns may be one coercion too far to be effective.

It also seems possible that the Department's removal of the ban on outing children without their informed consent may have the opposite effect. Parents who wrongly believe that the school will tell

⁸⁷ New Brunswick Women's Council, *Review of Changes to Policy 713*, pp. 7-8.

them if there are signs of their child considering changes to their gender identity may become less likely to initiate conversations or make enquiries that good, loving, responsible parents should make. The Department's regimented process rigidly directing to whom a can speak has no rational connection to the goal of actually encouraging children to speak to their parents. It may decrease the number of children using their name and pronouns at school, at least when adults are present. But discouraging children from expressing their gender identity is not a legitimate legislative goal, even if some of the groups supporting the changes to Policy 713 are offering the government political support on that basis. Government must show that their changes are rationally connected to increased positive interactions of children with supportive parents.

Citizens on both sides of the debate have pointed out that at some point, the social and informal use of a new name and pronouns along with changes in the child's appearance may lead parents to ask the child directly. This is fine. It is not the school's role to stop those normal family interactions. But if parents are putting unwarranted faith in the school to advise them or to coerce their child into talking to them, this may actually decrease the interest and curiosity that a loving parent will normally show. Here the changes again fail to advance the stated goal in any rational way.

I recognize that the rational connection test at law is a fairly forgiving standard and that government must only show some logical reason to believe that it might help meet the goal. One could ask why I did not apply the Supreme Court's reasoning in *Carter*, wherein concerns that the law denying access to all to a service was deemed to be better dealt with under the minimal impairment leg of the *Oakes* test. In *Carter*, however, there was a logic to the idea that a denial of the option of assisted suicide would indeed stop cases where vulnerable people were exploited.⁸⁸ In this case, however, we are not talking about an overbroad denial of pronouns. We are dealing with an intervention that experts and people with lived experience say will actually have the opposite effect – it will actively discourage teenagers from talking to any trusted adult at all and decrease the likelihood of parental involvement by cutting the child off from all the natural paths to parental discussion. In that sense, the policy is not overbroad as in *Carter*; it is actively self-defeating in the way that the Supreme Court found the policy at issue in *Sauvé* to be. If anything, the government appears to have fallen into the “symbolic objective” trap which led to the law being struck down in *Sauvé*, namely, that the changes seem desperate to make a symbolic point about parental involvement without actually adopting any plan that might actually meet that goal in practice.⁸⁹

Perhaps I could offer the last word on this point to Fred Rogers, the pastor who became “Mister Rogers” to a generation of children and taught them empathy and respect. Mr. Rogers never failed to steer children to talk to their parents. However, he often spoke to parents and made one point that seems worth consideration by the Department:

“There’s a world of difference between insisting on someone’s doing something and establishing an atmosphere in which that person can grow into wanting to do it.”

In guiding teenagers to trust adults and involve parents, big government regulation and state-mandated disrespect of their choices make for a terrible plan. In legislative debate, it was common to hear

⁸⁸ *Carter*, *supra* note 83, at para 100-101

⁸⁹ *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 (CanLII), [2002] 3 SCR 519, <<https://canlii.ca/t/50cw>> See especially para. 16, wherein the Court stated that “government cannot use lofty objectives to shield legislation from Charter scrutiny” and that “broad, symbolic objectives are problematic”.

defenses of the changes to Policy 713 premised upon what parents want. There are parents who feel symbolically pleased to see some recognition of their role, and as I shall deal with in the next section, that may well speak to a weakness in the substance and rollout of the original Policy 713. I do not deny that government may have made a worthy point in the deficiencies they aim to correct. They just failed to propose a plan that will do any good.

It is a worthy objective to want children to reach out and involve their parents in their personal decisions. There is, however, a world of difference between symbolically proclaiming the importance of parents and actually engaging experts in designing processes that will work. That hard work is the difference between politicking and governing. The Department has not done that work. The very experts who are supposed to steer the government's process say that it will not work. That is destructive to government's ability to establish a rational connection between the limit on rights and the objective they claim.

Minimal Impairment –Were There Less Intrusive Ways for Government to Include Parents?

If a government actor such as the Department wishes to place limits on rights (in this case, upon a student's right to choose their name, pronouns and gender identity), they must show that they have tread as lightly upon the right as necessary in order to meet the objective. As the Supreme Court stated:

“The question at this stage is whether the legislation infringes the right to free expression in a way that is measured and carefully tailored to the goals sought to be achieved. The “impairment must be ‘minimal’, that is, the law must be carefully tailored so that rights are impaired no more than necessary”⁹⁰

At this stage, it is also important to consider the relative failure of the Department throughout this process to demonstrate actual examples of the harm to be avoided. The more limited the cases of actual problems, the less tolerant the law becomes of limits on rights in response. In my previous investigation of the decision to initiate the review process that led to these changes, I noted that the Department produced only three emails when asked for examples of the “complaints and misinterpretations” that had led to the review.⁹¹ None of those three emails came from people directly affected by the provisions of Policy 713 with regards to student self-identification. The Department was subsequently asked if they wished to revisit that answer, and they responded that there were no material changes to their answer even after considerable public debate on the matter.

Two other inquiries have yielded a similar paucity of responses. As part of this review, I asked the Department for known examples of children under 12 using a different name or pronouns for the purposes of changing their gender identity without parental consent.⁹² The response was that there

⁹⁰ *Harper v. Canada (Attorney General)*, 2004 SCC 33 (CanLII), [2004] 1 SCR 827, at para 32.
<<https://canlii.ca/t/1h2c9>>.

⁹¹ Child & Youth Advocate, *Results of the Advocate's Investigation into the Decision of the Department of Education and Early Childhood Development to Place Policy 713 under Review*, Report to the Legislative Assembly, May 16, 2023.
<https://static1.squarespace.com/static/60340d12be1db058065cdc10/t/646393b3a39d3e26e3d9f8a0/1684247476892/Policy+713+-+Findings+and+Recommendations.pdf>

⁹² Child & Youth Advocate's letter to the Department, June 2023 at Question 14.

were no cases known by the Department, and that they had no process to track such cases. Senior government officials had made a number of public statements expressing concern that children as young as 4 years of age were changing pronouns without parental consent.⁹³ It appears that this concern never motivated anybody to make any inquiries of school districts to see if such a thing had actually happened. There have been further reports that the Department has replied to Right to Information requests confirming that complaints from parents excluded from their child's social transitioning "do not exist."⁹⁴

This lack of actual demonstrated harm poses some challenges for the Department. While governments may legitimately attempt to perceive potential future harm and should be shown some deference when doing so, when those preventative steps place limits upon rights courts will rightly ask if they have gone further than was necessary to avoid harm.

It is believable that government officials have had communications expressing support for the changes and concerns before. Politicians especially are subject to a diversity of conversations and these issues have become more prevalent lately. Discussions, phone calls, riding office communications and town halls all happen outside of departmental purviews, and I do not discount these possibilities. After all, our consultations have heard diverse views in substantial numbers.

This returns us to the difference between politicking and governing. In politics, one can campaign against a perceived or imagined harm and may even find votes by raising fears of things that have not happened. It can be an effective way to win power. When wielding power and placing legal limits on rights, however, the duty to actually show problems in some tangible, documented way will be greater.

This is the exact problem which doomed a government law restricting third party advertising during election campaigns. The federal government had imposed sweeping restrictions upon such interventions during election campaigns, which was a *prima facie* limit on *Charter* rights to free expression. The head of the National Citizens Coalition, Stephen Harper, challenged those limits. The argument of the government of the day was that limits were needed due to the specter of wealthy intervenors distorting political debate. When asked for examples of such sweeping interference, the government could not show even attempts, let alone successful ones, of such things happening. This was fatal to the Section 1 defense of the law. As the Supreme Court majority wrote:

It is impossible to say whether an infringement is carefully tailored to the asserted goals without having some idea of the actual seriousness of the problem being addressed. The yardstick by which excessive interference with rights is measured is the need for the remedial infringement. If a serious problem is demonstrated, more serious measures may be needed to tackle it. Conversely, if a problem is only hypothetical, severe curtailments on an important right may be excessive.

Here the concern of the Alberta courts that the Attorney General had not shown any real problem requiring rectification becomes relevant. The dangers posited are wholly hypothetical. The Attorney General presented no evidence that wealthier Canadians — alone or in concert — will dominate political debate during the electoral period absent limits. It offered only the hypothetical

⁹³ Lau, Rebecca, N.B. premier 'doubling down' on LGBTQ2 policy changes in Trudeau social media attack, Global News, June 12, 2023. <https://globalnews.ca/news/9762072/nb-blaine-higgs-twitter-policy-713-trudeau-attack/>

⁹⁴ CBC New Brunswick, No written complaints from parents who felt kept in the dark by Policy 713, July 31, 2023. <https://www.cbc.ca/player/play/2250460739967>

possibility that, without limits on citizen spending, problems could arise. If, as urged by the Attorney General, wealthy Canadians are poised to hijack this country's election process, an expectation of some evidence to that effect is reasonable. Yet none was presented. This minimizes the Attorney General's assertions of necessity and lends credence to the argument that the legislation is an overreaction to a non-existent problem.

