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# A POLICY OF GIVING UP

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HOW NEW BRUNSWICK SCHOOLS ILLEGALLY STOPPED  
EDUCATING HUNDREDS OF STUDENTS AND WHY THE  
GOVERNMENT MUST PROTECT VULNERABLE CHILDREN

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## INTRODUCTION

All children should receive an education. On school days, children belong in school.

That is a simple concept. You might think no one would disagree. After all, New Brunswick's *Education Act* says so in clear, legal language, right there in Section 8. It says that the Province of New Brunswick shall – not may, can or even should – “provide free school privileges” to any New Brunswick resident who meets the age requirement. That's pretty clear.

In fact, Section 13 of the *Act* says that parents also have an obligation to cause their child to attend school. Section 14 says that the student has a duty to attend school. Section 15 repeats again that school attendance is compulsory and that superintendents have to investigate cases of non-attendance. It's pretty clear that legally children belong in school, even if one wasn't convinced by simple common sense. It's one of the few services that government is legally bound to provide and citizens are obligated to accept. So, that's a pretty strong sign that children being in school is the law.

Also, government makes the laws and asks citizens to follow them, so government should follow the law too. That also seems like a pretty universally held principle. So, government should not make a law saying that School Districts must provide an education and students must attend, and then just send hundreds of children home without an education and for reasons the law doesn't allow.

Today in New Brunswick School Districts are breaking the law with impunity. Hundreds of children are not in school at the same time that their peers are. Our investigation has turned up hundreds of cases where children are simply not receiving any educational services at all for part of the day, or sometimes entire days, even though their peers are in school.

In some School Districts, this is called a 'partial day plan'. Some Districts use a different name, and then they claim to not be using partial days. And a couple of Districts just refuse to count how often they are doing it, so that they don't have to tell anyone how common it is. But they all have cases where children are told that they cannot come to school with their peers.

## SCHOOL DISTRICTS ARE ROUTINELY BREAKING THE LAW

The law which says that the Province must provide children with an education and that children must attend also lists the only times there can be an exception. The *Education Act* provides for three ways that schools can follow the law and limit the number of hours a child attends school.

One is through Section 12(4) of the *Education Act*, which allows a superintendent to designate another site for a child to attend that may not be in their neighbourhood school with their peers. Here is what it says:

12(4) *The superintendent concerned **may deliver programs and services** for pupils requiring a personalized learning plan to a pupil at the pupil's home or other setting if the pupil is not able to receive the program or service in a school due to*

*(a) the pupil's fragile health, hospitalization or convalescence, or*

*(b) a condition or need that requires a level of care **that cannot reasonably be provided** effectively in a school setting.*

**[Emphasis added]**

It must be noted that this provision does not allow for education services to be discontinued. This only allows districts to provide programs and services in the home or other setting. If the programs and services are not provided, then this section is inapplicable. As well, the onus is on the District to show that the programs cannot reasonably be provided in the school setting, which requires the District to actually show the methods they have considered to make it work in the school and state why these cannot be done without undue hardship.

In many files we reviewed, there were no services bring provided to students during the school hours when they were sent home, and there was no record in the file of options for continuing the service being provided. A failure to do either would mean that a partial day plan is not happening under the authority of Section 12(4), because that section requires the delivery of "programs and services" to be applicable.

There was also rarely a record on file that would document efforts made to seek less drastic alternatives and to explain why there would be undue hardship. Generally, we should see records of consultations with internal and potentially external experts, and costed alternatives based upon that advice. That is what would constitute a reasonable effort to provide service in a school setting.

We also did not see, in most cases, any evidence that the other possible sections of the *Education Act* were being followed. Section 16 allows for exemptions such as illness or religious observance, but this was not invoked or even relevant. And Section 24 provides for disciplinary suspensions, but this requires a documented discipline process (and, of course, that the child have capacity to meet the standard). These were not present.

So, we know that school districts are sending hundreds of students home without educational services while their peers are in school. What is not clear is why School Districts believe they have the legal authority to deny some children an education.

## WHY THIS MATTERS

There are three reasons why the question of partial days should matter to Members of the Legislative Assembly. None of these seem controversial.

1. Government expects citizens to follow the law, and our schools aim to teach children to respect the rules. Government and School Districts should set an example and not break the law.
2. Children belong in school and do better – educationally, socially, and emotionally – when they are in school.
3. Public schools are designed to promote equal opportunity, and partial days appear to be disproportionately affecting the most vulnerable children who most need educational services: children with disabilities, children in the care of the Minister of Social Development, and children from families with lower socioeconomic status. This is not fair.

The first point should be self-evident. Government should follow the law. There is also a need for oversight of School Districts. The children who are being sent away from school for part or all of the day are often those who it is hardest and most expensive to educate. They may need intense services, they often require considerable patience and work from school staff, and the services they would require outside the classroom may not be provided for in School District budgets. Often, these pose problems that are hard to solve, and there will always be a human temptation to avoid solving difficult problems.

However, we must never fall into the trap of making children disappear because they challenge the adults in the system. In fact, the children who test us the most often need us the most. It is exactly because these children's needs are many and their vulnerabilities are high that we must have regular oversight and clear rules so that we can ensure that School Districts are not just making the tough cases disappear. If education is a right – and it is – we must always remember that rights often only truly matter exactly *when* they are inconvenient.

On the second point, that children should be in school, we need only look at the recent plan developed by the Department of Education and Early Childhood Development. The Department made combatting absenteeism the very first action item in their action plan *Building A Better Education System*. In short, the Department believes that a child's presence in school is among the most important predictor of that child's success. Here is what that action plan says:

*Regular attendance in school is crucial for several reasons. First, there is a strong link between being in school and academic success. It is difficult to grasp the material being*

*taught when the child is not there to participate, this often leads to poor performance and a failure to complete the required coursework.*

*While learning curriculum is important, school also helps children with necessary skills development, like critical thinking, problem-solving, and social-emotional learning through social interaction. These skills are embedded in the curriculum and are practiced daily. These are all essential life skills shaped during these formative learning years.*

*It is well understood that school is the primary place for social development, allowing children to interact with their peers and teachers, building strong social skills and friendships. It also plays an important part of emotional development, positive mental health, and a sense of discipline reinforced by a structured routine that will carry children into adulthood and their professional lives. Consistent attendance in school can help teachers and support staff identify academic and interpersonal matters more quickly. This includes learning challenges, behavioural issues, or family contexts that may impact the child's performance.*

*Quite simply, regular, on-time school attendance is key for a child's success in school and in life.*

This is all logical, and the Department makes an excellent case for their focus on making sure that children attend school.

However, we see nothing here that says, "Except for the most vulnerable and high-needs children, who would benefit from missing more school time." In fact, it says the exact opposite: that learning challenges, behavioural issues, and family struggles benefit from school time. It is hard to square the Department's articulate and convincing case for school attendance with the fact that they are allowing districts to provide plans for hundreds of students that involve decreasing time in school by design.

The Department goes on to cite expert analysis in support of their prioritizing of school attendance:

*The consequences of chronic absenteeism on student outcomes are numerous and severe. Elementary-aged children who regularly miss school experience major losses in the development foundational skills which can result in a cascading effect on future educational outcomes (Childs & Grooms 2018; Durán-Narucki 2008; Kearney & Graczyk 2014). Furthermore, absenteeism is "most prominently linked" to eventual school dropout (Childs & Grooms 2018; Kearney & Graczyk 2014). Lastly, time spent outside of school can be spent on other unproductive and sometimes harmful or delinquent activities (Cole 2011, as cited in Childs & Grooms 2018). For example, rates of chronic absenteeism have been associated with "substance abuse, violence, suicide attempt, risky sexual behaviour, pregnancy, delinquency-related behaviours, injury, and illness" (Kearney & Graczyk 2014). In sum, absenteeism is associated with a host of negative*

*outcomes for students, making it a critical issue for schools and policymakers to address (Leighton 2024).*

*These absences have consequences, research shows. By third grade, chronically absent students are less likely to read on grade level. By sixth grade, chronic absence becomes an early warning sign that a student may drop out of high school. By ninth grade, it's a better indicator than eighth-grade test scores (Childs & Grooms 2018).*

So, again, the Department's own cited studies say that children being outside of school makes them less likely to learn and more likely to turn to substance abuse, self-harm, and high-risk behaviour. Once again, if these studies add qualifiers like "Except for students with high needs and behavioural problems, who should totally be told to go to school less", the Department did not provide that qualifier. (Actually, we checked, and the studies definitely do not say that.)

