New Brunswick
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Addendum to the Advocate's Report

September 8, 2023

On August 23, 2023, the Department of Education and Early Childhood Development amended Policy 713 once again. The Minister announced changes at a press conference and the updated Policy 713 appeared upon the departmental website. The Minister stated during this press conference that these changes address "all" of the concerns outlined in the August 15, 2023 report from the Office of the Advocate. The Minister is the final arbiter of whether or not the Department has made all the changes to the Policy which it intends to make. The Advocate is the final arbiter of whether or not the Advocate's concerns have been met.

Have "All" The Advocate's Concerns Been Addressed?

Two of the main concerns expressed in my report – the failure of the Department to apply the law regarding the child's evolving capacity and the failure of the Department to follow the *Right to Information and Protection of Personal Information Act* with regards to publicly releasing birth names and gender without the child's consent – have not been addressed at all. Those issues are addressed at length in the report and need no further elaboration here.

The Right to Accommodation

The changes do address the problem of ordering psychologists and social workers to violate their professional ethics. This has likely saved the professionals some uncertainty and saved the Department the time of contesting grievances they may well have lost. However, I did raise the additional problem that these professional groups have made it clear that calling students by the name they wish to be called is an essential accommodation of that student's need. How schools can reject this professional advice for accommodation of 2SLGBTQIA+ students without violating Section 15 of the *Charter* is an issue not addressed by the changes.

The changes also allow for a student to be addressed by their chosen name without parental consent if they are speaking one-on-one with school professionals for support and also if the student "is communicating with appropriate professionals in the development of a plan to speak to their parents." This clause is open to a variety of interpretations. It is in addition to language allowing the use of preferred names by school professionals, so it clearly intends some additional use of the preferred name. It does not limit who can use the preferred name and pronouns without consent, so on its face it appears to suggest that once a child has started the process of working on a plan, school personnel can use the preferred name without consent.

As of August 27, 2023, there was no published guidance to school districts on how to interpret this clause. For the policy to accord with both the *Education Act* and the *Interpretation Act*, one must deem all provisions to be remedial and give them a fair, large, and liberal interpretation to best ensure the objectives of the governing statute. One would therefore presume the words have their plain meaning -- that when a student is in the process of communicating with appropriate professionals in the

development of a plan to speak to their parents, any school professional, including of course teachers, may use the student's preferred first name. The public comments since leave the impression that the Department wishes for a different interpretation, however, what is written seems quite clear.

What is clear is that, with this change, the Department has accepted the clear evidence that it is unethical and ineffective for professionals working with children to call them names they do not wish to be called. Why the Department accepts this but still insists upon teachers and principals calling children names they do not wish to be called is an explanation they have not chosen to offer.

Equality Rights and Discrimination

The Department has attempted to address the issues of vagueness in drafting by (1) now explicitly stating that parental consent is required for the use of a trans child's preferred name and (2) redefining the "formal" and "informal" use of a child's name to define all classroom interactions, extracurricular and co-curricular activities, and classroom management activities as "formal".

I will note, for clarity, that any use of "formal/informal" distinctions in my report uses the definition as commonly understood at the time of the report – "formal" denotes legal documentation such as official records and "informal" denotes all daily interactions. As for the Department's redefinition, it appears to have been done in haste. The definition of "formal use of name" explicitly includes extracurricular and co-curricular activities, yet the definition of "informal use of name" applies to "social interactions outside of classroom interactions". Thus, it appears that some interactions in extracurricular or co-curricular settings are now both formal and informal. If this was deliberate, the purpose escapes me.

Defining extracurricular and co-curricular activities and all classroom interactions as having the same status as the formal, legal record is a policy choice that is, I believe, unprecedented within the Department. It is unclear if the Department sought legal advice on the unintended consequences of that choice. After all, it is a legal impossibility for formal things to happen at an informal meeting. Thus, if the use of the name is a formal, legal act then extracurricular activities are now formal, legal proceedings. As such, other legal obligations may also attach to these activities.