On the other side of the equation, the infringement on the right is severe.

On this point, this case is indistinguishable from Libman, supra, where the Court held that the spending limits imposed on citizens in the course of a referendum campaign did not satisfy the requirement of minimal impairment. The Court held that the legislature in a case such as this must try to strike a balance between the right to free expression and equality among the citizens in expressing their views. The limits imposed failed to meet the minimal impairment test in the case of individuals and groups who could neither join nor affiliate themselves with the national committees. The Court stated that the restrictions were so severe that they came close to being a total ban and that better, less intrusive alternatives existed. The situation is precisely the same here.⁹⁵

The Department is faced with a similar problem here. The harm they seek to avoid, which is parents being excluded from impactful decisions by children without the capacity or maturity to make them, does not seem to have been demonstrated or documented in any significant way. Yet the restrictions are significant. The Minister has presented this as an absolute ban, at the price of professional discipline, on educators respecting student choices or even assessing the capacity of the child to make their choices. This makes several unacceptable scenarios likely, including the public shaming of children who ask for that respect in a classroom setting and having the teacher have to reject their choice in front of their peers. The provision allowing for services to a child at risk of “harm” if their parents learn of their choice may allow social services to intervene, but the Policy still allows even a demonstrably abusive parent to veto their child’s preferred name and pronoun and does so with no apparent investigation into the harm this might cause. As with the *Harper* case, the government is defending an absolute ban in response to a speculative problem.

This restriction goes further than any other province in Canada. (I do note, to be fair, that it is far less restrictive than the policies in several U.S. states, but it is still significant within the Canadian legal regime.) The weight of expert opposition to these changes is also significant in this analysis. As noted earlier, the Supreme Court principle laid down in *A.C.* is that an older child who can demonstrate capacity to make their own personal medical decisions may reject treatments even when the medical consensus is that they risk harm to themselves. The government’s legal position is that the state may override the personal choices of a mature child **even when the medical consensus is that the state’s preference risks causing the child harm**. It is difficult to see how the Department can take case law clearly allowing children to reject the medical and expert consensus and then argue that the Department has the right to block the child from acting in accordance with the medial and expert consensus. I certainly cannot find that this was the least restrictive option available to government to deal with a speculative problem.

Had the Department approached this review in a competent and careful fashion, seeking guidance from educators and experts on how to avoid some of the speculative harm they feared, they would have had

⁹⁵ *Harper v. Canada (Attorney General)*, 2004 SCC 33 (CanLII), [2004] 1 SCR 827, at paras 33-36, <<https://canlii.ca/t/1h2c9>>

some room to act with legitimacy. It is true that the original Policy 713 was rolled out with minimal public notice and perhaps could have been better supported with guidelines and professional development. I do not begrudge the Department, the Minister, or the Premier the legitimacy of this observation. Having been through public consultations, I have benefitted from hearing some of the fears and concerns expressed by parents if Policy 713 in any form is not properly explained and implemented. These deserve to be acknowledged and addressed, and I will outline some of those concerns here.

Breakdown of trust between educators and parents. If there is a perception that schools are actively assisting a child in deceiving their parents, this could lead to a breakdown in the ability of schools and parents to mutually support a child, and this would have a negative impact upon children. As I said before, active steps in deception should be discouraged. The best way to do this is to restore the language allowing schools and teachers to truthfully say “We respect the child’s requests for what we call them and who we tell. You should speak directly to them.” This would also allow for clear guidelines and training for teachers in respecting the line between respecting a child’s privacy and actively helping or counselling them in hiding from their parents, which schools have no desire to do. These should exist.

Younger children and limited capacity. Quebec, Nova Scotia and Newfoundland all allow for informal supports for children younger than 16, but also recognize some novel issues in younger children. Again, the Supreme Court has determined that children’s capacity matters when challenging restrictions on their decision making. Assessments should be carried out when educators have concerns. While a child’s considered choice of name should be respected, no one has argued that anyone has to call a 4-year-old “Batman” on demand or indulge unserious demands for nicknames which are not *bona fide* requests. Outing and deadnaming are blunt instruments that do not impair rights minimally. Considered assessments of younger children’s capacity are legitimate.

Of course, I have significant doubts from my conversations with educators that there will be an extensive caseload of requests from very young children without parental support. Certainly, younger children can and do present with gender dysphoria and change their preferred name and pronouns. These appear to usually come through processes where parents seek expert advice and are involved in the approach with the school. Younger children have a reduced capacity to ignore parental resistance and to live a life independent of parental scrutiny. As one experienced educator explained to me, an 8-year-old who questions their gender identity and meets with parental hostility generally stops there until they are older. Nevertheless, guidance and nuance for assessing capacity of younger children would not be an unacceptable addition to Policy 713 if done with care and input from educators and experts. However, in cases where age or capacity may require an individualized approach, I recommend that the principal lead the process and use the professional supports such as psychologists and social workers in their discretion. The current approach not only sidelines educators early on, it stigmatizes gender identity exploration by rushing to mental health professionals. All three of the professions who might guide this process – doctors, psychologists, and social workers – have opposed that process. It is irrational to insist upon a process that consults someone who starts by saying that the process is wrong.

Appropriate school interventions. Some of the briefs I reviewed in support of Policy 713 took great pains to share concerns and literature around medical interventions and the risks of children later regretting these decisions. I have tread lightly in this area for two reasons. First, I do not know to what degree these are cherry-picked examples given the preponderance of outside groups and the broad search they undertook for non-peer reviewed literature. As a layperson with a two-month window for review, I am comfortable that when I simply reached out to doctors, psychologists and social workers in New

Brunswick, there was a broad consensus around practice standards and peer-reviewed literature which I found persuasive.

I would still have concerns if New Brunswick schools were dispensing medical advice or performing medical interventions. They are not, and any such intervention would have its own parental notification and consent regime. Informal supports such as respecting chosen names and pronouns, creating a safe school environment, educating peers on empathy and inclusion for their 2SLGBTQIA+ classmates, creating social spaces and accommodating students' identity in daily activities from roll call to social activities – these are all appropriate interventions that students should access consistent with their maturity and capacity. Teachers should not be suggesting medical interventions or ideating gender dysphoria and I have not heard of teachers doing so. It would not be excessive for the Department to create clearer guidelines for appropriate informal, daily supports short of changing the official record.

Facilitating exploration and autonomy without judgement or expectations. I have heard some concerns from adults who socially transitioned as teens only to decide, upon exploration and reflection, that they wished to return to their previous gender identity. As doctors have made clear, exploration and questioning is normal and healthy and deserving of space for the child to have their autonomy and identity respected. This should never come with pressure to freeze their identity at any stage. I earlier noted the irony that groups most hostile to allowing gender identity exploration by children had failed to notice that the changes to Policy 713 also would require a child to seek parental consent and undergo a process when socially de-transitioning. There is a serious point here that the policy should support children at all stages of gender identity exploration and emphasize support and respect for all choices. As one psychologist noted,

To be clear, I never intended to suggest we should abandon preferred pronouns, and I fully believe there are youth and adults who identify in a stable manner as a gender that does not match their biological sex, and they should be afforded every respect, and support as needed. I also don't support school rejecting youth's pronoun choices. I am just trying to express that we have gone down a challenging road with the overemphasis on explicitly labelling young people's dynamic and fluid identities.

While the expert consensus is not that we have over-labelled dynamic identities, an emphasis on autonomy, decision-making capacity and respect in daily interactions for all students is a good policy.

Actively encouraging parent-child discussion. A competent review of Policy 713 could have explored the many ways educators and experts facilitate parental involvement. It should come as no surprise that part of the practice standards of psychologists and social workers is to explore how a child might have a positive relationship with their parents. They do not find withholding names and pronouns a useful tool to do this, and the Department would have done well to be curious as to why this is ineffective and what they find effective. Unfortunately, in the haste to score a symbolic recognition of parental rights as they define them, the Department made little effort to explore best practices in guiding children to positive parental interactions.

The inclusion of language creating a “harm” exemption, while clearly well-intentioned and aimed at reducing the risk to children, may create more barriers to positive interactions between parents and children. First, it puts the onus on children who wish to have their name and pronoun preferences respected and avoid being directed to mental health professionals to think of all the ways they might be harmed. Second, the “supports” offered may involve child protection, and mature students know this.