It should be troubling when there is a gap like this between words and actions. On the one hand, the Department is saying that keeping children in school is an urgent situation that requires our collective effort. On the other, hundreds of children are not in school because the School Districts are telling them to go home.

This contradiction is made more striking by the third issue, which is that the children who are being denied an education are the ones most at risk of the outcomes the Department says absenteeism causes.

Numbers provided by the Department of Social Development show that children in care of the Minister of Social Development are nearly twenty times more likely to be placed on a partial day plan. This is extremely concerning. For one thing, the government's own numbers show that they are already at higher risk of exactly the outcomes – "*substance abuse, violence, suicide attempt, risky sexual behaviour, pregnancy, delinquency-related behaviours, injury, and illness*" – that the Department warned about in its case for stronger attendance measures. Indeed, the risk factors the Department cites are for children ordered to stay home with their parents. The risk factors go up even more when children are already separated from their family and are in homes without that parental attachment.

This also suggests that children are more likely to be denied an education and placed on a partial day plan when they do not have a parent advocating for them. Children in care often do not have a voice and are at the mercy of a system where it is not clear who speaks for them. When the government is your legal parent, and the government decides that it does not have the resources to educate you, who looks out for you?

Disturbingly, our investigation turned up incidents where social workers reported being told by superiors not to question partial day plans, even when they had concerns, because they should think of themselves as part of the same team as the school officials. Which begs the question – if schools are putting the needs of the system first, and the social worker is told to put the system first, and the system has parental authority over the child – exactly who is looking out



for the scared and wounded child who is being sent home from school? Especially when the system also acknowledges that its decision to send the child home increases the child's risk of "substance abuse, violence, suicide attempt, risky sexual behaviour, pregnancy, delinquency-related behaviours, injury, and illness".

If anyone has an argument explaining why any of this is consistent with acting in the interests of vulnerable children, we have not heard the pedagogical or ethical reasons for it. Indeed, the Department of Education and Early Childhood Development did not offer an argument that the practice is good for children sent home without educational services. Their justification is that it is in the interests of the system and other children, because their claim is that the "undue hardship" doctrine of human rights law, which asserts that the system's legitimate interests will be gravely harmed, applies here.

## **A FLIMSY AND DANGEROUS MISUSE OF "UNDUE HARDSHIP"**

It should be clearly stated that the difference between the Advocate and the Department here is not because the Advocate is saying that children can never be removed from the common learning environment in order to receive more individualized services. That legal authority exists when appropriate conditions are met.

The difference here is that the Department is insisting that a child can be removed from the common learning environment and placed in a setting with no educational services at all. It is not the removal that is automatically illegal, it is the subsequent denial of any services at all. To claim that there exists legitimate authority for partial day plans, the Department must justify why a complete denial of educational services to a child during a school day is legal. It is this authority that cannot be found in the law.

We asked the Department for the legal authority under which children could be not only removed from the common learning environment, but also denied any educational service at all while they are out of that common learning environment. The Department chose not to cite any section of the *Education Act*, which is a red flag at the outset. Actions taken by the Department or school districts must find their foundation in the *Education Act*. The fact that the Department was unwilling or unable to anchor their actions in statute is a sign of illegality.

By citing Policy 322 in their written response, the Department has implied that that the relevant section of the *Education Act* is Section 12(4) allowing for the variation of the common learning environment. They referred the Advocate to the parts of Policy 322 which define variation of the common learning environment, and these policies exist under the auspices of Section 12(4).

It is worth restating here that policies cannot contradict a statute like the *Education Act*, because the power to make policy itself derives from the *Education Act*. Ministers are not monarchs ruling by decree. The power to set policy exists only because the Legislative

Assembly has delegated that power by statute. So, any policy allowing for the variation of the common learning environment must operate within the confines of the variations allowed under Section 12(4) of the *Education Act*.

The Department's legal assertion is that once it is established that a child cannot be accommodated within the common learning environment without undue hardship, the undue hardship principle justifies any alternate learning environment the School District chooses, including ones that provide no learning at all.

The Advocate cannot state clearly enough that this is a cruel, illogical, and discriminatory use of the "undue hardship" doctrine which has never been backed by any court or tribunal decision that I have read or heard tell of during a full quarter century of practicing human rights law. It is nonsense.

First of all, the phrase "variation in the common learning environment" contains within its obvious meaning that the alternative must be *some kind* of learning environment. It does not take a veteran human rights lawyer to know that an alternative learning environment must be an environment that includes some kind of learning. Sending a child home without any educational services while their peers are in school is not a "variation" of the learning environment. It is a nullification of the learning environment. The learning, of course, is a necessary component of a "learning environment". Without the learning, the Department cannot argue it is providing a variation of the learning environment.

A variant of something still has to be essentially the same thing. A flatbread is plausibly a variation of pizza. An empty plate is not. If I purchased tickets to a movie in a theatre, a variation on the service I paid for might be showing the movie in a different theatre, or perhaps even in an alternate location. One might even stretch and say that showing a different movie of similar length, quality and genre is a variation on what I paid for. If I pay for a movie ticket and the movie theatre tells me to go home and they will provide no movie at all, that really isn't a variation on the movie environment. It's just flat out not offering the service. If a restaurant substitutes chicken for beef in a dish, that might be a variation on the order. If they bring out an empty plate and tell me to go home, that's a denial of the service. If I book a flight to go to Calgary direct, a variation on what I paid for might be a different plane, a different departure time, or an unplanned layover. Telling me to go home and not go to Calgary would not be a "variation of the flight". It would be a cancellation.

Placing a child in a setting where they receive short-term, targeted, and appropriate interventions to help them gain skills or master behaviours that they will need to return to the classroom is a variation of a learning environment. Sending a child home with no educational services is not a variation of the learning environment. It is a denial of any learning environment.

This may seem like restating the obvious three times, but an important government Department is asserting, in apparent seriousness, that sending a child home to an environment

with no learning is a “variation of the common learning environment”. This is not just something that seems wrong to lawyers. It seems wrong to anyone who uses a dictionary to find the basic meaning of “vary” and the basic meaning of “learn”.

Even if we overlook the glaring problem that the Department is suggesting that learning is not an essential part of learning environments, there is also a serious flaw in their application of the undue hardship doctrine. The Department is taking a finding of undue hardship in keeping the child in the common learning environment, and then taking the position that this finding of undue hardship justifies any subsequent action or denial of educational services. This is a flimsy and dangerous misuse of the undue hardship principle.

Explained simply, the Department’s response is that the use of partial days is justified by the undue hardship test if a child cannot be accommodated in the classroom with their peers. Here is why that is wrong.

Let’s imagine a scenario where a child’s behaviour escalates to the point where classes are disrupted for all learners several times a week. Let us grant, for the purpose of this example, that the school has established an undue hardship by demonstrating that they have consulted qualified experts, considered scenarios and supports that might help keep the child in the classroom, and determined that even with these supports the disruption would be an undue hardship on the school and the other learners.

The Department’s argument is that once this undue hardship is established, they can withdraw all services for part of the school day under the same claim of undue hardship. This is wrong because the undue hardship claim used to remove the child from the classroom – the disruption to classroom activities – ceases to be a hardship once the child is not in that classroom.

So, when the Advocate asks why a child, once removed from the classroom, cannot be given remedial or tutoring services in an alternate setting, the undue hardship cannot be the classroom disruption. Because, obviously, providing the child services in the alternate setting does not disrupt the classroom where the child is no longer present. The School District would have to now show that providing services in an alternate setting would create such an undue hardship that the child must sit home with nothing.

The Department appears to be aware of this limitation in their argument, yet curiously blind to its obvious conclusion. The Department wrote to the Advocate:

*“In conclusion, placement in partial day programming may, in certain cases, be justified based upon whether ‘undue hardship’ has been proven in the context of attempting to accommodate a student in a mainstream classroom setting or if it is in the best interests of the child, such as for mental health reasons.”*

So, the correct questions that the Department must ask and document when applying their two criteria – undue hardship or the child’s best interests – are as follows:

1. Is it in the child’s best interests to receive fewer hours of instruction than their peers?
2. Once the child is required to stay at home, is there any undue hardship that arises from providing educational services in that environment for the same amount of time as the child’s peers currently receive?

Again, the Department has the right test but seems unwilling to acknowledge that they are applying it to the wrong question. Once the child is out of the mainstream classroom, the question now becomes “Is the provision of services in an alternate setting an undue hardship that justifies complete denial of educational services for part of the school day?” The Department knows, or ought to know with a modicum of curiosity, that there is not a single human rights tribunal decision which has supported using a hardship claim that supports removal from the classroom to justify a complete denial of services.

