New Brunswick Child & Youth Advocate

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HUMAN RIGHTS ARE NOT A BARGAINING CHIP

Recommendations To Protect The Rights of Children With Special Needs in New Brunswick Schools

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OVERVIEW

It is a fundamental principle of law that parties cannot contract out of human rights. Management and a union may not meet and bargain away the human rights of others. Even if a management team and a union agree, they cannot, for example, agree to discriminate against people of a given race in hiring or to impose religious rituals on employees. Human rights are non-negotiable.

Despite this principle being clear, legally and morally, it is not being followed when it comes to the rights of children with special needs in New Brunswick schools. Children with special needs have a legal right to reasonable accommodations to help them learn. There is a moral urgency to this right. A child who struggles to learn early on can quickly fall behind, lose interest, and develop issues that will be harder to fix. Children have a right to the help they need to learn, and the primary consideration should always be "what helps this child learn?". One cannot claim to put children first, and then place the wishes of others ahead of the child's needs. Putting children first has to actually mean what the words clearly say.

A number of students – a small number, to be sure, but still some children – rely upon familiarity, trust and routine in order to feel safe and be able to learn. Sometimes they have a need for routine due to a unique condition, as with some learners with autism spectrum disorder. Some have conditions which require physical care which is intimate and frequent, and these rituals are best carried out by someone the child knows and trusts. And sometimes children have disruptions and trauma in their lives, like the death of a parent, that make their attachment to other caring adults in their lives even more essential.

For these children, educational assistants are true heroes. The work these assistants do is vital in providing children with the security and support they need to be able to learn from their teachers and make friends with their peers. Those familiar, caring faces are a constant that means a lot to these few children. When children must deal with feeding tubes and catheters that make them feel vulnerable and different, or when children process the world around them differently, having an assistant they trust and know is an educational need.

For a variety of reasons, the unions that represent educational assistants have often negotiated hard for clauses that allow assistants with more years of service to identify a school or assignment they would prefer and to claim that job over a less-tenured colleague. This practice, commonly called "bumping", can even be done if the less-tenured worker is already doing the job. By this mechanism, a child can discover on short notice that the worker they have come to know and trust has been replaced by another. For some students, as long as the training and school leadership is sound, that can possibly work just fine. For some children the change can be intensely disruptive. In some cases, the familiarity and routine is an essential educational need of the child.

That familiarity is so essential that in 2008, the Government of New Brunswick negotiated a clause in the collective agreement governing educational assistants called the "delicate

relationship" clause. It allows a school to provide evidence from an educational professional such as a psychologist, counselor or educational specialist that the child's need for familiarity is an issue that will impact their learning, socialization or development. And if that is so, the child's need for continuity trumps the union's desire for the doctrine of seniority – as it should in any system that claims to put children first.

The Advocate's inquiries have led to a disturbing finding -- not only are some school districts not using this clause, none provided the Advocate with any evidence that they are even asking expert advice on when it would benefit children. Yet we know that these cases of children who need familiarity exist.

Several families and professionals have contacted the Advocate's Office for help. The absence of even a good faith search for evidence and the implausibility of so few children requiring the accommodation leads to an unsettling possibility. For the sake of labour peace, it appears that both educational leaders and union leaders have collaborated to avoid making this accommodation known and understood by vulnerable children and their families. If so, that would amount to a collaborative effort to deny children with disabilities of their human rights.

There are two important principles of law and policy at play here. The first is that a student with disabilities has a right to have their educational needs be the first consideration in the provision of services, and that their interests cannot be subrogated to any other consideration. The second principle is that parties cannot contract out of human rights law and the rights of a third party cannot be bargained away by two parties in reaching a contract or Collective Agreement.

The Advocate has raised this issue in previous reports, most recently in *Easier To Build*, our exploration of the needs of children in care and children with complex needs. No action or even acknowledgement has followed from government. As such, the Advocate now exercises his discretion under Section 13(1)(f) of the *Child, Youth and Senior Advocate Act* to report the matter to the Legislative Assembly prior to the looming date by which the Department of Education and Early Childhood Development will negotiate protocols with the union on how these rights will be managed in the future.

HUMAN RIGHTS ARE NOT A BARGAINING CHIP

In the case of *Newfoundland Association of Public Employees v Newfoundland (Green Bay Health Centre)* (1996) 2 S.C.R. 3, the Supreme Court states the matter in clear language:

"Human rights legislation sets out a floor beneath which the parties cannot contract out."