While existing laws currently and rightly require notification when teachers perceive a risk of harm at home, it is not likely to encourage children to trust adults. Forcing teachers to say “I will call you names you do not want to be called in front of your peers, but I will send a social worker to interrogate your parents” is not exactly the comforting dialogue starter that the Department seems to think that it is.

New Brunswick teachers have been unfairly politicized by how these changes were brought forward. Teachers are not pushing children to change their gender identity, advocating for medical interventions or “keeping secrets” from parents. They are trying to extend kindness, empathy and support to children who present with questions about their gender identity, and to offer that empathy and respect whether the child informs their parents or not. As one middle school principal told me:

“We are not telling kids to change their gender. We are not giving medical advice. We aren’t telling kids to lie to parents. We are just trying to be kind and decent so we can keep kids alive and in school while they figure all this out.”

The Department can issue guidelines and offer professional development on where the appropriate lines lie between support and ideation, on how to encourage parental discussions without losing the child’s trust, on how to offer judgement-free support for exploration and changes in the child’s identity, and when to assess capacity of younger children. By trying to short-circuit that discussion and simply freeze even informal kindnesses and respect for names and pronouns, the Department has made it harder to offer that appropriate guidance and support. For the changes to Policy 713 to meet the *Charter* test requiring they be reasonable and justified, at the minimal impairment stage the onus on the government is to demonstrate that no less rights-impairing means of achieving the objective exist. Government has not achieved this. There is a minimally-invasive way to address the legitimate questions raised by parents. Ignoring the law of mature minors and withholding respect for the child’s process of determining their identity is not that way.

How the Department Could Have Addressed the Concerns Properly and Legally

As we shall see in the recommendation section, the Department could have a properly drafted Policy 713 which:

- Defines the respect to be given to all children’s informed choices on preferred names and pronouns, based upon capacity.
- Sets out the explicit policy goal of encouraging parental involvement and offering expert guidance on how to do so.
- Entrenches the need for judgement-free support for exploration whether exploring a new gender identity or returning to one’s previous identity.
- Provides guidelines for educators on appropriate and inappropriate interventions and privacy standards.
- Distinguishes between the weightier step of changing official records and more fluid daily, informal supports.

- Guides educators on how to deal with issues of capacity and protection of younger children's informed consent.
- Encourages rather than shuts down or pathologizes children's interactions with trusted adults.

Such a policy might not have the symbolic heft or political currency of stating that parental rights must trump everything. It would, however, increase the likelihood that children will be safe and parents will have healthy interactions with their children.

Will the harm to children outweigh the benefits of parental involvement in practice? The "Proportionality" Test

As noted earlier, denying a child an accommodation needed to help them access educational services would require a demonstration of undue hardship. This means specifically stating why the school cannot offer the accommodation and showing that providing it would create some ill greater than the harm caused the child by withholding the accommodation. This weighing of factors is not dissimilar to the proportionality test courts would apply to the Department if it sought to justify the limitations it has placed upon the child's *Charter* rights. The legal phrasing of the third element of the *Charter* reasonable limits test is that there must be proportionality between the deleterious and salutary effects of the policy. That is to say, the policy must be assessed as to whether the benefits are worth the harm.

I believe that the problems under the rational connection and minimal impairment steps of the analysis show the operational and policy problems with the Department's approach are fatal to its claim to legality. They would fail to show why accommodating student's choice of names and pronouns are not a necessary accommodation, because the government cannot show any undue hardship caused by respecting trans children as other children are respected in daily interactions. They also make it bad, confusing, and self-defeating policy. These same points are relevant to the proportionality test, and I will not repeat them. In order to address some remaining policy concerns, I will offer some comment upon some of the concerns about the original Policy 713 raised by citizens in our consultations. These were raised, and I want to explain why I have found that these concerns in practice do not outweigh the harm caused by disrespecting and shaming children by deadnaming them.

First, it is inaccurate to say that allowing mature children with capacity to choose what they are called on a daily basis excludes parents. Nothing in that kindness and accommodation stops parents from using all the existing tools within the family dynamic to find out what their child is going through. Children return home each day and interact with their parents. Observing children, initiating conversations with children, monitoring their social media and technology time, building a healthy relationship, engaging in family activities that increase comfort and low-stress interactions – these are all good tools which remain within the power of parents to use. Parents remain a child's first and most important relationship, and the trust and affection we build up when our children are young will help us communicate with them when they get older. Children get more autonomy as they get older, and we must rely upon the respect and trust we have earned rather than commands and restrictions to keep the conversation going. The school should not interfere with or discourage parental involvement, but cutting off supports from other adults is not a step that strengthens the family.

It may well be that government can find more effective ways to support families, but that laudable goal is not achieved by denying a child respect and kindness at school. Parents cannot demand a government small enough to butt out of the family and demand a school apparatus big enough to force their child to talk to them. Happily, parents have all the same tools they always did to build a loving, trusting relationship with their children.

Also, there is no restriction upon other people's rights by acknowledging that 2SLGBTQIA+ people exist. It does not devalue straight or cis-gendered relationships to respect other relationships. It is not inherently sexual or explicit for 2SLGBTQIA+ to be acknowledged. The calls for children to stay "innocent" are a bit misguided. A straight couple's family picture is not sexual – it just means they exist and are worthy of respect. Straight and cis-gendered people are depicted in media, literature and textbooks, as they should be.

Finally, I wish to address the concern stated in some submissions that schools should "focus on reading and writing", as if being kind to trans children might somehow cause a massive distraction from literacy programmes.

Teachers cannot and should not be expected to ignore the needs of the children they teach. A teacher cannot enter a classroom with blinders and a muzzle, avoiding any conversation beyond the prescribed text and then run out of the room lest they hear some student's personal challenges. Education has never worked like that. It couldn't. Children arrive hungry, children experience bullying, children may have worries and fears from home events, children may develop interests and passions that make them curious about learning. Good teachers engage all of these things and have since the days of the one-room schoolhouse.

Beyond this, public education has always been a preparation for adult life and responsibilities. Part of becoming an adult and a citizen is learning how to live in a world where not everyone is like you. Public schools are where many of us first encounter a world with the full spectrum of people – different family incomes, religions, races, gender identities, beliefs, strengths, values and family backgrounds. As adults, we will live in a world bigger and more diverse than the one we as children in our own families and social circles. Adults must navigate that. Public education prepares children to live in a world where differences are respected. The provincial education plans that this Department has on their web site explicitly make the promise that they will provide those skills along with reading and math. That cannot be done by fearing difference.

Given that respecting the child's right to make informed decisions on what to be called does not limit existing parental rights, does not detract from the educational mandate nor diminish the extension of the same rights to identity and accommodation of cis-gendered students, I cannot see any negative impact or undue hardship that would be proportionate to what experts agree will be the negative impact upon children.

Parents introduce a child to who their family is and what their values and history are. Schools introduce the child to the diversity of others and show them how to navigate a world where there are differences. And ultimately, the child chooses who they are. The school does not own our children. Neither do we, as parents. And if the original Policy 713 left some feeling like the role of parents was left understated, the changes to Policy 713 have missed the important distinction that children are their own people who claim and exercise their own rights as their capacity evolves. In the recommendations, I will try to restore this balance.

Other Areas of Changes to Policy 713

Nearly 60% of submissions dealt with the changes to children's self-identification and parental consent, more than any other issue combined. As such, I have anchored much of my legal and policy analysis in that section, and will not repeat the background on equality rights, privacy, or children's rights to express their gender identity and be accommodated. That analysis stands.

As Policy 713 had only been in place for two years but was borne of four years of consultations, those who opposed the changes generally called for a return to the original policy. That said, our interviews with families and youth did ask if there were any improvements beyond just reviewing the changes that we could consider. Two issues did recur with some frequency, and I will note them here.

First, as technology and group chats become more prevalent, there is some lag in the ability of online tools to accommodate children's daily name as opposed to the name on the official record. As part of establishing a baseline where all children can choose how they are addressed in informal, daily interactions, this should be looked at.

Second, roll call by supply or replacement teachers is often a time of high anxiety for trans students and some youth reported avoiding class when they see a supply teacher because they expect to be deadnamed. This is even true of trans students who use a different name with parental consent. Procedures should be looked at and put in place to guard against this.

With those points made, I will address the changes the Department made with regards to washrooms and private spaces and to extracurricular activities.

Washrooms and Changing Areas

Some submissions asked why it was necessary to reassure students that they can use the washroom which conforms with their gender identity. After all, what could be the harm in continuing to use the washroom assigned at birth?