Here it must be noted that the Supreme Court has said over and over, most recently in the *Moore* decision, that denying services to children with disabilities because the School District does not have the money, space, or staff is not undue hardship. To make a claim of undue hardship, it must be shown that the financial cost of the service would be beyond the fiscal capacity of the provincial government. Otherwise, the School District must devise an accommodation plan that is in the best interests of the child and pursue the money, space, and staff by asking the Department for funding on the record and reviewing resources that could be purchased privately if unavailable in the public sector. What is happening instead is that Districts are simply sending children home without an education if the funds are not in the District’s budget for services. It may be convenient for the Department to not get documented requests for accommodations but if the goal is educating children, and not avoiding administrative accountability, that is what Districts should be told to do.

This again seems so obvious it should not have to be stated, yet the Department is making the argument that tutoring a child at home somehow continues the undue hardship in a separate classroom.

## **THE DEPARTMENT’S POLICY CANNOT BREAK THE LAW**

It is further unsettling to read the Department’s claim that “not all students would qualify for tutoring under the policy”. A policy developed under the *Education Act* cannot create a power not already contained in the *Act*. Once again, the power to vary a learning environment is not the same thing as the power to deny any learning environment.

Once that is understood, the Department cannot say that they are denying educational services because their policy says to deny educational services. First, the Department controls the policy. A policy is still a choice, it is simply a statement that the same choice will be made in similar circumstances. If the choice is illegal, stating that it is one's policy to break the law does not make it better. If a police officer pulls someone over for driving 160 kilometres an hour in a school zone, it would not be a valid defence for the driver to produce a piece of paper while saying "But, Officer, it is my policy to drive 160 kilometers an hour in school zones." The *Education Act* is as much the law of the land as the *Motor Vehicle Act*, and one cannot make a policy to ignore it. "I am denying this child educational services because it is our policy to deny certain children educational services" is not an appropriate response from the Department.

## A COMPLETE DEPARTMENTAL MISSTATEMENT OF THE LAW

The Department's response contained one statement which is so breathtakingly incorrect that it must be corrected in the bluntest possible language. At page 3 of the Department's response, it is written that:

*"The Education Act contains no legal presumption in favour of a regular class placement...."*

This is not just wrong. It calls to mind Sir Winston Churchill's admonition that "the opposite of the truth could hardly be stated with greater accuracy". Section 12(3) of the *Education Act* reads as follows:

*12(3) The superintendent concerned shall place a pupil requiring a personalized learning plan so that the pupil receives the programs and services within the common learning environment to the fullest extent considered practicable having regard for the rights and needs of that pupil and the needs of other pupils.*

So, just to be clear, Section 12(3) explicitly states that the child must be in the common learning environment unless a deviation can be justified by the superintendent based upon defined criteria. That is, in fact, exactly what a legal presumption is – a status quo which must be rebutted by the party seeking to vary it. To say that there is no legal presumption in that section is to deny what the word "presumption means". It is to call to mind the scene in the film "The Princess Bride" where a character keeps insisting that events clearly occurring are "inconceivable" until someone tells him that he may not know what the word means. It is the not an interpretation error, it is a bald statement of untruth. It is the equivalent of saying that Elton John is not a piano player when he is, in fact, famously and foremost a piano player.

The Department should immediately correct this in any place where such a preposterous statement has been communicated.

## A BREAKDOWN IN OVERSIGHT AND ACCOUNTABILITY

The Department states in their response to the Advocate that a number of things should be the case, but does not appear to have adequate mechanisms in place to protect vulnerable children. For example:

- The Francophone Sector reports that it does not even require School Districts to report on the use of partial days.
- The Francophone Sector further responds that a “personalized learning plan must contain why a student has been put on partial days and the accommodations that student will receive”. Glaringly absent is any requirement that services must be given to address the reason the child is on partial days, or any requirement that there be any accommodations at all (only that if they exist, they must be listed).
- The Department states that “a partial day plan must be for the shortest amount of time in mind”, yet there do not appear to be any guidelines for establishing this. Our investigators have found numerous cases where the child is not receiving any services to remediate the problem that caused the partial day plan while they are excluded. If a partial day plan is to be for the “shortest time possible”, that would require actual services to shorten the time.
- The Department writes that “there is an expectation that with appropriate supports and services, the length of the partial day will decrease”. However, they also state that there is no automatic review of cases where this expectation is not met. The only accountability is that once a year, selected cases are reviewed for quality assurance. Our investigators found numerous cases where children are remaining out of school for years with no improvement, and there was no mechanism to review whether or not the services should be changed.

The Department’s response is long on statements of what should happen, but disturbingly short on mechanisms to protect vulnerable children. As we shall see, many of the files reviewed by this Office did not meet the standards the Department is claiming here. In most cases, the school is making a child with disabilities meet standards to prove they warrant an education, but there is no oversight requiring the school to show it is educating the child. There is no mechanism to ensure that partial days are brief, that services are reconsidered when the child does not progress, or indeed that any services are even provided. This is important because, again, partial days mean that while a child’s peers are getting an education, the child at home is not getting an education. This is an extreme ‘remedy’ and it is being used with minimal oversight to ensure that schools don’t find it convenient to just give up on the most vulnerable children because they are too much trouble or their families lack influence and resources.

There are unfortunately many incentives for a school to simply place a child on a partial day and leave them there. Schools are struggling with challenging classroom composition and limited resources. The children on partial days often do present behaviours that make educators' jobs challenging. Getting timely expert guidance is hard and there is a dearth of psychologists both in schools and in the private sector. Administrators can be under pressure to reduce disruptions and it is quicker to send a problem away than to solve it.

Yet it is for that reason that there should be clear procedures, good legal information, robust oversight, and regular check-ins when a school takes the extreme step of simply not educating a child for a period of time. Instead, the Department is proclaiming standards but has a quality assurance system more fit for a factory than a vital public service. Pulling a few files off the conveyor belt for undefined "quality assurance" is no substitute for clear rules and individualized oversight that protects vulnerable children from being discarded.

## THE USE OF PARTIAL DAYS HAS METASTASIZED

In our investigation, we discovered that in the early days of inclusive, integrated education in New Brunswick, the practice of partial days was almost non-existent and in many Districts was defined as illegal for the same reasons shared in this report: that the *Education Act* states that the Minister shall provide school privileges to children resident in New Brunswick and contains no section allowing for the complete withdrawal of those services. Even a decade ago, the practice was extremely rare.

Our investigation discovered that the use of withholding educational services through partial days has exploded in recent years. In early 2024, the Anglophone Sector was reporting that 344 students were on partial days. The Francophone Sector replied that they do not even track the use of the practice, but expressed hopes that School Districts would know; the School Districts responded that they do not keep track because they are not required to. Assuming that the Francophone Sector has a similar use of partial days, that would mean that nearly 500 students are now under a partial day program. Given that increasing attendance is a key goal of the Department's strategic plan, ordering one out of every 200 students to not attend school is an odd strategy. And the pace appears to be snowballing without oversight – the Advocate's Office is noting an exponential increase in partial day files.

It should also be noted again that children in care of the Minister of Social Development are twenty times more likely to be on a partial day program. While some overrepresentation of complex cases would be understandable in that group, it is also true that children without stable homes should generally be *more* in need of school-based support and less likely to be sent home for parts of the school day. This raises questions as to whether or not children without parents to advocate for them are more likely to be sent away from school without services. Our most vulnerable children should not be the ones most excluded from school.

Partial days are described by the Department as a short-term measure which is grounded in effective interventions and a return to full school days. The cases we are seeing do not reflect this reality. We are going to share some of these children's stories to illustrate the impact the partial days program is having on children and families and to demonstrate the gap we are seeing between what the Department describes and what is actually happening to children.

## THE CHILDREN'S STORIES

**In these stories, some details have been altered or changed to ensure respect for privacy and confidentiality. The changes do not affect the important parts of the story.**

### Carly

Carly is a middle schooler who did well in elementary school with supports and a learning plan. She is energetic and enjoyed learning in earlier grades. She loves and cares for animals and enjoys outdoor sports. She has a number of complex needs including Tourette's Syndrome, ADHD, and an anxiety disorder, in addition to being on the autism spectrum. She has challenges understanding and interpreting the actions of others and can become emotional and anxious in situations involving conflict. She has a loving and active family.

One day at school, when she refused to do work a teacher grabbed a small security blanket that Carly brings to school to help manage her emotions. Carly became upset and physically assaulted the teacher. This led to a suspension under the disciplinary policy for a few days. The school also called the police and asked that Carly be charged, which the police declined to do once the officer spoke with Carly and reviewed her disabilities and diagnoses. The officer reported that the school had pushed for criminal charges and had denied that Carly had a disability.