The reasoning for this is important to frame our review of this issue. At paragraph 21, the Court notes that the prohibition on contracting out of statute is intended to prevent exploitation:

"If contracting out were allowed, those without bargaining power may be coerced or forced to give up their rights"

In short, adults cannot meet at a negotiating table where children with disabilities have no voice and simply agree that their human rights can be taken away. No group of adults would accept the closed-door bargaining away of their rights. It is not acceptable when we do the same to children who can't fight back.

THE DUTY TO ACCOMMODATE

It is established in law beyond any reasonable debate that children with disabilities have a right to accommodations to help them learn and develop, unless a school district can show that the accommodation will cause undue hardship to the school or other children. The *Moore* decision established pursuant to provincial human rights legislation, that if a child requires a service in order to meet the educational goals appropriate to their age, a school district must provide it even if that service must be purchased from private sector providers. (A lack of budgeted funds is not an undue hardship on government, courts have ruled, as long as government overall could find the money through balancing priorities; there is an obligation on government to consider financial alternatives). The Supreme Court of Canada has been very clear that this is a constitutional principle as well. The right to be accommodated is a constitutional right under Section 15 of the *Charter of Rights and Freedoms*.

It is also a right passed and guaranteed by this Legislative Assembly through the *Human Rights* Act, and several tribunals have found schools have a duty to make accommodation of children a priority even when it inconveniences adults. The New Brunswick Human Rights Commission has developed a Guideline on Accommodating Students with a Disability (K-12). Article 8.2 of the guideline specifically addresses the duty to accommodate with respect to staff and collective bargaining as follows:

- Ensure that collective agreements do not conflict with the need to reasonably accommodate students with a disability short of undue hardship;

- Interpret and apply collective agreements, classifications, seniority lists, bargaining unit certifications and service contracts in a way that permits reasonable accommodation of students with a disability short of undue hardship; and

- Ensure that members and staff have appropriate training on the duties to reasonably accommodate and to prevent harassment/bullying, and on practices and strategies to implement these duties, including inclusion of students with a disability in regular classrooms.

The Supreme Court of Canada has also defined the duty to accommodate for school districts, and the legal duty is substantial. In *Moore v. British Columbia (Education)*, 2012 SCC 61 the Court found that the *quasi-constitutional human rights legislation* places duties on school

boards in providing all necessary accommodations to allow students to access the services and outcomes available to all students. As the Court noted at paragraph 28 of the *Moore* decision:

".... for students with learning disabilities like Jeffrey's, special education is not the service, it is the means by which those students get meaningful access to the general education services available to all of British Columbia's students..."

Further, the Court found that the duty to accommodate was breached when the school district made a decision affecting services to a child with disabilities without investigating and assessing how that decision will affect the child's learning. The Court upheld the order to pay a legal settlement to the child and his family for damages as well as the cost they incurred for private schooling.

To put this in the context of collective agreements and seniority, the parallel should be clear. Both a school district and a union may want to make seniority a factor in matching educational assistants to the schools and children they will work with, but any decision must be open to evidence of what the child needs. And if the child's needs conflict with the labour relations goals, the child's needs must win out. **If a district doesn't assess a child's needs, it can't claim to have met its legal duty to accommodate those needs.**

International law is also clear on our obligations to place the educational needs of children ahead of the demands of adults. The *Convention on the Rights of Persons with Disabilities* (CRPD) provides, under Article 24, that an inclusive education system must ensure that effective individualized support measures are provided in environments that maximize academic and social development. The *United Nations Convention on the Rights of the Child* (UNCRC) provides under Article 23(3) that assistance extended shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving **the fullest possible social integration and individual development**..

Article 28 of the UNCRC requires that governments recognize a child's right to education, while Article 29 requires that the education of the child be directed to "the development of the child's personality, talents and mental and physical abilities to their **fullest potential.**" This right is bolstered by UNCRC Article 6(2) and the duty on government to ensure the development of the child to the maximum extent possible.

One will note that the child's right is to meet their "**fullest potential**", without qualification or limit. It is not their "fullest potential that can be achieved within collective agreements." It is not "their fullest potential possible without causing disagreements with unions." The child has a right to the best accommodations that will allow them to reach their fullest potential, period.