Trans youth and their families answered that question, and the stories I heard were compelling. Many gender-diverse people find themselves painfully between two worlds, and some of the rhetoric and fear around bathroom use forces a stark choice upon them. Go to the washroom which conforms with your gender identity today and you will face anger and accusations of being a safety risk. Go to the washroom consistent with your gender assigned at birth, and any change in your appearance or public identification will be used to say you don't belong there, either.

While washrooms in schools are often a source of anxiety for all students, and privacy and safety are things we all want, it should be said that what trans children want is what we all want – to be able to use the washroom without a lot of attention or fear of being bothered. Absent clear direction which normalizes using the washroom that corresponds to your gender identity, many trans youth find the day constantly stressful and physically uncomfortable.

“We need more of these bathrooms. My daughter would hold it in and walk to her grandmother’s house to use the bathroom at lunchtime.” –A Parent

Seen in this light, the best way to help students who may be uncomfortable with the potential for private spaces defined by gender identity rather than biological sex at birth is to normalize it, just as public washrooms became normalized for all of us when we started school and began sharing private spaces with people who were not our family. That said, the existence of private, gender-neutral washrooms also allow some options for students wanting more privacy, and in many ways more privacy for all students is a good thing.

In interviewing past officials at the Department, it appears that the Department’s new standards for washrooms are designed in part to improve everyone’s safety. Even leaving gender identity issues out of it, washrooms were often sites of bullying, assaults and drug sales among cis-gendered students of the same biological sex. None of us particularly like to perform private acts of toileting and changing without privacy and increasing the privacy of these spaces for teenagers is good for everyone. It is a good thing to steer constructions and renovations to designs with single-use private stalls for toileting and an open, communal area with more visibility for handwashing stations and mirrors. Change areas with more private single-use shower stalls and more privacy for changing are good for everyone. I can report that the Department and the current Minister are committed to those improvements and have expressed a desire to make them a priority.

Some commentators raised safety concerns. In reviewing submissions and social science evidence, I cannot find any basis upon which to say that allowing gender identity-conforming use of washrooms creates any higher statistical incidence of risk. That is a bit different from saying there is an absolute zero number of adverse incidents in gender-neutral washrooms. However, I have not seen any incidents in which the gender-neutral designation was the critical factor. If a washroom is poorly supervised, then people who are not allowed to be in it may be in it. If there is inadequate supervision or poor safety protocols, criminal activity will be undetected regardless of the identity of those involved. Supervision and security matter. The status of the washroom does not. Sadly, many assaults and sexual assaults still occur not between students but at the hands of people who are in a position of trust and authorized to be around the child. Reducing incidents in all settings through detection, screening, supervision and consequences is a good public policy goal.

I will note, for those genuinely concerned about people accessing a washroom for prurient or improper reasons, that the law has always allowed institutions to weed out insincere or opportunistic demands for accommodation. One cannot demand a kosher meal for one lunch hour and then simply claim to not be Jewish anymore. Religious exemptions have always been subject to allowable inquiries as to whether or not the demander is actually living life consistent with the claim of religious status. Equally so, schools have legal tools to deal with someone seeking to change their gender identity for an afternoon to access a changeroom or play a basketball game.⁹⁶ I can say with some certainty that trans youth and their families also have no desire to see those rights misused by pranksters or bad faith actors. They just want to use the bathroom with as little fanfare as possible, as all of us do.

⁹⁶ See *Syndicat Northcrest v. Amselem*, 2004 SCC 47 (CanLII), [2004] 2 SCR 551, at paras 51-53, <<https://canlii.ca/t/1hddh>>

Accommodation of washroom use which conforms with gender identity is settled law in Canada. I note the following official guidance:

*Trans people should have access to washrooms, change rooms and other gender specific services and facilities based on their lived gender identity.*⁹⁷

The Act prohibits discrimination in accommodation (e.g. hotels), services or facilities available to the public (e.g. stores, restaurants, schools, government programs, public spaces, shopping malls). Providers of these services and facilities cannot:

*· Prohibit or restrict a trans person from using the washroom or change facility that aligns with their gender identity;*⁹⁸

The following are examples of discrimination or harassment based on gender identity:

- *A transsexual woman is denied access to the women's washroom where she works. Her supervisor defends this decision by explaining that some workers have expressed uneasiness at the thought of sharing a washroom with her.*⁹⁹

*Every person has the right to use washrooms, change rooms, and other sex-segregated services and facilities that reflect their gender identity. Having gender inclusive facilities is a positive step, but a trans person should not be required to use a separate facility or be segregated.*¹⁰⁰

The following are some examples of discrimination or harassment on the basis of gender identity or gender expression.....

⁹⁷ Ontario Human Rights Commission, *Policy on preventing discrimination because of gender identity and gender expression*, April, 2014. <https://www.ohrc.on.ca/en/policy-preventing-discrimination-because-gender-identity-and-gender-expression>

⁹⁸ New Brunswick Human Rights Commission, *Guideline on Gender Identity or Expression*, May, 2017. <https://www2.gnb.ca/content/dam/gnb/Departments/hrc-cdp/PDF/Guideline-on-gender-identity-or-expression.pdf>

⁹⁹ Saskatchewan Human Rights Commission, *Human Rights of Transgender People*, https://saskatchewanhumanrights.ca/wp-content/uploads/2020/03/SHRC_Transgender.pdf

¹⁰⁰ P.E.I. Human Rights Commission, *Gender identity and Gender Expression*. June, 2018. <https://www.peihumanrights.ca/sites/www.peihumanrights.ca/files/GIGE.pdf>

*Example: Although Paul identifies and presents as male, his boss demands he provide medical documentation of his transition before allowing him to use the men’s change room at work. This may be grounds for a human rights complaint.*¹⁰¹

Q. Would these amendments allow people with male anatomical characteristics full access to women’s and girls’ washrooms and change rooms?

*A. Transgender persons have a right to be treated according to their deeply-felt gender identity. In many situations, that includes the right of a person who lives as a woman to use women’s facilities, even if she has some male anatomical characteristics. These amendments will codify that right. Transgendered and other gender-diverse Canadians already use gender-appropriate bathrooms and pose no greater threat than anyone else in doing so; they simply want to use the washroom or change room that corresponds with their lived identity.*¹⁰²

The Department’s changes do not, in my view, deviate from this established legal principle. The Minister has made numerous comments supporting this principle and has expressed a desire to accelerate renovations and standards to make this more comfortable for all. I recommend that he continue to do so.

Two areas would be worth clarifying in Policy 713. The Department did remove prescriptive language regarding field trips and extracurricular activities off-site, and chose to recommend that field trips and other off-campus activities ensure washroom access. While it is a reasonable limit to avoid placing schools in the position of cancelling or restricting these activities altogether while the world catches up with the law, it would not be a bad addition to the Policy to make educators mindful of the need to use best efforts to accommodate students and prefer locations that do comply with the law. We also heard some concerns that repairs can linger for a long time or that some facilities are in a distant area of the school or of a makeshift capacity that increases discomfort and stigma. There are aging schools, but best efforts should be made to ensure that these universal facilities are equally accessible and convenient in all schools.

Sporting Activities

The only significant change here is that the Department has removed the explicit guidance that students can participate in activities “consistent with their gender identity”, leaving only the criteria that activities

¹⁰¹ Newfoundland and Labrador Human Rights Commission, *Guidelines Regarding Discrimination: Gender Identity and Gender Expression*. <https://thinkhumanrights.ca/resources/legal-guidelines/guidelines-to-inform-discrimination-gender-identity-and-gender-expression/>

¹⁰² Government of Canada, Department of Justice, *Bill C-16: An Act to amend the Canadian Human Rights Act and the Criminal Code – Explanatory Note*. <https://www.justice.gc.ca/eng/csj-sjc/pl/identity-identite/statement-enonce.html>

are to be “safe and welcoming”. This gratuitous deletion was noticed and some families fear a chilling effect.

“Removing those words is a huge step backwards and puts the onus on children to be their own advocates when sometimes all they want to do is fit in. Need to create a culture of belonging.” -- A Parent

“This isn’t the Olympics, it’s just school sports!”-- A Student

“If a kid is changing their gender to win at sports, there are other problems at hand.” – A Teacher

To be sure, at the highest levels of competition there has always been some tolerance for separating competition by age, and sometimes by size (in the case of combat sports) to ensure fair competition. There is nothing inherently wrong with regulation that makes sure that everyone has a fair chance to compete. However, an excessive obsession with the possible worst-case scenario should not drive us to use exclusionary language and foster attitudes that deny even more children a chance to play. After all, there are very few cases where professional athletes emerge from school sports. Even post-secondary scholarship athletes are a relatively small percentage of those who play. Letting everyone feel safe playing is the first goal of an approach.