After Carly's suspension, the school reported that they did not have a plan in place for Carly's return and added a month to the suspension without going through the disciplinary policy. The school then informed the family that Carly would only be allowed to attend school two days a week for 90 minutes a day, placed in a separate room with an educational assistant.

Every two weeks, based upon Carly's behaviour, the school would add another 90 minutes. So, essentially, after a month away from school, Carly would attend school three hours a week instead of the 35 hours of education her peers receive.

The school first advised the Advocate's Office that going for three hours a week was in Carly's interests because of her anxiety, even though she had been attending full-time up until the incident. When the Advocate's Office asked if the school had consulted any expert before determining that missing 90% of school time was in the child's interests, the school could not cite any consultation or evaluation that had led to that conclusion. Nor had the school



considered the impact of having to catch up on schoolwork after so much missed time upon Carly's anxiety.

After two weeks of the reduced hours in which there were no physical incidents, the school refused to add another 90 minutes to Carly's school time because there had been a few refusals (a "refusal" was defined as an incident where Carly refused to do work when told). This seemed odd to the Advocate's Office, because Carly had averaged 10 refusals a week before the suspension and the school had never deemed these to be worth removing her from school before. This concerned the Advocate's Office, because it raised the spectre that the partial day plan was being used to simply keep Carly out of school when a suspension was not available and the school's attempt to put the child into the criminal justice system were rebuffed by police.

Even more concerning was the absence of any increased services or supports to assist Carly in managing aggression and behaviour. It is perfectly legitimate for the physical assault on an educator to be taken seriously by the school and to be seen as a sign of higher needs for Carly. Generally, a more serious problem is matched by more intensive supports, counselling, and programs. There is nothing in the file to suggest that the school did this or looked to provide behaviour interventions during the hours Carly was out of school. The only thing the school offered was 4 hours a week of tutoring, for a total of 7 hours a week of educational services.

The school says that Carly has high needs for behavioural interventions and high anxiety that force them to keep her from attending school. They have not filled any of her time away from school with mental health or behavioural supports, yet they are expecting improvements in these areas before they will allow her to get an education. Even though the school recognizes no onus themselves to find these services or seek assessments as to what might help, they have placed an onus on Carly to improve her behaviour without additional supports and meet a higher standard than she was meeting before, all while returning each week to school farther and farther behind while she manages an anxiety disorder.

It is difficult to see how Carly gets an education before she leaves middle school and then has to tackle high school while having not had any meaningful instruction in nearly a year. It is difficult to believe this plan reflects anything but a desire to make sure that the student does not return to school, even if it means that her education effectively ends in middle school.

## **Cole**

Cole grew up in an unstable home where substance abuse and violence were all too common. In his earliest report cards Cole is described as an artistic little boy who was kind and respectful and enjoyed helping others, especially those younger than him. His favourite part of the school day was listening to stories. School was a refuge for Cole, a place of safety away from the ongoing violence at home.

The challenges Cole faced at home would eventually affect his school-life, however. Incidents of noncompliance, struggles with peer relationships, hitting, kicking, hiding, and frustration with schoolwork became common. It was around this time that Cole was also given diagnoses of ADHD and ODD. Despite trying an array of supports, Grade 5 was when two important changes arrived in Cole's life. Firstly, he was taken into protective care and moved into a group home downtown. Secondly, it was at this point that the school placed him on a partial day schedule. Just when Cole most needed to be in school, school was taken from him. He was allowed at school for just a couple of hours each morning. There were no additional services offered to help Cole deal with his worsening home life, just less time in school.

For most children, losing the ability to attend school full-time would come with a unique set of consequences such as finding childcare, losing peer connections, and falling behind academically. For someone like Cole, whose young life has been rife with the trauma of intimate partner violence, alcoholism, and drug addiction, this disruption came with a much higher cost. At 10 years old, he got the message from the school that they did not want him there, and he drew the conclusion that if the school did not want him there after mid-morning, there wasn't much point in attending for the early morning either. Soon he was spending his days not in school but hanging around homeless encampments and engaging in drug use. Community agencies contacted Social Development with their concerns but were rebuffed.

Effectively removed from school at the age of 10, Cole's partial day plan turned into a departure from school. He would never again have a full day of learning, or even a full day of treatment and therapy, or even just a full day of structure that school provides. Cole was placed in and out of protective care and lived in 5 different placements, many downtown. The absence of a caring parent to ensure his safety while out of school left Cole to fend for himself, eventually following in his mother's footsteps and seeking drugs to fuel his growing addiction. At age 16, Cole was incarcerated and, when he was released, no treatment-based placement was available for him. Released without a plan and now having spent years without an education, at last sighting Cole was continuing to live on the street. The school system gave up on that little boy who loved art and stories.

### **Jeffrey and Gregory**

These two brothers, a year apart in age, both had significant developmental delays and required complex services. The school advocated for additional services and complex case planning for the boys while they were still in elementary school, but the school principal frequently expressed frustration that there simply were not the integrated services from the Departments of Health and Social Development which might have helped the small community school support two high-need students. As the boys progressed, they were placed on partial day programs. When their behaviour escalated past the point where school staff could maintain the learning environment, the parents were called to leave work and pick the boys up. There was no learning plan developed to provide more intensive interventions.

Sadly, the partial day plan was simply a policy of taking the boys out of school with no additional services for the children or parents filling that void. The parents, who worked hourly shiftwork, eventually lost income by being unable to consistently work. The family lost their income and their housing and had to move frequently and further away from services. They also gave up their cell phones to save money, but this led to longer delays and slower service from Social Development. A year later, there was still no integrated services plan available to support the boys getting the skills they needed to be able to attend school.

## **Sylvia**

Sylvia is a grade 9 student with various mental health diagnoses and supports from various community agencies. In Grade 8 she attended school full-time and had a multitude of supports to help her succeed. Prior to her Grade 9 school starting in September, the family was informed that she could only attend school for 2 hours and 15 minutes a day. There was no new assessment which would justify the reduction in school time, nor were any services or tutoring provided to fill the time that Sylvia would lose.

Her family was informed that Sylvia would need 5 successful days at school in order to increase her day by 15 minutes (with less than 3 incidents of non-compliant behaviors and no aggressive behaviors in that same timeframe). There were no additional supports offered during the day to help Sylvia meet the standard, and so the year went on with Sylvia still in school less than half the time with her peers. The longer this drags on, the more difficult it will be for Sylvia to ever attend school.

Eventually, another government Department stepped in to cover the cost for Sylvia to access a programme outside of the school during the afternoon hours. However, we saw no sign that the school was ever asked to intensify or improve its plan after a full year without any progress towards meeting the standard the school itself had set. There is an onus upon Sylvia to prove she deserves an education. There is no onus upon the school to help her or improve results when she struggles.

Sylvia's parents have requested that the community providers be brought in to plan further with the school administration. The parents want their daughter to attend school full time by the end of the school year, however the school maintains that they do not have the resources to modify Sylvia's learning environment in a way to resemble that of the alt-ed programming but at the same time the school has not made any proposals setting out the funding they would need to accommodate and advocate for the student.

## **Brandon**

Brandon is a friendly and athletic boy whose parents are recently separated. He has been diagnosed as being on the autism spectrum. Since the separation, the school struggles with his behaviours and placed Brandon on a modified school plan.

Brandon now is only allowed to attend school 2 hours per day in the mornings. However, no additional services or programs have been provided to help Brandon learn behaviour modulation or to prepare him to return to school full-time. Neither parent is able to leave their employment to take care of Brandon during their work hours, nor do they have the funds available to find some kind of private in-home daycare to cover the time he is not able to be at school. The school set standards for Brandon to meet in order to be allowed more time at school, but each time he has struggled to meet the goal and so far the school has refused to look at different interventions. Months later, there was still no path for Brandon to ever be a full-time student again – he has been forced out of school before age 10 and may never return full-time.

### **Melody**

Melody is a middle school student who is being denied an education for over half the school day. The partial day plan started in Grade 6 when she began middle school and a full year passed without any significant increase in her school time, nor any additional supports, nor any interventions. Her mother reports that Melody has lost interest in school – she does not have a chance to make friends, she is falling further behind her peers, and she feels like the school does not want her there. Despite a year of the school's plan not working, the school did not work over the summer to develop a new plan for Melody. They simply placed her on a partial day plan again immediately upon the new year starting. Melody's parents feel that their daughter's dislike for school will continue to grow the longer her time at school is not integrated with the other youth her age. With no plan to return her to school full-time, the odds grow every day that Melody will effectively have been forced out of full-time education starting at age 12.