Two obvious categories of concern would be collective agreements and inclusion obligations. If activities now have formal, legal status then collective agreement provisions around staffing, qualifications and work of the bargaining unit may expand and create obligations for districts which have financial obligations. If these are unbudgeted, other services for children may suffer or districts may face deficits. Further, if extracurricular activities now have formal, legal status that may affect the scope of obligations for inclusive education supports for students.

If asked for a practical example of this concern, I would cite school dances. Currently, these extracurricular activities are generally run with a lot of volunteer labour. Students with special needs are not generally supported with educational assistants and other supports the way they would be in a classroom setting. If a dance is now a formal" proceeding in policy where one cannot address a student without use of the formal, legal record, other formal obligations may attach. Volunteers may be asked if they are doing work of the bargaining unit. Staffing levels may need to meet classroom levels. Students who require accommodation may have a right to that, because otherwise they are being denied access to a formal gathering with legal status.

I cannot say for certain that these issues will arise. Were I rewriting policy to designate extracurricular gatherings as having "formal" status, I certainly would take time to get guidance on that point. The Advocate's Office will be seeking legal counsel on these issues, and I urge the Department to do the same. One problem with hastily changing rules that target a minority group is that the new rules can cause unintended consequences when applied more broadly.

The New Policy Is More Explicitly Discriminatory

The largest concern with these latest changes is that they create new human rights issues. As I wrote in the original report:

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

Indeed, Policy 713 is now more specific but it is thus more overtly discriminatory. One problem is that now restrictions on choosing the name you want to be called are clearly targeted at only trans and non-binary students. The first revised policy target names chosen for the purpose of changing gender identity. Now it targets a class of people. As written**, the policy actually bans trans and non-binary students from using any nickname it all, while explicitly extending that same privilege to any student who is not trans or non-binary.** In the definitions section, there is now a clear direction to make the rules for use of a nickname dependent only upon whether or not the student is part of a defined group.

> *Preferred first name refers to a name that has been identified by a transgender or non-binary student to be used in place of their legal first name.*

The Minister has stated publicly that there is a general acceptance of students using nicknames for any purpose but for gender identity, and that teachers "can always ask" whether or not a student is trans or non-binary before agreeing to use a nickname. This creates at least two serious issues.

Let us say, for example, that 14-year-old William, born male, wishes to be called "Billy". The teacher, thinking of the males who sing "Piano Man" (Joel) and "Rebel Yell" (Idol), starts calling the child "Billy". On the first test, however, the child writes their name "Billie". This, of course, could refer to the male singer of "American Idiot" (Armstrong) or the female singer of "Bad Guy" (Eilish) or even the Billie who sang "Strange Fruit" (Holliday). The stated Departmental policy is now that the teacher has a duty to ask not just the purpose of the name change, but if the student is trans or non-binary, because the Policy now makes the rules around nicknames dependent not upon the name but the gender identity of the student making the request.

Asking if someone is a member of a minority group before deciding which rules apply is a really bad idea, with a host of legal and ethical implications.

First of all, the question itself is inappropriate. A student does not have to disclose their gender identity to teachers. It is also a process that can cause tremendous embarrassment to children. Just as trans people do not like to be deadnamed, I do not expect that cisgendered students will universally enjoy having to deny that they are trans or prove their cisgendered status to gatekeepers at their school.

Secondly, asking if someone is a member of a minority group before deciding which rules apply is really textbook discrimination. Through history, we have seen these examples.

c.1950:

Q: May I have a credit card?

A: That depends. Are you a married woman? If so, your husband has a right to know.

c. 1960:

Q: May I eat at this lunch counter?

A: That depends. Are you black?

c. 1970:

Q: Is this country club accepting membership applications?

A: That depends. Are you Jewish?

c. 1980:

Q: Can I just go to the prom with my friend, who is male like me?