For the highest level of competition, where the stakes may be higher, regulators have long dealt with balancing accommodation and fair play. In the area of disability and the use of supports, athletes such as the golfer Casey Martin and the runner Oscar Pistorius have shown that sports governing bodies can look at individual circumstances and strike a balance. The runner Castor Semenya competed at the highest levels and showed that the non-binary nature of gender has always existed and has always been dealt with sport by sport, athlete by athlete. Our sport governing bodies can deal with details as long as the goal of maximum social inclusion and accommodation is made clear.

It should be noted that the New Brunswick Interscholastic Athletics Association (NBIAA) reports having had a policy allowing a student’s gender identification to determine their eligibility for eight years with no complaints or issues requiring adjudication. They strike a balance that maximizes inclusion while finding non-stigmatizing language which guards against opportunistic changes. Similar language exists in the other Atlantic Provinces.

New Brunswick Interscholastic Athletic Association (NBIAA) Operating Regulations:

- *15.12 Gender Participation Principles*
 - *Any transgender and/or non-binary student-athlete may participate fully and safely in gender-separated sports activities in accordance with their gender identity. A student-athlete who does not identify as either binary gender may participate with the gender in which they feel most comfortable. Decisions will center around the student/athlete’s wishes and will not be subject to requirements for disclosure or personal information beyond those required of cisgender athletes.*
 - *Decisions regarding team choice will be made at the beginning of the season of play. The student-athlete may not switch teams within the season of play. If the student chooses to identify as a different gender in a different season of play, the school personnel must submit a letter to the NBIAA office.*

- *Transgender and gender diverse student-athletes have the right to safe restroom facilities and the right to use a washroom that best corresponds to their gender identity. Section 6.4.1 in Policy 713 – Sexual Orientation and Gender Identity states that all students will have access to washroom facilities that align with their gender identity. The washroom facilities will be available to all students in a non-stigmatizing, or discriminatory manner. Schools may also provide gender neutral washroom and change room facilities as an option for student-athletes, keeping in mind the right to use the facilities that best match their gender identity.*

PEI School Athletic Association (PEISAA) By-Laws:

- *Section 3 – Gender Identity*
 - *The PEISAA recognizes its obligation to respect the gender identities of all students. Gender identity is not dependent upon physical appearance or medical procedures. A student’s self- identification is the sole measure of their gender identity.*
 - *a. Any student may participate fully and safely in gender designated sport activities in accordance with their lived gender identity or preference (for non-binary and gender- fluid students).*
- *Section 4 – Gender Designated Teams*
 - *PEISAA encourages its member schools to offer equal programs for male and female student athletes and opportunities for students of all genders*
 - *b. Students who identify as girls or women can play on a team designated for girls or women, and students who identify as boys or men can play on a team designated for boys or men. All genders can compete on a team designated as a "co-ed" sport, in accordance with the sport-specific roster allocations.*
 - *The only exception to this rule is students who identify as girls or women may play on a team designated for men or boys only if the school does not offer a girls’ or women’s team in that sport, at the appropriate classification, during the same school year. A letter from that particular student’s principal confirming that a girls’ or women’s team will not be offered that year at the school must accompany the appropriate player registration form.*

School Sport Nova Scotia (SSNS)

SSNS Guidelines for Supporting Transgender and Gender Non-Conforming Students:

- *SSNS allows participation for all students regardless of their gender identity or expression. The purpose of this document is to designate a set of guidelines in which student- athletes are able to compete on a level playing field in a safe, competitive and friendly environment, free of discrimination. Fundamental fairness, as well as local, provincial and federal rules and regulations, require schools to provide intersex and transgender student-athletes with equal opportunities to participate in athletics. These guidelines create a framework in which this participation may occur in a safe and healthy manner that is fair to all competitors.*

- *SSNS supports:*
 - *The Guidelines for Supporting Transgender and Gender Nonconforming Students as developed by the NS Department of Education and Early Childhood Development.*
- *Guideline: The student can safely and fully participate in extracurricular activities in accordance with their gender identity.*
 - *All students, regardless of their gender identity or expression, should be able to participate in extracurricular activities, including competitive and recreation athletic/sport teams, in a safe, inclusive, and respectful environment. Transgender and gender nonconforming students have the right to participate in these activities in the ways that they are safe and comfortable and consistent with their gender identity.*
- *Approach*
 - *Students participate in extracurricular activities, including competitive and recreation athletic/sport teams, in ways they are comfortable and according to their gender identity. Proactively review student athletic policies and procedures to ensure they are inclusive of transgender and gender nonconforming students.*
 - *A student's self-identification is the sole measure of the student's gender identity. Requiring a transgender or gender nonconforming student to participate in activities based on the student's sex assigned at birth, status of medical transition or to 'prove' their gender identity (by requiring a doctor's letter, identity documents, etc.) is not acceptable.*
- *Areas of Awareness for Schools:*
 - *Have a plan in place.*
 - *Use correct names/pronouns- according to student's self-identification.*
 - *Gender appropriate restroom accessibility and locker room accessibility. (All students shall have access to locker room facilities that correspond to their consistently asserted gender identity. In locker rooms that require undressing in front of others, student athletes who desire increased privacy for any reason (medical, religious, cultural, gender identity etc.) shall be provided with accommodations that best meet their individual needs and privacy concerns. Based on availability and the nature of the privacy concerns expressed, such accommodations could include but are not limited to:*
 - *use of a private area such as a washroom, staffroom, nurses or gym office.*
 - *development of a separate or modified changing schedule.)*
 - *Overnight trips – Transgender and gender non-conforming rooms.*
 - *Educational training for teachers, counselors, coaches, administrator and students on transgender sensitivity in relation to student.*
 - *Manner of dress according to gender identity.*
 - *Access to resources and accurate information.*

School Sports Newfoundland and Labrador (SSNL)

Section 2: General Policies

- *14. Gender Diversity and Equality*
 - *School Sports NL is committed to the principles of equality in all aspects of SSNL programs. Member schools and individual students at those schools have a right to participate in SSNL sponsored activities without being discriminated against on the basis of race, religious orientation, ethnicity, sexual orientation, gender identity or expression.*

- *SSNL supports equitable programming for all student-athletes and offers male, female and co-ed programs. SSNL holds events for males only, for females only, and mixed gender events as well.*
- *A. Students of all genders, in SSNL member schools, who wish to compete for their school, must be given the opportunity to do so.*
- *B. Schools are encouraged to offer gender-based teams in each sport that SSNL sanctions. Females are expected to compete on a female team, males on a male team.*
- *C. Athletes cannot play on both male and female teams in the same sport in the same year. However, an athlete is permitted to play in a different gender category from one sport to another.*
- *D. In order to ensure a safe environment, students will have the right to compete on the team of the gender with which they identify, or the team with which they are most comfortable. Once they have selected a team to participate with, they will not be permitted to play for the opposite gender team in that sport in the same school year.*
- *E. Students can be permitted to play on the opposite gender team (upon application from the school) if the same gender school team does not exist in the school. The “Exemption to Gender Rule Form” can be found on our web site under “Resources & Forms.”*
- *F. Students may participate on teams organized for students of the opposite gender, but that team must participate in the male category regardless of the number of males/females participating.*
- *G. All schools hosting SSNL tournaments should ensure gender-inclusive locker room and restroom accessibility and the availability of single-stall changing space and washrooms, where possible.*

As can be seen from the above policies, there has generally been acceptance of the right to play on teams consistent with one’s gender identity at the highest level of competition in school sports – high school competitive teams – without the sky falling. This makes the teacher’s comment compelling – there are social and personal factors at play which protect against the scenario where a student exploits their gender identity to gain a competition advantage. The social factors at play, and the reduced satisfaction any competitive athlete would get winning an unfair competition, likely create natural disincentives to this. A student who does not take the game seriously enough to care about fair play will not likely be able to affect the competition at the highest levels in any event. As any women’s coach can tell you, an unserious male walking into a competitive women’s team will soon get embarrassed by the serious athletes.

This may be why, despite the legitimate public policy goal of ensuring competitive spaces for women, the New Brunswick Women’s Council recommends promoting inclusivity rather than responding with fear of extreme scenarios.