### **Charles**

Charles goes to school for half days due to physical behaviours that have been disruptive. Attending school is a trigger for him as he struggles with some sensory issues. The school has been asked to provide instruction in a learning environment which supports these sensory issues. The school claimed that there is no space in their building or an alternative location in the community where such an environment could be created. However, our investigation showed that the school had neither sourced nor priced these alternate locations or community options, nor had they submitted a plan to request additional resources from the District or Department. Charles will be graduating in the next several years, and it appears that his final

years in school will be spent falling further behind his peers as he goes to school for half of the time his peers attend, and with no plan for educational services in place.

## THESE ARE NOT ISOLATED CASES

The Department expressed a belief that partial days are meant to be short-term, to be accompanied by a plan to address the issues that are keeping the child from succeeding in the common learning environment, and to be reviewed for effectiveness. The Department also expressed a belief that partial days are to be used only when other supports have been tried and the case for undue hardship has been met.

In the files we have seen and the new files we continue to receive the very week this report is to be submitted, none of this has been happening.

It would be true that the Advocate's Office would tend to get the most escalated cases; it is also true that our investigations turn up depressingly similar stories time and time again. It would appear that the most vulnerable and high-needs students are simply being banished from the school for part of the day and that there is no particular urgency to change the situation. Among the most common failings we saw in our review of the partial day system were the following:

- Schools placing a student on partial days and making no effort to assist or advocate for families to get help with problems such as transportation, childcare, or home support. In one case, a child was placed on partial day and, when the school discovered that the new shortened school day did not align with the specialized accessible transportation the child relied upon, told the parents to arrange their own transportation at their own expense until our office intervened.
- Schools placing conditions upon children to prove their worthiness to return to school and then not adapting or altering supports when the child does not meet the criteria. In some cases, once a child was on partial day the school actually placed conditions that were higher and more demanding than what the student was achieving during full-time attendance. The onus is on the child to magically improve, but schools do not hold themselves accountable for helping the child meet the standard.

- Schools failing to review or recalibrate plans when a child spends months without going to school full-time, even to the point that one school year ends and another begins, with no effort to examine how to ensure full-time education for the child. We see this in the majority of our cases.
- Schools claiming a lack of resources, staff, or space but showing no signs on file of having actually developed, costed, or requested a plan for the additional resources, staff, or space required.
- Schools placing a child on partial days for months and then denying tutoring to the child on the grounds of cost or policy, thus ensuring that the learning gap will grow for the child to a crushing level when they finally return.
- Schools telling families that additional help may be available from Health or Social Development to support their child, but making no effort to ensure a warm handoff, coordinated services, or basic advocacy in ensuring that the needed services actually occur.

## **MAKING THE MOST VULNERABLE CHILDREN INVISIBLE**

We are creating an educational culture where the policy is to give up on children.

Who would design a plan like this? The most vulnerable, high-needs children are told to have fewer hours of learning. We then banish them from school, with no additional services to help them return. We place onerous criteria upon them in order to ‘earn’ more time at school, to somehow prove that they deserve what their peers already receive: a protected right to education. We then offer minimal help as we watch these most vulnerable children fall further behind. We send every message that they are unwelcome, we let time pass until their learning gap is significant and their social interactions minimal, and then we wonder why they drop out of the school where they were made to feel so unwelcome. If one wanted to design a program to drive a child out of school, this is what it would look like.

Yet, this culture of giving up on children is spreading, from what once was only a handful of children to then dozens, and now to hundreds. The Department recently cited numbers showing improvements in behaviour indicators. Nevertheless, when we asked if some of the improvement was simply because schools were now banishing their most high-need students, there was no immediate answer forthcoming. The Department seems unaware of the degree

to which schools are just sending children home if they were too much trouble. The practice has simply become normalized.

In fact, there is no meaningful oversight of the partial days program. While School Districts all defended their use of partial days, not one tracked the most basic outcomes. Do children tend to return to full days once placed on partial days? Do children show greater academic performance over time? Do children who are placed on partial days show increases or decreases in attendance? Are children placed on partial days more or less likely to drop out?

One would think that, if School Districts were experimenting with a measure as counterintuitive as simply denying children an education for part or even most of the day, they would show intense curiosity about the long-term effects of that strategy. However, no District appeared interested to the point of actually bothering to measuring the results. The adults who make children attain measurable targets in order to earn a few more minutes of education show minimal interest in holding themselves accountable for the results.

A policy of giving up on children as young as age 10 is bad policy. Right now, giving up is being normalized. It needs to be scrutinized, overseen, and ultimately reversed.

## **WHY IS THE USE OF PARTIAL DAYS BEING NORMALIZED?**

We do not see any sign that the Department has deliberately driven this policy. In fairness to senior Departmental leadership, the explosion of partial day designations appears to be driven by School Districts making decisions and resisting reporting. There have been recent decisions from the Department, such as hiring more behaviour intervention workers to treat the root causes of behaviour problems and reducing reliance upon educational assistants to manage those problems, which show promise and reflect understanding of the need for transformative change. We did not see evidence that the Department has driven the explosion of partial days.

What has happened is that School Districts have gotten very comfortable just sending their most troubled children home without an education, and the Department has not yet provided oversight that might make Districts accountable for the increased use of the technique.

Schools face many challenges. Classes are more compositionally challenging than ever. Schools are being asked to integrate record numbers of newcomers, they are dealing with more complex learning needs, and they are still reeling from the government's decision to return to streaming most children with special needs into one classroom without placing additional resources in the classroom. Add in a pandemic where some children had limited access to the equalizing effect of public schools and there is an understandable sense of overload among school personnel.

However, that also creates a powerful incentive to find ways to take the easiest route towards solving a problem rather than considering the best interests of the child. Developing plans, asking for more resources, scouting private sector solutions, fighting for integrated services or complex case protocols – these all take time and time is scarce. Just telling a child to stay home is so much quicker and, once they are out, it is easy to resist bringing them back. The risk of taking the path of least resistance is high.

Many of the children who are on partial days may also have less power to resist. As we have seen, sending children home from school without supporting the parents can create even more problems – a lack of work, lack of money, lack of time – all of which make it harder for parents to advocate for their children or question the decisions that impact their children’s learning. Children in government care are far more likely to wind up on partial days, and their locum parent is the very same government which is sending them home. As noted, we have heard from some social workers saying that they were explicitly told not to push the school on their partial day plan because the school and the social worker should be on the same team – a team which, obviously and dishearteningly, the child was not part of. That there may be perceived, or informal, pressures seem likely in the absence of a clear plan to ensure advocacy and accountability.

While we understand that the strain on schools is high, inventing a power to deny children an education in the absence of any law allowing such an action is bad practice. It should not be normalized. Placing children on partial days – that is to say, sending children home without an education during the school day – is a form of giving up on a child.

It may seem harsh to suggest that educators are “giving up” on children who present them with tough challenges. We use this language with hesitation. But one fact stands out in drawing this conclusion. Neither the Department of Education and Early Childhood Development nor any of the Districts had any long-term tracking of outcomes for those children put on partial days. How many children placed on partial days eventually meet the conditions to return to school full-time? No one knows for sure. Do children receive more or fewer support services after being placed on partial days? No one knows. How do children placed on partial days do in terms of graduation rates? How do they fare in the future beyond school in terms of struggles such as homeless, addiction or incarceration? No one knows. Do children placed on partial days manage to receive successful interventions from other Departments like Health or Social Development? No one knows.

Our school system is defaulting to a practice of providing children with less education right when their needs are highest. No one has bothered to look at the long-term impact of this. And that is concerning because, as we saw in some of the stories earlier, the cases we have looked at do not have happy endings.

So, when we stop educating children without examining how that affects them or where they end up, how can that not be called giving up on the children with the greatest need?



The use of denying education as an educational tool seems almost Orwellian in its mismatch between stated goal and actual outcome. It does not appear to have arisen because educators chose it as the right path for children, or even one they feel good about. It has arisen because of a toxic mix of poor human resources planning, poor training and clarity around inclusion policies, a lack of resources for interventions, and a complete lack of oversight and accountability in the system. As a result, we have a situation where hundreds of children are being denied an education because the system has drifted into ignoring a problem.