Special attention should be given to the UNCRC in terms of the educational obligations of State parties, as the Supreme Court of Canada has established the principles that all law is to be

interpreted in presumption of accordance with international human rights norms, and that it is to be presumed that the Canadian *Charter of Rights and Freedoms* provides protection at least as great as the norms found in ratified international human rights law.

The existence of the clause in the Collective Agreement allowing districts to consult professionals on a child's needs and exempt some positions from seniority requirements flows from these same international human rights principles. This clause cannot be ignored.

DELICATE RELATIONSHIPS

In 2008, the Delicate Relationship clause (Article 13.09) was added to the Collective Agreement of CUPE Local 2745. This clause gives students who have complex and exceptional needs the right to remain with the same educational assistant (EA) for the duration of the school year if their relationship is deemed essential by District Education Support Services to the student's well-being. In other words, once a delicate relationship between a student and EA is established, the EA cannot lose their position to another EA with more seniority, i.e. they cannot be 'bumped'.

Article 13.09 of the Collective Agreement reads as follows:

> *13.09 Delicate Relationship*
>
> *Where a delicate relationship between an employee and a special needs student is deemed consequential to the well being of the special needs student by a team of student services professionals, the employee shall not be subject to be bumped. Where such delicate relationships exist, the Employer agrees to meet with the Regional Vice-President two (2) weeks prior to staffing for the next school year to inform her of the rationale for such delicate relationships. Two weeks prior to the end of classes for each school year, the Regional Vice-President shall be informed, in writing, where such delicate relationships exist.*

Fifteen years later, we are troubled that although the article appears in the Collective Agreement, an alarmingly few students have been able to avail themselves of this provision. Even more disquieting is the discovery that years pass without any evidence that districts are even asking professionals if they **should** consider use of the delicate relationship clause. We could not find any school district which had a clear policy on when such use would be considered, let alone one which publicly lets parents know how to raise concerns around that issue and be heard.

It is one thing to believe that such an exception should be rare. It is another thing to let years go by and never see a case that requires an exception. To have years go by and never even be

curious enough to seek expert advice for any child whatsoever strains credulity. The evidence and cases we have seen suggest that the New Brunswick education system has adopted a willful incuriosity to the needs of children in favour of maintaining labour peace and convenience among adults. This is legally and morally dubious.

OUR INVESTIGATION

Our office has expressed concerns regarding the practice of bumping educational assistants without a proper evaluation of the best interests of the child, as this is inconsistent with the rights of children to the best available services. As such, the Advocate launched an investigation.

After giving notice of our investigation to the Department of Education and Early Childhood Development, we requested all existing procedural information in place to guide the practice of having EAs assigned to students. This included: policy, criteria, appeal mechanism and application process. From the scant information received, we've concluded that these guiding documents and processes for delicate relationships simply do not exist in New Brunswick school districts.

We also had the following specific questions.

-By school district, how many times has the delicate relationship" clause been invoked or used in the last three years?

-How many times has each district (or the Department) commissioned expert guidance on whether the best interests of the child would be served by invoking this clause?

-How many such uses have led to grievances and how were they resolved?

-How many times has an existing relationship between a child and an educational assistant been changed or disrupted due to the invocation of seniority by a union member?

-In how many of those cases was additional training required for the new educational assistant?

-What steps have districts taken to make parents aware of the delicate relationship clause?

-What formal or informal agreements have been made with the union?

During our investigation, we learned of a trial initiative applying to delicate relationships between students entering kindergarten and their pre-kindergarten attendants. The intent of

this initiative is similar to that of Article 13.09 - the child's pre-kindergarten attendant becomes their kindergarten EA and cannot be bumped by another with higher seniority. The details of the trial are outlined in a Letter of Agreement added to the Collective Agreement in December of 2021 and expiring on February 28th, 2023.

We had the following questions regarding this letter of agreement.

> *-What is being measured and who is responsible for the current evaluation of the delicate relationship trial that ends in February 2023 (e.g. how is this being evaluated? What determines whether the agreement is extended beyond February 2023?)*
>
> *-How does the team of student services professionals evaluate each delicate relationship at the end of the school year?*

We have received no answers from the Department to these questions.