With the removal of Policy 713’s guarantee that students can participate in activities that align with their gender identity, trans students could now be required to either participate in categories or with teams and groups that do not align with their gender identities or be excluded entirely. Cisgender students who are perceived as gender non-conforming—again, this is more likely to be racialized students—could also face increased risk of scrutiny or exclusion. It will depend on the interpretation of the policy, as described in the section of this submission that

*reviews the changes to item 6.3.1. The Women’s Council recommends reverting to the original text of this item.*¹⁰³

Below the highest competitive levels, there seems to be little reason to over-regulate competition. In primary grades, the competitive advantage based upon biological sex at birth is minimally existent or slightly in favour of girls, who tend to develop earlier. In intramural sports, the stakes are low and the goal is to ensure that everyone plays and is physically active. In competitive high school sports, we have seen that existing safeguards work. There is a tangibly greater risk that prejudices and fear of being resented will keep trans students out of sports than that the rules will be gamed to allow a biological male to seek a Pyrrhic victory. Even if this occurs, sports bodies have shown effective rules to keep fair play and have legal authority to weed out unserious or mischievous identification.

Given these observations, I would recommend that the explicit goal of ensuring participation based upon identity be restored with clear direction to schools to use arms-length governing bodies or committees to regulate competition as they already do. The only gap currently is interscholastic competition at the middle school level, and this can be solved by direction in Policy 713 to middle schools to adopt NBIAA rules or establish their own sporting oversight bodies at the District or Provincial level.

The Final Issue – Vagueness in Drafting

As promised at the outset, I now return to the one issue that remains unaddressed, which is the vagueness of the new Policy 713 in the area of deadnaming and refusing pronouns. The Minister has said that he expects teachers will deny a student use of pronouns and preferred name absent parental consent until age 16. The Policy, however, does not explicitly say that. I have reviewed the Policy changes as if the Minister can simply express a desire that is not explicitly in the Policy. However, I do not think he can.

The Supreme Court has been very clear that statutory silences must be filled with the most *Charter*-friendly interpretation of the document.

*Arbour J.A.’s judgment can be summarized as follows — the constitutional imperfection of the Education Act resides in what it does not say; what it does not prohibit explicitly, the statute must authorize, including unconstitutional conduct. However, in *Slaight Communications*, where I dissented in the result but spoke for the majority on this very issue, I held exactly the opposite — that statutory silences should be read down to not authorize breaches of the Charter, unless this cannot be done because such an authorization arises by necessary implication. I developed this principle in the context of administrative tribunals which operate pursuant to broad grants of statutory powers, and which can potentially violate Charter rights. Whatever section of the Act or of Regulation 305, R.R.O. 1990, grants the authority to the Tribunal to place students like *Emily Eaton* — a question which I need not address — *Slaight Communications* would require*

¹⁰³ NB Women’s Council, *supra* at p.7.

*that any open-ended language in that provision (if there were any) be interpreted so as to not authorize breaches of the Charter.*¹⁰⁴

For all the reasons I outlined at length, including our Court of Appeal's recent reminder of the quasi-constitutional status of the *Human Rights Act*, it is abundantly clear at law that if the Minister wants educators to violate the *Human Rights Act* and deadname students with the maturity and capacity to articulate a desire that they stop, the Minister will have to explicitly say so.

The Minister can change the Policy with a further signed revision, of course. However, I expect that the reason the Policy is so silent now is that the more clear the direction to educators to keep calling the student by the unwanted official record name, the more obvious and egregious the rights violations will be. To fill the legislative silence that exists, the Policy would have to describe how to deal with public refusals to respect name requests and the embarrassment and stigma that will cause, it will have to explicitly authorize teachers to release the official record name in violation of privacy laws, and it will have to make directions clear that professional ethics guidelines are to be ignored. And a Policy that does all this explicitly is more likely to get struck down by the courts.

Beyond this, vagueness, and uncertainty mere weeks before a school year is a bad managerial practice. It also has a disproportionate impact on vulnerable children who are already at heightened risk of bullying, violence, dropouts, and self-harm. If the desire here is to ensure that children are protected and have guidance in approaching their parents, uncertainty should be the last thing the Department wants. If children approach no trusted adults, they are not going to get support in figuring out how to talk to their parents or accessing the supports the Minister says he wants them to access. Yet now the language that promises they will not be outed without consent is gone. We were saying to children, effectively, maybe you'll get outed or maybe you won't. Maybe you'll get publicly deadnamed by your teachers, or maybe you won't. Maybe you will get to see a social worker or psychologist, or maybe there is not one available. The uncertainty is more likely to drive children into the shadows than to their parents.

In the recommendations that follow, I will be suggesting new language of Policy 713 that will fix this serious problem. I also note that District Education Councils are public bodies and the recommendation powers of the Advocate apply to them as well. As such, I will also provide an alternate model policy that school districts can use under their power to clarify policies of the Department¹⁰⁵ to give legal effect to the recommendations I have made. If the Department does not change its Policy, I suggest that districts make use of this document because otherwise they will have had legal authority to bring the policy into compliance with the *Charter* and other statutes and will have failed to do so. I note that some districts have already availed themselves of this option and nothing in the model policy for districts will be inconsistent with those policies as adopted by the DECs.

¹⁰⁴ *Eaton v. Brant County Board of Education*, 1997 CanLII 366 (SCC), [1997] 1 SCR 241, <<https://canlii.ca/t/1fr3z>>

¹⁰⁵ *Education Act*, Section 36.9(5)(a).

Conclusion

We need to take the debate on Policy 713 away from soundbites and divisive language. That only increases the stigma and feelings of isolation that hurt too many queer and trans children. It should be said that it is not bigoted for a parent to want to know about their child's major decisions. Equally so, it is not extreme to want children to have privacy and autonomy when they are old and mature enough to exercise it. The fault with the changes to Policy 713 is they were pushed through to demonstrate rhetorical support for a principle, but failed to take the steps a government would take to approach a matter with competence and seriousness. Those steps – checking compliance with laws, with other procedures, with expert processes and ethics, with the lived reality of people who live with the impacts of policy – do not seem to have been taken.

In the appendices to this report, I am offering an example of what a policy might look like if we accepted the legitimacy of numerous factors. Children do best when shown respect and kindness. Teenagers cannot be disrespected into submission. Parents matter and their connection with their child should be encouraged. Educators can be a source of trust and guidance to children. Professionals do have codes of ethics which reflect the interests of children. Laws and human rights codes exist. The new Policy 713 I propose here tries to balance all of these factors in a way that may not be a dramatic rallying cry but is a nuanced document for governing a school system with diverse needs and diverse people.

If we move away from political soundbites and into the harder, detailed work of governing wisely and with nuanced policies, we will serve our children well. It is time for all of us to strive, in our political debate, to sound like the grownups that our children need us to be. Revising policy that speaks to children's rights and experiences when they are most vulnerable is serious work. The grownups in a position to govern need to go beyond slogans and symbolism. We need to approach the work with care, attention to detail, and kindness. That is what serious adults do when they make laws, they move past demands and slogans and embrace complexity and nuance. We all need to rise to that level. Children need grownups to act like grownups.

SUBMITTED TO the Legislative Assembly this 15th day of August, 2023.

A handwritten signature in black ink, appearing to read "Kelly A. Lamrock". The signature is fluid and cursive, with a large loop at the end.

Kelly A. Lamrock, K.C.
Advocate

APPENDIX "A"

***Table of
Recommendations***

The Advocate recommends the following changes to Policy 713:

1. That the Policy affirm the universal right of all students, consistent with their capacity and whether for the purposes of gender identity or not, to choose how they wish to be addressed.
2. That the Policy provide guidance to school personnel in the Definitions section on what capacity is and augment Policy 713 with additional resources to guide school personnel, including clear guidance on evaluating capacity with specific guidance to be provided for cases involving children with disabilities, students whose first language is neither English nor French, and students of diverse cultural backgrounds.
3. That the Policy retain the provision that official records can be changed unilaterally by students at age 16.
4. That the Policy establish and define the right of all students to choose how to be addressed in informal, daily interactions consistent with their evolving capacity and establish the presumption that a child has capacity to make this decision starting at Grade 6, consistent with policies in Quebec, Nova Scotia, and Newfoundland & Labrador.
5. That the Policy explicitly provide direction for educators to encourage, facilitate and provide tools to the students in talking with their parents as an important and recommended accommodation, and provide professional development to school personnel in this regard.
6. That the Policy adopt language advising school personnel not to misinform or mislead parents, but instead affirmatively advise parents of the limits of school disclosure and the tools parents have for talking with their children about issues of gender identity.
7. That the Policy adopt language reminding educators of the importance of parental support and involvement, and explicitly include supporting the child in talking to their parents as a positive intervention (when done in compliance with statutory reporting guidelines regarding risk of harm).
8. That the Policy be augmented by additional resources to provide guidance for schools in assessing capacity and providing accommodations for students in elementary schools consistent with the child's Section 15 *Charter* right to inclusion and accommodation.