Of course, we will eventually pay for this practice, because in the Department's own words, we are taking the most vulnerable children and applying a practice that will lead to *"substance abuse, violence, suicide attempt, risky sexual behaviour, pregnancy, delinquency-related behaviours, injury, and illness"*. All of these things are, ultimately, more expensive and more devastating than funding proper and appropriately timed interventions. So why is the system devolving into giving up and watching it happen?

The answer has to do with a lack of good options and clear processes to support educators.

Many school administrators expressed a mistaken, but sincere, belief that there was no way to have a child learn outside the common learning environment. Others expressed reluctance to push for funds not in the budget because advising the District or Department that a child's rights would be violated absent more funding could be a bad career move. Other files show a lack of training and support in proper inclusive education methods which might have headed off the crisis.

It is also true that partial day plans often are used after the system has failed to support a child in their younger years. Delayed assessments, a lack of supports, compositionally challenging classrooms, and a failure to use integrated services soon enough all lead to situations where the child becomes difficult to accommodate in the common learning environment because help arrived too late.

Essentially, too many school personnel are seeing only one trajectory: muddle through in the regular classroom until things become untenable, and then eventually banish the child to partial day once this point has been reached. This is not the only possible trajectory – it cannot be – and we believe that providing clear options and tools to teachers and schools will be the best way to reverse this trend of giving up on children.

We also suggest that a more vigorous system of spot audits and reviews of inclusion files generally will create incentives for school administrators to intervene more aggressively. Right now, the system has incentives that work against children. If a school leader pushes for adequate resources or communicates urgency to the District or Department, they may be seen as difficult and may pay a career price. If they stay silent when a child is at risk and then send the child away on a partial day plan once the problem gets worse, they have avoided bothering their superiors and the only negative impacts are on the child and their family.

There is no rule that can foresee every child's unique needs. That will always be best assessed by those working directly with the child. However, the Department can create incentives through clear goals and regular reporting which can create motivation for front line school personnel to make sure that when a child struggles the situation is treated with urgency, not bureaucracy. Mandates to reduce the use of partial days, spot audits of files, and policy which requires results-based planning can all create incentives that put the needs of the child ahead of the needs of the system.

With this report and the accompanying legal guidance memorandum, we are doing two things. First, we are providing a legal guidance memorandum showing the steps which must be taken before varying the common learning environment for a child. While this may appear to be placing burdens on schools, we are also adding certainty – while these steps must be followed, when they are followed the school will be on solid ground. By making the steps schools must consider public knowledge, and by committing our own office to using these steps when we review a file, we will provide more options and more certainty to educators.

The second thing we are doing is providing recommendations in this report aimed at expanding the toolkits available to schools. We believe that better resources, better oversight, and better training can work.

Whether in the Department, a District office, or a classroom, we do not believe that people in the education system want to make giving up on the toughest cases the norm in New Brunswick. We suspect that the lack of resources, direction and oversight has created a boom of bad practice through partial days programs. With more resources, proper oversight, and regular professional development, we believe that we can create a path forward which is neither forcing schools to ignore unsustainable disruptions nor banishing children and forcing them to prove themselves worthy of an education.

## RECOMMENDATIONS

It should be noted that our follow-up discussions with senior Department leadership was extremely positive. While this report has been blunt in its concerns regarding the initial response, when we reviewed our findings with senior leadership at Education and Social Development we received thoughtful and constructive responses.

While we believe that the legal requirement that children should receive education during the school day can be clarified immediately, we recognize that breaking the system's reliance on law-breaking will require strategies aimed at improving resources, training, and clarity of policies. This will take work. Department leadership offered thoughtful ways to begin

addressing the overuse of partial days and some of those suggestions have become recommendations herein. That is how the oversight process is to work and the openness and creativity of Department leadership must be noted.

With that said, the Advocate makes the following recommendations.

### **Actions to be taken by the Department of Education and Early Childhood Development**

1. We recommend that the Department clarify its legal position regarding partial days by September 2024. This clarity should include the following components:
  - (a) A clear statement on the legal authority granted by Section 12(4) of the *Education Act*, clarifying that it permits variations of the common learning environment but not the removal of educational services during the school day unless (1) there is an expert recommendation on file explicitly affirming that a reduction in learning time is in the child's best interests even if services were available or (2) there is an undue hardship case made specifically on the question of why services cannot be provided in an alternate setting given proper resources; and
  - (b) A school claiming undue hardship must reflect, in the child's file, a genuine exploration of other services, supports and accommodations and an explanation as to why implementing those supports would constitute an undue hardship; and
  - (c) Separate undue hardship processes must be done for the variation of the common learning environment and for any proposed removal of educational services for part of the school day.
2. The Department should provide training and support materials for administrators on implementing Policy 322 and the legal duty to accommodate, including the substance of the duty to accommodate, how to consider and document variations of the common learning environment, and what considerations of supports and accommodations must be made prior to any claim of undue hardship. Training should also include awareness of tertiary services, promising practices in short-term therapeutic interventions, Trauma-informed practice, and interdepartmental collaboration. This should start within the 2024-25 school year.

3. The Department should expand the toolkit of educators in the area of inclusive education to ensure that best practices for accommodating students in the common learning environment, or teaching methods which make the common learning environment more inclusive, are implemented. Consideration should be given to partnering with university education departments to create model teaching schools where best inclusion practices are modelled, and teachers can observe and learn from these model schools. One promising model is found in Washington State through the Ruby Bridges Elementary School and the Faculty of Education at the University of Washington.
  
4. The Department should adopt a policy with standards and oversight of partial day programming in schools by March 2025. This policy should include the following components:
  - (a) An obligation for schools to report each use of a partial day plan, and for the Department to track numbers and investigate areas with above-average use of the technique;
  - (b) Clear direction on the types of services to be considered and provided when appropriate for students outside the common learning environment, and a clear statement of the school's obligation to provide those services;
  - (c) A direction that integrated services and common planning between Departments are to be used once a student is placed on a partial day program;
  - (d) Strict time limits on how long a student can remain on a partial day program before there is an obligation on the school to review and intensify supports;
  - (e) Removal of arbitrary limits on tutoring and academic support and a statement obligating schools to provide sufficient services to ensure that the student can return to school smoothly and seamlessly;
  - (f) Guidelines regulating the planning to be done between school years when a child ends the school year still on a partial day program;
  - (g) Guidelines regulating the use of conditions for return and limiting the arbitrary expansion of suspensions for children with disabilities;
  - (h) An automatic external review of any partial day program still in effect after 90 days;
  - (i) An obligation for children and families dealing with partial day programs to be notified of the services and contact information of the Office of the Child and Youth Advocate;
  - (j) Clarity on when and how to use tertiary services, community partners, and other supports;
  - (k) Appropriate use of district funding flexibility to allow for short-term therapeutic interventions; and
  - (l) Proper and consistent reporting of partial day plans, including enforcement of requirements for district signoffs and clear milestones.

5. By the start of the 2025-26 school year, the Department should have in place either a central fund managed by the Department, or budget flexibility for School Districts to create funds, which can be used by a school to provide services for students whose time in the common learning environment is varied. These interventions should be used in a manner consistent with Policy 322 and the Advocate’s legal guidance appended to this report – that such interventions are to be temporary, grounded in effective pedagogy, documented to be in the child’s best interest, documented to be the most inclusive practice available, and delivered with the aim of returning the child to the common learning environment as soon as possible.
  
6. By the start of the 2025-26 school year, the Department should have in place a rigorous oversight program for partial days, including proper monitoring of the standards outlined in the Policy proposed in Recommendation 4 and a program of spot audits of partial day files to see if there were adequate early interventions and if laws and policies are being followed.
  
7. The Department should take further steps to address compositionally-challenging classrooms, most urgently those in Grades K-2, in the next twelve months. It is better to intervene early than to place children on partial days later. These could include targeted class size reductions, additional specialized teachers, and/or increased supports and interventions for students at risk in early grades.

#### **Recommendation to the Department of Social Development**

8. By January 2025, the Department should have in place training and guidelines for Social Development personnel advocating for children with partial day or other personalized learning plans in the school system, and a policy and protocol in place to ensure independent educational advocates for children in care when appropriate.

#### **Recommendation to the Departments of Health, Social Development and Education & Early Childhood Development**

9. By January 2025, the three Departments should have a protocol in place to immediately ensure integrated services and planning for any child on a partial day program. This should ensure a “Jordan’s Principle” style arrangement in which service is provided to a child as soon as the need is established and disputes over which Department should pay can be adjudicated afterwards. The Departments should consider a similar regulatory

regime for this practice as exists under the *Child and Youth Well-Being Act* and its enhanced provisions for multi-departmental planning.