WHICH CHILDREN ARE AFFECTED

Over the years, our Office has advocated for the assignment of delicate relationships in a few notable cases; however, despite our efforts, we did not succeed. As of October 2019, zero delicate relationships had been established in the province since Article 13.09 was adopted.

The following is an example of one such case – Stella (a pseudonym) is a primary level student who had been diagnosed with a gastrointestinal disorder requiring virtually all of her nutrition to be provided through a surgically implanted gastronomy tube (G-tube). While at school, Stella must rely on a specially trained EA to provide her lunchtime feeds or else she is unable to attend. Gastronomy-tube feeding is technically challenging to learn and requires specialized training provided by her parents. During this training which, on average, takes three weeks to complete, Stella misses class time while the new EA receives instruction to become competent working with her equipment and preparing her formula so that the process is smooth, efficient and safe for her both emotionally and physically. In the past, Stella was paired with an EA who was incapable of administering her G-tube feedings, placing Stella at risk of injury and giving her considerable anxiety. This resulted in a new EA assignment, thereby restarting the three-week training process and obligating her parents to take more time off from work and Stella to miss additional class time. Understandably, Stella's parents have grown weary of having to teach new people every fall with each new EA assignment and have been strong advocates for a delicate relationship status for their daughter. One can understand how the relationship that is sometimes formed between an EA, a student, and their parents can become a pivotal factor in providing comfort, trust and relief for parents whose children are highly vulnerable due to their exceptional needs. Stella's parents provided several letters of support from her medical

professionals explaining the importance of consistency in her feeding routine to Stella's health. However, even with these efforts, their request for a delicate relationship was never granted.

We are also aware of other cases where children have sought some protection for an existing relationship and been denied, to the child's detriment. There have been cases where a re-assignment came when a child was dealing with the loss of a parent and needed to delay the loss of a familiar educational assistant while still in trauma. Another case dealt with a non-verbal student who had begun to show improvement under a commissioned plan but lost the educational assistant who participated directly in the development of the plan. Others have dealt with children with communication or behavioural issues whose individual nuances of communication made familiarity a huge advantage to an assistant seeking to de-escalate the student and avoid having them sent home early. Yet in all these cases, the request for consideration was not granted.

Because of cases like Stella's and those of other children and youth who are denied the right to remain with the EAs who are best placed to meet their needs, we have exercised our discretion under Section 13(1)(f) of the *Child, Youth and Senior Advocate Act* to review current practices and policies and to make recommendations to ensure that the Department of Education and Early Childhood Development is honoring their duty to accommodate these students.

DELICATE RELATIONSHIPS CAN STILL BE THE EXCEPTION

Our discussions with individuals who would be affected by Article 13.09 such as families of special needs students, EAs, and other educational support staff has revealed a wide-ranging array of views and makes clear the complexities posed by a clause of this nature.

For example, many educational professionals believe school serves several purposes in addition to curriculum education, and strongly believe that it should prepare students for life outside the classroom. In this view, when students become overly reliant on just one person it does not foster independence, hindering their ability to effectively and comfortably communicate with different people they will encounter in life. Exposing these children to different personalities and routines encourages adaptability and resilience, two competencies that promote success in the 'real world'. Conversely, many parents of special needs students want consistency for their children and peace of mind knowing that their needs are being met by someone they trust who can manage challenging behaviours or care needs with methods drawn from the experience of working intimately with their children over a prolonged period of time. Some EAs share these sentiments and wish to continue working with the same child or youth, as they've developed a close bond.

On the flip side, some EAs suffer from caregiver burnout caused by the sometimes emotional and/or physical toll of meeting the challenging needs of these students and are requesting assignment to another student yet aren't comfortable with expressing these feelings to the parents. We've been told that sometimes, professional boundaries between the families and EAs are blurred resulting in families over-depending upon these EAs.

We accept that a delicate relationship status is not warranted for most student-EA relationships. Rather, it should be reserved for those exceptional circumstances where it is justified. We can broadly accept that, when there is no impact on the child's learning, it is legitimate for the Department of Education and Early Childhood Development to grant the preference of its employees' representatives that seniority be honoured.

However, we have concerns that there are students who are being denied the right to a delicate relationship who would benefit immensely by having an established and secured relationship with the same EA for the entirety of the school year and perhaps beyond. What became clear to us throughout this investigation is that there is a scarcity of information on delicate relationships and that the Department has much work to do to better understand this clause, who it affects, who it should apply to, and how it should work. The Department cannot be incurious to these questions just because they are difficult discussions. Children's rights cannot be subsumed to labour relations needs.