9. That the Policy establish the right of students, regardless of age, to have accommodations which allow them full participation in the educational and community life of the school.
10. That the Policy clearly establish that the Principal is responsible for developing plans for students in elementary school who have not consented to parental consultation, and allow the Principal to use their professional judgement in engaging mental health professionals, rather than arbitrarily direct all gender-diverse students to mental health professionals.
11. That the Policy explicitly incorporate existing statutory notification provisions to avoid conflicts with existing legal obligations.
12. That the Policy explicitly incorporate existing statutory privacy provisions to avoid conflicts with existing legal obligations.
13. That the Policy explicitly incorporate existing professional codes of ethics to avoid conflicts with existing legal obligations.
14. That the Policy provide teachers and school personnel with guidance on appropriate and inappropriate interventions, including provisions which respect appropriate limits of role and expertise for school personnel.
15. That the Policy restore language explicitly restricting school personnel from outing students without their permission.
16. That the Policy require schools to take steps to ensure that students' names in the official record are not used without their consent in situations such as roll call, videoconferencing, assemblies, and classrooms where there is a supply teacher.
17. That the Policy provide specific guidance on the quality and accessibility of private, gender-neutral washrooms and changing facilities.
18. That the Policy mandate schools to use best efforts to accommodate all students on field trips and extracurricular activities.
19. That the Policy restore language protecting students' right to participate in activities consistent with their gender identity.
20. That the Policy explicitly require schools to establish or adopt arms-length regulation of interscholastic sports competition at the middle and high school levels.

The Advocate further makes the following recommendations to government:

1. That the Department be provided such capital resources as needed to follow through on its evolving standards for safe and private washroom and changeroom design.
2. That the Departments of Health, Justice and Public Safety, Social Development and Education and Early Childhood Development collectively undertake a review of all statutory age limits, including those provided in the *Education Act*, *Medical Consent of Minors Act*, *Vital Statistics Act* and other analogous legislation, and apply the law of evolving consent and the duty to assess the capacity of minors as set out in the *Charter of Rights and Freedoms*.
3. That the Department establish a five-year review for Policy 713 and set out criteria and processes in advance to evaluate its effectiveness.

The Advocate further makes the following recommendation to District Education Councils:

1. That in the event the Department of Education and Early Childhood Development fails to bring Policy 713 in compliance with the law by September 1, 2023, that DEC's adopt the policy at Appendix C under their statutory capacity to make policy not inconsistent with Departmental policy.

APPENDIX "B"

Policy 713

ADVOCATE'S VERSION

[Changes to the current Policy 713 are highlighted]

PROPOSED POLICY 713: Sexual Orientation and Gender Identity

1.0 Purpose

This policy sets minimum requirements for school districts and public schools to create a safe, welcoming, inclusive, and affirming school environment for all students, families, and allies who identify or are perceived as LGBTQI2S+.

2.0 Application

This policy applies to the school environment, which includes:

- a) all students who are registered in public schools in New Brunswick;
- b) all school personnel, contract/casual employees, visiting professionals, student teachers, parents, visitors, and volunteers;
- c) school transportation: on school buses or other school system-organized transportation;
- d) school sponsored and endorsed events and activities;
- e) all school documents, classroom instruction, forms, report card, classroom materials, and evaluations/tests; and
- f) all communications related to school (e.g. meetings, phone calls, written correspondence, emails, social media messaging, and other instances that could have an impact on the school environment).

3.0 Definitions

Ally refers to an individual who acknowledges that LGBTQI2S+ people face discrimination and advocates for social justice.

Capacity refers to the ability of the student to understand the nature and impact of a decision, considering their age, development, maturity, and the gravity of the decision, and the student's ability to make and communicate that decision with appropriate seriousness and reflection.

Cisgender refers to an individual whose gender identity corresponds with their sex assigned at birth.

Gender Expression refers to the way an individual express themselves and how they present and communicate their gender to society. An individual can express themselves by using a name, pronoun, or physical appearance that is different from the social normativity. An

individual's gender expression is independent from their sex assigned at birth or sexual orientation.

Gender Identity refers to an individual's internal sense of their gender, which may or may not align with their sex assigned at birth and is not visible to others.

Homophobia/transphobia refers to negative attitudes, feelings, discrimination, and behaviours towards individuals who identify or are perceived to be a member of the LGBTQI2S+ community.

Legal name refers to the name that appears on a birth certificate.

LGBTQI2S+ is a commonly used acronym that represents different identities within society. The acronym refers to an individual who identifies as: lesbian, gay, bisexual, transgender, queer, intersex and two-spirited. The acronym ends with a plus symbol to reflect that in society there are many more identities that could be represented.

Members of the school environment refer to all students who are registered in the public school system in New Brunswick, all school personnel, contract and casual employees, visiting professionals, student teachers, parents, visitors, and volunteers.

Non-binary gender refers to an individual whose gender identity is neither exclusively male nor female or is in between or beyond both genders.

Parents refer to parents or guardians, as defined in the *Education Act*.

Preferred first name refers to a name that has been identified by any student as what they wish to be called by others in daily interactions, whether it is their legal first name or not. It includes, but is not limited to, a name chosen by a transgender or non-binary student which aligns with their gender identity.

Preferred pronoun refers to a pronoun that has been identified by any student as what they wish to be called by others in daily interactions. It includes, but is not limited to, a pronoun chosen by a transgender or non-binary student that aligns with their gender identity.

Sexual orientation refers to an individual's psychological, emotional and/or sexual attraction towards another person.

Students refer to pupils, as defined in the *Education Act*.

School Personnel as defined in the *Education Act*. For the purpose of this policy, school personnel also includes volunteers.

Transgender refers to an individual who does not identify either fully or in part with the gender associated with their sex assigned at birth.

4.0 Legal Considerations and Authority

Education Act, section 6 The Minister...

b.2) may establish provincial policies and guidelines related to public education within the scope of this Act [...]

Education Act,

Subsection 13(1)(e) and 13(3), Roles of parents

Subsection 27(1), Duties of Teachers

Subsection 48(2)(b), Duties of Superintendent

Paragraphs 28(2)(c), 28(2)(e) and 28(2)(h), Duties of Principals

Paragraphs 33(1.1), Duties of Parent School Support Committees

Paragraphs 36.9(5)(a) and (b), Duties of the District Education Council

5.0 Goals/Principles

The Department of Education and Early Childhood Development (EECD) believes:

5.1 All members of the school environment have the right to self identify and express themselves without fear of consequences and with an expectation of dignity, privacy, and confidentiality;

5.2 All members of the school environment have the right to learn and work together in an atmosphere that is respectful and free from harassment and discrimination;

5.3 It is important that all students have a sense of belonging and connection to their school environment. Students should feel that they are supported by school personnel;

5.4 School personnel will create a culture whereby LGBTQI2S+ students see themselves and their lives positively reflected in the school environment;

5.5 It is important to collaborate with community stakeholders to support the needs of all LGBTQI2S+ members of the school environment; and

5.6 Support groups such as Gender and Sexuality Alliances (GSA) are important and provide a safe space for students. Gender and Sexuality Alliance and school personnel will work together to create a safe and inclusive school environment for LGBTQI2S+ students.

6.0 Requirements/Standards

6.1 Supportive School Environment

6.1.1 The school principal will ensure that all members of the school environment are aware of the requirements set out in this policy.

6.1.2 School personnel will ensure that the school environment respects student's right to self-identify, and appropriate measures are in place to protect personal information and privacy.

6.1.3 EECD and school districts will provide professional learning opportunities to school personnel to understand and support the needs of LGBTQI2S+ students.

6.1.4 Homophobic/transphobic language, behaviour, or discrimination towards a member of the school environment will not be tolerated and will be immediately reported to the principal or designate. All allegations will be taken seriously and dealt with in a timely and effective manner as per Policy 703 – Positive Learning and Working Environment.

6.1.5 All students will be able to participate in curricular, co-curricular, and extracurricular activities that are safe, welcoming and consistent with their gender identity. Schools should ensure that competitive, interscholastic sports are regulated by specialized bodies such as the NBIAA which can regulate sports in a manner which is respectful of student inclusion rights and ensures universal access to fair play and competition consistent with the child's abilities.

6.1.6 EECD, school districts, and school personnel will ensure that classroom materials and activities contain positive, age-appropriate and accurate information related to sexual orientation and gender identities.

6.1.7 EECD, school districts, and schools will strive to use inclusive and gender-neutral language when communicating with members of the school environment. This includes: classroom instruction, classroom materials, school and school district newsletters, forms, social media, emails, phone calls, and meetings.