A: That depends. Are either of you gay?

c. New Brunswick, c. 2023

Q. The register says "William", but can you call me "Billy"?

A: That depends. Are you trans or non-binary?

I am sure that people making this Policy are decent enough that these examples will be jarring to them. The historical pattern, however, needs to be bluntly pointed out because it is jarring to see these old lines being crossed once again with a new minority group.

Some might point out that it is often an acceptable use of the form to protect children from decisions they lack the capacity to make, as we do when we answer "Can I drive?" with "That depends. Are you under 16?" The vital difference is that, in this case, government has now conceded that children under

16 are capable of choosing the name they want teachers to call them. Only trans and non-binary children cannot make that choice, and the only reason provided in the new Policy 713 is their status as trans or non-binary people.

Policy 713 is also now discriminatory towards certain parents as well. Far from cementing parental rights to know what one's child is being called at school, the policy now gives that right to only one group of parents. If the policy provided a broad parental right to decide what children are called by teachers, that would at least be consistent. Intrusive and statist, yes, but consistent. However, parents do not have that right, because the Minister has been clear that the teacher's duty to ask is only present if they suspect that a child is trans or non-binary. If parents object to their child's choice of name on religious, cultural or other grounds, they do not have the right to be informed or the right to veto the name choice. Parental rights now depend on the gender identity of their child as well. This is an odd way to support parental rights.

The bottom line is that Policy 713 is now explicitly discriminatory. Quebec, Nova Scotia, Prince Edward Island and Newfoundland and Labrador [1] all provide children with the freedom to choose what name they wish to be called in their daily interactions, regardless of their gender identity. New Brunswick should not stand alone in its willingness to discriminate.

Advice to Districts

School districts and educators are now in an incredibly difficult position. The Department has now clarified its intention to order educators to engage in *prima facie* discrimination and to prefer departmental policy to the advice of doctors, psychologists and social workers. At the same time, there is now legitimate doubt as to whether or not the order is legal.

On this point, I should be clear that the Department's policy, and my analysis of it, have not been tested in court. No lawyer should ever say with 100% certainty what a judge may do. Even the nine Supreme Court justices – all excellent lawyers – sometimes differ in how the law should be applied in a given case. The fact that my considered analysis is that there are legal problems with Policy 713 does not predict with 100% certainty that a court will agree.

At the same time, teachers and school districts are independent actors and if they engage in actions which breach privacy or human rights law, the fact that they were following orders may not shield them from legal accountability for those actions. If they choose to follow the government's instructions and begin deadnaming children, using their official record name without consent, and asking children if they are trans, they may find themselves as respondents in the legal response. And the government cannot say what a judge will do with 100% certainty, either. The Ombuds did provide an opinion which shaped my analysis of privacy law, and her interpretation of that statute is entitled to some deference at law. Already two well-respected constitutional law experts have publicly shared their analysis of this issue and it aligns with the analysis in my report. The potential for legal liability of educators and districts who apply Policy 713 as worded must also be acknowledged.

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[1] Quebec and Nova Scotia do so at ages 14 and 12, respectively. P.E.I. and Newfoundland have no age limits. In the interest of accuracy, I should note that in the original report I stated that Newfoundland also used age 12 as the threshold, but in fact they are even more permissive than that.

Educators and districts find themselves in a situation which could be likened to a soldier given an order to violate the Geneva Convention. The order is clear but dubiously legal. The authority issuing the order has the ability to give the order but not the ability to guarantee its legality. The means to resolve the legality of the order will not provide an answer before the order must be followed or not followed. Yet if the action is later found to be illegal, you may face consequences for having done it.

If government really wanted to take educators out of this dilemma, and truly believes in the legality of their new Policy 713, I note that the Attorney-General can ask the Court of Appeal directly for a declaration of legality by way of judicial reference. Suspending the changes until the Court of Appeal can hear and dispose of a reference would be a wise move.