It should be stated that we recognize that unions' first duty is to their members, and there is nothing professionally wrong with a union pursuing any policy that is in their members' interest even if it is at odds with the interests of children. (Of course, it is also legitimate for the public to be made aware at collective bargaining time that unions have a duty to prefer their members' needs over those of children whenever the two clash).

It is the responsibility of government to defend the interests of vulnerable children who do not have a voice at the bargaining table, and they must do so even when it makes labour relations challenging. The Advocate's recommendations will not seek to tell unions what demands they should make on behalf of their members. The recommendations will certainly tell government when they have a duty to resist those demands legally, morally, and educationally. One party at the negotiating table must put children first, and that duty rests upon government.

As such, the Advocate will be exercising his discretion to make recommendations and to advise the Legislative Assembly in future reports of the progress thereupon.

RECOMMENDATIONS

1. After appropriate consultation with the four above mentioned groups (Families of special needs students requiring EA support, Educational Assistants, ESS Teams, CUPE Local 2745) the Department of Education and Early Childhood Development should establish:

-Policy

-Application criteria

-Guidelines

-Process

-Appeal mechanism

for the application of Article 13.09 on delicate relationships. This should be done by September 2023.

The information should be clearly marked and easily accessed on all School District websites.

2. Article 13.09 should apply to casual or temporary workers in addition to permanent employees of CUPE 2745.

3. The Department of Education and Early Childhood Development should track the number of delicate relationships by region, including requests for the designation, acceptances and rejections, and reasons.

4. The Department of Finance should ensure, prior to commencing collective agreement negotiations with any union representing front-line employees who work with children, that it receives legal guidance on human rights issues from the Office of the Attorney General and seeks a Child Rights Impact Assessment (CRIA) on the existing agreement and proposals for amendment.

5. The Department of Education and Early Childhood Development should share with the Office of the Child, Youth and Senior Advocate, findings from the evaluation of the trial for Delicate Relationships for Students Entering Kindergarten.

SUGGESTIONS FOR POLICY DEVELOPMENT

To assist and encourage this process of consulting and developing clear policies and processes, we have suggested certain questions to be posed to stakeholders in this discussion as follows.

1 Families of special needs students requiring EA support

-Why do you feel your child would benefit from a delicate relationship?

-Have you been made aware of Article 13.09?

-What has your child's experience been with EAs?

2 Educational Assistants

- What are your thoughts on delicate relationships?

-Describe your experience with delicate relationships.

-What are the benefits/drawbacks of delicate relationships?

-What supports would you need to prevent caregiver burnout so you can consistently offer your student the support they require?

3 ESS teams

-Who should qualify for a delicate relationship (e.g. extreme behavioural needs, medical care needs)?

-How long should a delicate relationship be in place?

-How do delicate relationships benefit/hinder certain students?

-What are alternatives to delicate relationships that would still be in the student's best interest?

4 CUPE Local 2745

- What is your position on the delicate relationship agreement?

-How do you interpret the clause? Do you feel that you have the power to veto it?

-What has been the Union's experience with delicate relationships (positive and negative)?

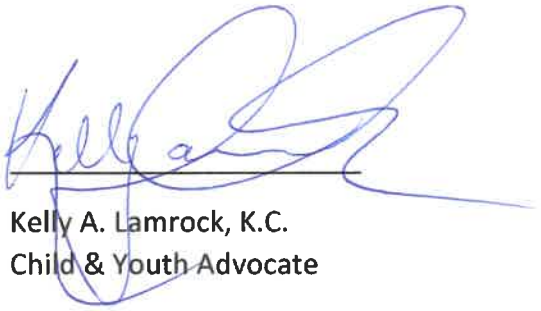
-How are members made aware of this clause?

-How many delicate relationship requests do you receive in a school year on average? How do you process these?

-Have there been any grievances? How are these managed?

Our office is available to advise the Department in developing a process for establishing delicate relationships that is clear, easy to navigate, fair and supportive, and, above all, in the best interest of students. The Advocate officially makes the above recommendations pursuant to the *Child, Youth and Senior Advocate Act* and reserves the discretion to make a further report.

RESPECTFULLY SUBMITTED this 2nd day of March, 2023



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