6.1.8 Schools shall ensure that the student's personal information in the official record is used only for the purpose for which it was collected and is not disclosed without consent. Procedures for roll call, supply teachers, videoconferencing, school assemblies, and ceremonies should reflect this legal obligation.

6.2 Supportive Alliances

6.2.1 All schools will have a designated member of the school environment to act as an advocate for students who identify as LGBTQI2S+ and their families.

6.2.2 The school principals and school personnel will support the establishment of a Gender Sexuality Alliance and will support any events and activities organized by the group.

6.2.3 Gender Sexuality Alliance membership does not require parental consent and privacy and confidentiality will be respected.

6.3 Self-Identification

6.3.1 All students 16 years of age or older have the right to determine their preferred name and/or pronouns to be officially used for record-keeping purposes and daily management (EECD, school district, and school software applications, report cards, class lists, etc.). The student has this right to make this change regardless of the reason for the change. Prior to the student reaching 16 years of age, parental consent is required for changes to the official record.

6.3.2 All students have the right, consistent with their age, maturity and evolving capacity, to choose the name and/or pronouns by which other members of the school community address them in informal, daily interactions. The student has this right regardless of their reasons for the change. For greater certainty, informal, daily interactions include but are not limited to classroom communication, extracurricular and co-curricular activities, free time, and social conversation.

6.3.3 For the purposes of this Policy, a student is presumed to have capacity to determine their own terms of informal address beginning in Grade 6. For children not yet in Grade 6, or in situations where the Principal has concerns regarding the child's capacity, the Principal shall develop a plan for the child in consultation with school personnel and such specialized guidance from school counselors, social workers, doctors and psychologists as the Principal may think appropriate in their professional judgement. That plan may include but is not limited to:

- An assessment of the child's capacity to make the request;
- An assessment of the impact of the request upon the child's ability to fully receive educational services and participate fully in the school community;
- An assessment of the appropriate supports and accommodations to be provided to the child; and

- An assessment of how to consult parents in the development of any supports and accommodations, consistent with the child's best interests and rights to educational services.

6.3.4 Nothing in this Policy requires school personnel to grant an informal name change which is insincere or done for an improper purpose.

6.4. Supports and Accommodations for Students

6.4.1 Students have a right to such accommodations for their gender identity as will allow them to fully receive educational services and participate fully in the school community. School personnel shall offer such supports consistent with the educational and developmental needs of the student.

6.4.2 For the purposes of this Policy, a student is presumed to have capacity to determine their own gender identity and expression beginning in Grade 6. For children younger than Grade 6, or in situations where the Principal has concerns regarding the child's capacity, the Principal shall develop an accommodation plan in the manner set out in Section 6.3.3

6.4.3 School personnel shall offer appropriate supports and accommodations to the student consistent with the student's educational and developmental needs. For greater certainty, the following are examples of appropriate and inappropriate supports:

Appropriate supports include:

- Respecting the right of students with capacity to choose how they wish to be addressed.
- Providing parents with clear information regarding this Policy, the child's rights to privacy and accommodation, and the tools parents have to be involved with and informed of their children's activities.
- Listening to a student who initiates a conversation about gender expression and questions in an empathetic and non-judgemental way.
- Answering questions, when asked, in a factual and informed way.
- Educating students on the need to accept diversity in others and modelling inclusive behaviour.
- Responding quickly to incidents of bullying or harassment.
- Exploring and encouraging communication with the student's parents and providing the student with tools to engage their parents in questions around gender identity and expression.
- Providing books and other classroom materials which depict a diverse range of individuals and families.
- Providing access to school personnel such as guidance counselors, psychologists and social workers when appropriate.

- Respecting and affirming the child's privacy and autonomy consistent with their capacity.

Inappropriate interventions include:

- Initiating, ideating or making assumptions about a child's gender identity.
- Promoting or encouraging any medical intervention, including gender-affirming care, for a student. Students should be directed to appropriate medical professionals and their parental consultation processes for those discussions.
- Imposing the teacher's personal religious or political beliefs upon a student.
- Pressuring a student to conform to any norms or preconceptions, including the student's past preferences or expressions, regarding gender identity.
- Providing the student with practical advice for the purpose of deceiving or providing misinformation to parents.
- Disclosing a student's gender identity to other parties without their informed consent.

6.4.4 The Principal shall, in collaboration with the District and the Department, ensure continuing professional development for school personnel on best practices in appropriate supports and accommodations.

6.5 Private Spaces

6.5.1 All students will have access to washroom facilities that align with their gender identity. Washroom facilities will be available to all students in a non-stigmatizing manner.

6.5.2 All schools will have at least one universal washroom facility that is accessible at all times. These facilities should be safe and of similar quality and access as gender-segregated washrooms.

6.5.3 Private universal changing areas will be available in all schools. These facilities should be safe and of similar quality and access as gender-segregated washrooms.

7.1 Guidelines/Recommendations

7.1 Where possible, schools are encouraged to provide more than one, universal washroom facility that is accessible at all times.

7.2 Superintendents will make reasonable efforts to support students who request to transfer schools due to reasons relating to their sexual orientation, gender identity, and gender expression.

7.3 Where possible, students should have access to accommodations that align with their gender identity when travelling off school property. School personnel will use best efforts to accommodate all students on field trips, co-curricular and curricular activities, travelling for competition, or events at another school, etc.

7.4 Nothing in this Policy shall be construed as directing school personnel to violate any code of ethics provided by their professional association, or to violate provincial law governing human rights and personal privacy.

7.5 Nothing in this Policy shall be construed as altering the legal obligations in provincial statutes or regulations of school personnel regarding parental consent or notification.

8.0 District Education Council Policy-Making

A District Education Council may develop policies and procedures that are consistent with, or more comprehensive than, this provincial policy. Their policy must be posted on the school district website, and shared with all members of the school environment at the beginning of every school year.

9.0 References

Canadian Charter of Rights and Freedom

Human Rights Act

Education Act

Right to Information and Protection of Privacy Act

Policy 703 – Positive Learning and Working Environment

New Brunswick LGBTQ Inclusive Education Resource

APPENDIX "C"

***Contingent Model Policy for
District Education Councils***

FOR GREATER CERTAINTY, the following guidelines will apply to schools when implementing the provisions of Policy 713

1. Regarding Section 6.1.2, schools will not release a student's personal information, including the name and biological sex, contained in the student's official record without the student's consent as defined in the *Right to Information and Protection of Privacy Act*.
2. Regarding Section 6.3.2, "obtaining consent to talk to the parent" means obtaining the student's informed consent to talk to the parent.
3. Regarding Sections 5.1, 6.1.2 and Section 6.3.2, school personnel shall respect the direction of the student in regard to the name and pronouns they wish to be called in daily and informal interactions with school personnel and other students. The student does not have to provide reasons for the change. For greater certainty, informal, daily interactions include but are not limited to classroom communication, extracurricular and co-curricular activities, free time, and social conversation. This respect for the student's wishes will be extended while efforts to "obtain consent to talk to the parent" are being made as per Section 6.3.2. School personnel may not withhold use of the student's preferred name and/or pronouns as a means of "obtaining consent to talk to the parent". The use of the student's preferred name and/or pronoun, consistent with their gender identity is an accommodation consistent with the *Education Act, Sections 1.1(a), 27(1)(b.1), 28(2)(c), Human Rights Act, Sections 2.1(n), 6(1)*, and the *Charter of Rights and Freedoms, Section 15*.
4. Regarding Section 6.3.2, "directed" means that students wishing to have assistance in speaking with parents for the purpose of obtaining their consent will be advised that school psychologists and social workers are available and told how to obtain those services. "Directed" will not be interpreted as requiring students to consult those professionals.
5. Regarding Sections 5.1, 6.1.2 and Section 6.3.2, school personnel shall not disclose a student's gender identity, gender expression, or

requests for informal use of names and pronouns without that student's request. Teachers may not misinform or deceive parents but may advise parents of the student's rights under the *Right to Information and Protection of Privacy Act*, and provide reasonable consultation with the parent on the parent's options consistent with Section 13(2) of the *Education Act*. Schools are encouraged to proactively communicate with parents regarding this policy.

6. Regarding Section 6.1.5, "safe and welcoming" activities are those that allow every student to participate in a manner consistent with their gender identity. Schools should ensure that competitive, interscholastic sports at the middle and high school levels are regulated by arms-length bodies which can ensure universal participation, fair play and competitive balance.
7. Regarding Sections 6.4.2 and 6.4.3, schools will make best efforts to ensure that gender-neutral washroom and changing facilities are safe and of a quality and accessibility consistent with other such facilities. School personnel will use best efforts to accommodate all students' use of private washroom and change facilities on school trips and extracurricular activities occurring off the school campus.