### **Follow-up Actions to be Undertaken by The Office of the Child & Youth Advocate**

1. The OCYA has appended to this report a Legal Guidance Memorandum on the inclusive education policies contained in Policy 322 and will make workshops on its contents available to schools, teachers, public servants and parents.
2. The OCYA will begin conducting spot audits of partial day files in September 2025, using the Advocate's authority to compel the production of records under the *Child, Youth and Senior Advocate Act*.
3. The OCYA will conduct recommendation monitoring of this report and the Legal Guidance Memorandum appended hereto and report to the Legislative Assembly by December 2025.
4. If the legal standards contained in this report are not accepted by the Department of Education and Early Childhood Development as set out in Recommendation 1, and disagreement cannot be resolved between the Advocate and the Department, the Advocate will explore options under provincial statute to bring an application to the Court of King's Bench to clarify the limits upon schools withdrawing educational services under Section 12(4) of the *Education Act*.

**RESPECTFULLY SUBMITTED** to the Legislative Assembly this 30<sup>th</sup> day of May, 2024.

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Kelly A. Lamrock, K.C.

Advocate

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# **APPENDIX: DEPARTMENT CORRESPONDENCE**

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Mde. Julie Mason and Mr. Ryan Donaghy  
Deputy Ministers, Education and Early Childhood Development  
Province of New Brunswick

April 29, 2023

Dear Ms. Mason & Mr. Donaghy:

**Re: Partial Days in New Brunswick Schools**

As you are aware, this Office is finalizing its review of inclusive education and variations to the common learning environment. One practice we have examined at length is the use of what most districts call “partial days”. A “partial day”, for the purpose of this investigation, occurs when:

- (1) a student is instructed by the school and/or district to not attend school during times when their peers are generally attending school, and
- (2) for at least part of the time the student is not attending school and their peers generally are, the child is not receiving educational services in an alternate site but is simply at home and/or under the care of their parents without educational service providers working with the child.

We have found approximately 450 reported cases of partial days in New Brunswick school districts and some instances where districts claim to be using the practice under a different name and thus assert that they do not, and do not have to, track how widespread the practice is.

As I have noted before, as I read the *Education Act*, once a child meets the criteria for free school privileges under Section 8, there are only three sections of the *Education Act* which would grant legal authority for a child who meets the criteria for free school privileges to not be in school with their peers. Those instances are:

- (1) A *bona fide* disciplinary suspension under Section 24 of the *Education Act* and which follows the procedure established for discipline and suspension under Policy 703 for discipline;
- (2) The placement in an alternate setting under Section 12(4) of the *Act*, which requires the “provision of educational services”, documented adherence to Policy 322, Section 6.4.3; or
- (3) A lawful and legitimate decision of the parent to keep the child out of school for one of the acceptable reasons under Section 16 of the *Act*.

I can find three other provisions underlining the legal requirement for students to attend school – Sections 13, 14 and 15 of the *Act* – but I cannot find any other section which authorizes an exception to the requirement that students be in school.

When our Office reviewed partial day numbers and procedures of districts, we found a high incidence of students whose plan involves:



- (a) reduced hours of attendance at school,
- (b) an absence of educational services being provided during the time the student is not permitted to attend school, and
- (c) an absence of any record of what alternatives and options were considered for instruction to continue in the common learning environment or even for the provision of programs and services at home or in another location, and
- (d) an absence of any stated reason why undue hardship would result from more inclusive alternatives to the partial day plan.

Yet Section 12(4) of the *Act* clearly requires the provision of programs and services. It does not contain language that permits the discontinuance of programs and services. It also contains a reasonableness clause which is generally understood to require some record of consideration of alternatives before exercising the power it bestows. You can read below with my emphasis added:

*12(4)The superintendent concerned **may deliver programs and services** for pupils requiring a personalized learning plan to a pupil at the pupil's home or other setting if the pupil is not able to receive the program or service in a school due to:*

- (a) the pupil's fragile health, hospitalization or convalescence, or*
- (b) a condition or need that requires a level of care **that cannot reasonably be provided** effectively in a school setting.*

Further, in the partial day plans we reviewed, there was no attempt to follow the disciplinary process and so Section 24 cannot apply. Nor were any of the acceptable reasons for absence listed under Section 16 present.

My concern is this – school districts must follow the law. If the use of partial day plans excludes children from receiving school privileges while their peers are in school, what is the legal authority for this action by districts? Does the Department take the view that one of the above sections apply? If Sections 12, 16 and 24 do not apply, by what legal authority is the child allowed to be absent from school while the school is operating, and their peers are attending?

My statutory duties require me to ask that question. School districts denying services to hundreds of children without legal authority, simply because they do not wish to do so, would be a very serious matter. It would be one thing if the Department has a different view of the law than the Advocate does. It would be another altogether if the Department and Districts are not even trying to comply with the law. I am assuming that this is a case of the former and not the latter.

This concern has been raised by this Office for over a year now, on an informal basis. I have been told informally by Department officials that they do not share my view of the law above. However, they have not shared what legal authority they are citing in support of the school district's authority to deny a student attendance at the school during the school day, and to also provide no programs or services at home during the times when the student's peers are in school.

I therefore must ask on the record what legal authority the Department is relying upon in permitting the practice. As always, I am not asking to see any legal advice the Department has in reaching the conclusion that some section of the *Education Act* allows the practice. I do not need to see the advice leading to the Department's conclusion, I only need to have the Department's conclusion on the record. It is, for these purposes, a legitimate answer for the Department to respond that one of the sections I

have noted above is the one they are relying upon. For the purposes of this inquiry, it is only important that the Department advise me of what they consider the legal authority – not that I agree. Prior to my report to the Legislative Assembly, I think it is fair for the Department to have a chance to confirm that they are following the law as they see it.

The following are the questions I would pose to the Department under Section of the *Child, Youth & Senior Advocate Act*. Any response I receive by May 3, 2024 can be included in our report.

Requests for Information

1. When a District places a student on a partial day plan (as defined above), what legal authority does the Department believe permits this?
2. Is the placement of a student on a partial day plan considered a variation of the common learning environment under Policy 322, Section 6.4? Why or why not?
3. Are Districts obligated to meet the tutoring requirements set out in Policy 322, Section 6.4.4 when a student is on a partial day plan?
4. Are partial day plans suspensions within the meaning of Policy 322, Section 6.6? If so, what standards, processes and guidelines does the Department provide to ensure that Districts comply with the provisions of Section 6.6.
5. Does the Department have any standard guidelines for the reporting by Districts of the use of partial day plans?
6. Does the Department impose any requirements for how long a student may remain upon a partial day plan before some review or action must take place?
7. Does the Department have any standards, guidelines or procedures in place for Districts to use when a child on a partial day plan is also in the care of the Minister of Social Development?

Thank you as always for your cooperation.

Respectfully,

  
Kelly A. Lamroek, K.C.  
Advocate



Le 13 mai 2024

May 13, 2024

Kelly A. Lamrock, c.r.  
Défenseur des enfants et de la jeunesse  
548, rue York  
Case postale 6000  
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Kelly A. Lamrock, Q.C.  
Child and Youth Advocate  
548 York Street  
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Kelly Lamrock,

Kelly Lamrock:

Nous vous remercions de nous avoir donné l'occasion de répondre à l'examen que vous avez entrepris au sujet de l'éducation inclusive et les variations de l'environnement d'apprentissage commun dans notre système scolaire public.

Thank you for allowing us the opportunity to respond to the investigation you undertook regarding inclusive education and variations to the common learning environment in our public school system.

Comme vous le savez, la programmation de journées partielles est une stratégie utilisée à titre provisoire et dans des circonstances exceptionnelles pour aider les élèves à réussir à l'école tout en respectant la *Politique 322 - Éducation inclusive* et la *Politique 703 - Milieu propice à l'apprentissage et au travail*. Les circonstances exceptionnelles sont considérées comme des problèmes de santé mentale et de comportement qui empêchent l'élève de participer avec succès au milieu scolaire (voir la page 1 du *Guidelines for Partial Day Programming du secteur anglophone*, gouvernement du Nouveau-Brunswick, ministère de l'Éducation et du Développement de la petite enfance, juin 2019). Bien que le secteur francophone ne dispose pas de lignes directrices similaires, les principes pour les journées partielles sont les mêmes.

As you are aware, partial day programming is a strategy used on an interim basis and in exceptional circumstances to assist students to be successful at school while respecting *Policy 322 - Inclusive Education* and *Policy 703 - Positive Learning and Working Environment*. Exceptional circumstances are considered as "mental health and behavioural challenges that inhibit the student's ability to successfully participate within the school environment" (see *Guidelines for Partial Day Programming (Anglophone Sector)*, Government of New Brunswick - Department of Education & Early Childhood Development, June 2019, p. 1.). While the Francophone Sector does not have similar guidelines, the principles for partial days are the same.