Of course, a judicial reference is a power of the Attorney-General, but not the Advocate. All the Advocate can do is interpret the law as best they can in carrying out their statutory functions. For the record, it is my interpretation that privacy and human rights law, as well as provisions of the *Education Act*, conflict with the changes to Policy 713. As ministerial policy is trumped by legislation, conflicts between statutes and policy can be resolved by districts. They must follow statutes first. As well, provisions of Policy 703 (which explicitly forbids discrimination on the grounds of gender identity) also conflict with Policy 713, and districts can resolve conflicting policies.

Because districts have the legal authority to follow statute law and to resolve policy conflicts in favour of the interpretations that support the *Charter* and the *Human Rights Act*, it is the position of the Office of the Advocate that school districts and educators also the legal duty to do so. We will advocate on individual files with the expectation that districts will exercise their authority so as to avoid violating children's human rights. If courts subsequently disagree, the Office of the Advocate will update our internal policy accordingly.

Because we will be expecting school districts to comply with the law and resolve conflicts between Policy 713 and other statutes in favour of those statutes, I have updated the proposed district policy so that my recommendation is consistent with Policy 713 as written.

The Advocate's Role Going Forward

The general practice of the Office of the Advocate is that we carry out reviews, make recommendations to Authorities such as government departments, and report to the Legislative Assembly on the effectiveness and relevance of services to children and youth . The Advocate is an officer of the Legislative Assembly, meaning that we provide information and review of government departments in order to assist the legislative branch of government in carrying out its oversight function. The Advocate also has a legislated duty to provide information and advice to communities, and we therefore provide facts and analysis to assist in public debate.

The corollary of this is that the Office of the Advocate provides insights for public debate but does not become part of the debate. In my eighteen months as Advocate, my practice has been to issue reports or analyses, spend 48-72 hours answering questions and explaining the findings, and then let the public and elected officials take the debate where they will. In the case of Policy 713, this Office conducted a review of the decision to reopen the Policy because there was a departure from the usual practice and a vulnerable minority was affected. The Office also provided a legal analysis of the new policy as per our usual process. Three days after the review, we significantly limited public statements.

As we all know, the Advocate's final report on this matter arose from the unusual (but perfectly legal) decision of the Legislative Assembly to pass a motion asking that the review be done. This motion, supported by a majority of Members with representation from all three caucuses, carried significant weight, and we respected that desire of the majority. I believe the report was thorough and substantive given the quick timeline we were asked to meet.

I can also affirm that government was respectful of the process, even though it was apparent that the Advocate had significant concerns with the Policy. The leadership at the Department has been professional, prompt, and forthcoming when asked for information. Cabinet has been nothing but respectful of the Advocate's mandate to offer advice free from pressure or undue influence. Just as government has respected the role and the process, I must as well. It is the duty of an Advocate to make recommendations, but the debate over whether or not those recommendations happen is now up to citizens and those they elect (and courts acting within their unique role, of course). It is important that the Advocate be able to address a number of issues affecting children and seniors without any sense that past disagreements have shaped future analysis.

This addendum is being offered because there was a public statement that all of my concerns had been addressed, and there was corresponding public interest on that point. For the record, the Department did not ask if my concerns were addressed and if they had, I would have provided them with the feedback I am providing here. I am also providing that clarity to districts because it is their actions which will be subject to our individual case advocacy files. Going forward, our Office will offer comment if the actions or findings of the Office are questioned or misrepresented. However, it is not the role of the Advocate to offer instant responses or counterarguments to each development. Declining to be part of the political debate is not a retreat from our report. The report stands and can be quoted from unless and until the Advocate rescinds it. It is not the role of the Advocate to offer fresh quotes to each news cycle. Declining to do so does not change the findings of the report.

In short, this addendum updates the report to encompass recent changes. What happens now is up to the Legislative Assembly, courts and tribunals, and informed citizens. I wish them wisdom in their deliberations.