Dans votre lettre, vous avez énuméré plusieurs articles de la *Loi sur l'éducation* qui guident le ministère de l'Éducation et du Développement de la petite enfance (le ministère) pour déterminer si les élèves doivent participer à l'environnement d'apprentissage commun avec leurs pairs. Bien que le ministère soit d'accord avec votre évaluation en principe, nous aimerions souligner qu'il existe des principes de droits de la personne qui entrent également en jeu lorsqu'il s'agit de déterminer ce qui est dans le meilleur intérêt de l'élève et de ses pairs.

Dans sa *Ligne directrice sur l'accommodement des élèves ayant une incapacité (M-12)* (« Ligne directrice »), la Commission des droits de la personne du Nouveau-Brunswick (« Commission ») reconnaît que « Tous les élèves ayant une incapacité, même ceux dont le comportement est perturbateur ou qui constitue de l'intimidation ou du harcèlement, ont le droit de bénéficier d'un accommodement dans la mesure où cela n'entraîne pas de contrainte excessive ». (p. 16).

Le ministère approuve le point de vue de la Commission selon lequel « dans de rares cas, le comportement des élèves, même s'il est une manifestation de leur incapacité, constitue un risque pour leur santé ou leur sécurité ou de celles des autres élèves, du personnel enseignant et des autres membres du personnel de l'établissement. Dans cette situation, le fournisseur de services éducatifs conserve l'obligation de procéder à l'accommodement sans subir de contrainte excessive, mais il pourrait être nécessaire de donner suite aux préoccupations légitimes relatives à la santé et à la sécurité. En pareil

You have identified several sections of the *Education Act* in your letter that guide the Department of Education and Early Childhood Development (the Department) in determining if students should participate in the common learning environment with their peers. Although the Department agrees with your assessment in principle, we would like to point out that there are human rights principles that also come in play when determining what is in the best interest of the student and their peers.

In its *Guideline on Accommodating Students with a Disability (K-12)* ("Guideline"), the New Brunswick Human Rights Commission ("Commission") recognizes that "all students with a disability, even those whose behaviour is disruptive or constitutes bullying or harassment, are entitled to receive accommodation up to the point of undue hardship" (p. 16).

The Department endorses the Commission's view that "there may be rare situations in which a student's behaviour, even where it is a manifestation of a disability, poses a health and safety risk to the student, other students and/or teachers and other staff. While an education provider in this type of situation continues to have a duty to accommodate the student up to the point of undue hardship, legitimate health and safety concerns may need to be addressed. In some situations, placement in a mainstream classroom may not be the most appropriate accommodation" (p. 17).

cas, le placement dans une classe ordinaire ne constitue pas nécessairement l'accommodement le plus approprié » (p. 17).

Le concept de "contrainte excessive" s'applique en harmonie avec toutes les dispositions de la *Loi sur l'éducation*. La *Loi sur l'éducation* ne crée aucune présomption légale en faveur d'un placement en classe ordinaire et la jurisprudence reconnaît :

- que, selon les circonstances individuelles d'un élève, il est possible de l'intégrer partiellement dans une classe ordinaire tout en lui fournissant les services nécessaires à ses besoins ;
- qu'un élève en difficulté peut être exclu de l'école pour des raisons de sécurité légitimes impliquant des perturbations continues en classe qui peuvent inclure, mais sans s'y limiter, une agression physique envers les autres ;
- que les transferts involontaires hors d'une école peuvent être effectués pour des raisons de sécurité.

Les journées partielles sont une variation au concept de l'environnement d'apprentissage commun tel que décrit dans la *Politique 322*. Ceci étant dit, tous les élèves bénéficiant de journées partielles ne sont pas éligibles aux exigences de tutorat prévues par la politique, car ils peuvent être placés en journée partielle pour d'autres raisons que celles énumérées dans la politique. Le ministère estime que les différentes équipes des écoles et des districts scolaires doivent examiner les raisons pour lesquelles l'élève a été mis en journée partielle et évaluer le meilleur aménagement pour cet élève afin de s'assurer qu'il puisse continuer à recevoir des services éducatifs. Le tutorat,

The concept of "undue hardship" applies in harmony with all provisions found in the *Education Act*. The *Education Act* creates no legal presumption in favour of a regular class placement and case law would recognize:

- That depending on the individual circumstances of a student, it is possible to have a student partially integrated into the common learning environment while being provided with the necessary services for their needs;
- That an exceptional student may be excluded from school for legitimate safety reasons involving continuous disruptions in class which may include, but may not be limited to, physical aggression towards others; and
- That involuntary transfers out of a school may be done for safety reasons.

Partial days are a deviation from the common learning environment as described in *Policy 322*. That being said, not all students on partial days would qualify for tutoring requirements under the policy because they could be put on a partial day for other reasons than those enumerated in the policy. The Department believes that the various school and school district teams need to look at the reasons the student has been put on partial days and evaluate what is the best accommodation for that student to ensure they can continue to receive educational services. Tutoring, in its historical sense may not be the best option for that child.

dans son sens historique, n'est peut-être pas la meilleure option pour cet enfant.

Selon les lignes directrices pour la programmation des journées partielles (secteur anglophone), toutes les journées partielles doivent être enregistrées par les écoles et un plan d'aide au retour de l'élève à une journée complète doit être élaboré. Le ministère relève les chiffres du plan (annuellement) et procède à une évaluation périodique de ces plans pour l'assurance de la qualité. Les districts sont tenus de surveiller le nombre d'élèves bénéficiant d'une journée partielle et leurs progrès.

Bien que le secteur francophone n'ait pas publié de lignes directrices sur les journées partielles, le plan d'intervention de l'élève doit contenir les raisons pour lesquelles l'élève a été mis en journée partielle, ainsi que les aménagements dont il bénéficiera.

Il n'y a pas de limite de temps pour le maintien d'un élève dans le cadre d'un programme de journées partielles car celui-ci doit être individualisé. Ceci étant dit, un plan de journée partielle doit être élaboré en ayant à l'esprit la durée la plus courte possible. Avec le soutien et les services appropriés, on s'attend que la durée de la journée partielle diminuera. Une telle diminution devrait se produire au fil des semaines/mois et non pas des années.

Quant à votre question sur les élèves pris en charge par le ministre du Développement social, il n'y a pas de directives spécifiques, mais pendant l'élaboration du plan de l'élève, l'équipe se penchera sur les réalités et les besoins de l'élève.

Under the *Guidelines for Partial Day Programming (Anglophone Sector)*, all partial days are to be recorded by schools and a plan for supporting the student's return to full day must be developed. The Department pulls the plan numbers (annually) and periodically evaluate those plans for quality assurance. Districts are required to monitor the number of students on a partial day and their progress.

Although the Francophone Sector has not published guidelines on partial days, the student's personalized learning plan must contain why a student has been put on partial days and the accommodations that the student will receive.

There is no time limit on how long a student can remain on a partial day plan as it must be individualized. But a partial day plan must be developed with the shortest amount of time in mind. There is an expectation that with the appropriate supports and services, the length of the partial day will decrease. This decrease should happen over weeks/months and not years.

As for your question around students in the care of the Minister of Social Development, there are no specific guidelines but while the student's plan is being developed, the team would look at the student's realities and needs.

En conclusion, le placement dans un programme de journée partielle peut, dans certains cas, être justifié selon qu'une "contrainte excessive" a été prouvée dans le contexte d'une tentative d'adaptation d'un élève dans une classe ordinaire ou s'il est dans l'intérêt supérieur de l'enfant, par exemple pour des raisons de santé mentale. Tout plan doit être élaboré en temps utile.

Nous attendons avec intérêt de recevoir votre rapport et de continuer à travailler avec vous dans l'intérêt des élèves et du système scolaire du Nouveau-Brunswick.

Veillez agréer l'expression de mes sentiments les meilleurs.



Julie Beaulieu Mason  
Sous-ministre

In conclusion, placement in partial day programming may, in certain cases, be justified depending on whether "undue hardship" has been proven in the context of attempting to accommodate a student in a mainstream classroom setting or if it is in the best interest of the child, such as for mental health reasons. Any plan must be developed in a timely manner.

We are looking forward to being able to receive your report and to continue working with you to support the best interest of New Brunswick students and the school system.

Sincerely,



Ryan Donaghy  
Deputy Minister

