**What is "gender expression"? How a new and nebulous human rights construct is taking shape in Ontario school board policy documents**

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In 2002, jurisdictions across Canada began adding two new protected grounds to their human rights laws: “gender identity” and/or “gender expression”. Gender identity protections generally apply only to transgender people, whereas gender expression protections *may* be apply to all Canadians in places like K-12 schools. However, it remains legally unclear what kind of action, utterance or pattern constitutes gender expression discrimination, and who can access related protections. In search of clarification, this article explores how the meaning of gender expression is being constructed within policy documents (N=209) authored at the level of Ontario's English public secular school boards.

En 2002, des ressorts dans l’ensemble du Canada ont commencé à ajouter deux nouveaux motifs de discrimination interdits à leurs lois sur les droits de la personne, soit « l’identité sexuelle » et/ou « l’expression sexuelle ou de genre ». Les protections entourant l’identité ne s’appliquent en général qu’aux personnes transgenres, alors que les protections entourant l’expression sexuelle ou de genre *peuvent* s’appliquer à tous les Canadiens et Canadiennes dans des endroits tels que les écoles élémentaires et secondaires. Une incertitude juridique demeure toutefois à l’égard du type d’action, de propos ou de schéma de comportement qui constitue une discrimination à l’égard de l’expression sexuelle ou de genre et à savoir qui peut se prévaloir des protections qui en découlent. Dans le but de clarifier cet aspect, cet article explore la manière dont la signification de l’expression sexuelle ou de genre est façonnée dans le cadre des politiques (N=209) adoptées à l’échelon des conseils scolaires publics laïques de l’Ontario.

*Keywords:* gender expression, gender identity, transgender, education policy, education law, K-12, Ontario, Canada

**Introduction**

Canada is in the midst of a gender human rights law revolution. Starting in 2002, federal, provincial, and territorial governments across the country began adding two new protected grounds to their human rights laws: “gender identity” and/or[[1]](#footnote-1) “gender expression”. In Ontario this happened via *Toby's Act* (2012). However, in each instance these terms were left undefined. In this vacuum, the Ontario Human Rights Commission ([OHRC] 2014) has provisionally defined “gender identity” as “each person’s internal and individual experience of gender” and “gender expression” as “how a person publicly presents their gender” (p. 7). Protection from *gender identity discrimination* generally applies only to transgender[[2]](#footnote-2) people, and only if their transgender status is apparent, self-declared or disclosed by another. On the other hand, protection from *gender expression discrimination* may be a universal right: something that *all* Canadians enjoy in public service contexts like K-12 schools.

Since the passage of Toby's Act, then, Ontario schools have been legally required to act from the knowledge that every single student may experience gender-based discrimination born of everyday practices and relational patterns commonly believed to be 'just the way things are.' After *Toby’s Act*,for example, a cisgender,[[3]](#footnote-3) heterosexually-active male high school student harassed for ‘non-masculine’ interests (e.g., in art or dance) may have experienced gender expression discrimination, which is distinct from homophobia, a form of sexuality-based discrimination (Airton, 2009). Another example is the long-observed (see Jackson & King, 2004; Lloyd & Norris, 1999; Swanson et al., 1998) pattern of school staff being more likely to label highly active girls than similarly-active boys with an emotional or behavioural disorder (e.g., oppositional defiant disorder [ODD]) rather than attention deficit-hyperactivity disorder, with the former being less normalized and often also stigmatized in the language used to describe it (e.g., “spiteful or vindictive” in the case of ODD – see Frick & Nigg, 2012). Behaviours perceived by teachers to be ‘serious’ in girls and boys tend to map onto gender-stereotypical norms of behaviour (e.g., Kokkinos, Panayiotou, & Davazoglou, 2004; Meyer, Stafford, & Airton, 2017), and behaviour is a component of gender expression (OHRC, 2014). The notion that 'boys will be boys' is no longer simply quaint or colloquial; when commonsensical, stereotypical ideas about gender justify teacher or administrator decisions that impact students, this may run afoul of gender expression protections in human rights law. 'May' is the operative word at this time, however, as it remains legally unclear what kind of action, utterance or pattern constitutes gender expression discrimination, and who can access related protections (Kirkup, 2018a).

Despite this lack of legal clarity, the meaning and scope of ‘gender expression’ is being decisively constructed outside of courts and human rights tribunals (see Kirkup, Airton, McMillan, & DesRochers, Under Review). This article takes up the challenge of tracking this construction, and reports initial findings from a qualitative study of how 'gender expression' is being constructed by policy documents produced by and circulating within Ontario's publicly funded school boards. While Ontario is our case study, the gender identity and gender expression definitions provided by human rights commissions across the country are virtually identical. Our findings thus have national implications for how gender diversity is understood in public education systems across the country. Our more pragmatic aim is to assist students and their families in invoking protections that they have but may not know about, and to assist school staff in understanding their responsibilities in relation to gender expression protections without posing commonsensical yet incorrect limits on who is thought to be require protection from related forms of discrimination. In our view, this could – and ought to – be anyone.

**Overview of the Paper**

The next section contains a hybrid literature review and theoretical framework that situates the larger research project in the educational research literature on gender, and places this article in conversation with critiques of human rights law and policy as means of improving transgender peoples’ lives, levied by scholars within and outside of education. We then describe the study’s methodology – qualitative textual analysis informed by critical discourse analysis along with quasi-statistical analysis – and the data collection procedures and sampling criteria that lead to our data set of policy documents authored at the level of Ontario public school boards and containing gender identity and/or gender expression. The remainder of the article is devoted to sharing our descriptive findings, inferences and recommendations for school boards.

**Literature Review and Theoretical Framework**

We ground our analysis of how Ontario school board policy documents are constructing gender expression in three bodies of relevant scholarship: a) the extensive body of educational research that explores how and with what effect gender is produced in and produces the contours of everyday life in K-12 schools; b) scholarship on the intersection of gender diversity and human rights law or policy; and c) socio-legal scholarship that explores the complex, iterative processes through which law on the books becomes law in action, including through the daily activities of extra-legal actors like school boards. Our broader study is interdisciplinary, integrating education and law; the law-focused analysis of our data is ongoing concurrently, and more closely engages the socio-legal studies scholarship. The present article draws more heavily on research and frameworks from education.

**Approaches to Studying Gender in K-12 Education**

In educational studies, we observe that there are three broad ‘streams’ of scholarship on how gender functions and why it matters in schooling. These can be delineated by their approach to gender as an object of research and locus of problems or possibilities. Streams one and two take a primarily 'gender identity' approach, seeing gender as a fairly self-evident individual *characteristic*, whereas the third stream approaches gender as an ongoing *process* of achieving recognition from others; our own study is sited in this third stream. If schools are required to ensure protection against discrimination on the grounds of gender expression, this means that school actors are called to attend to gender as *more* than an identity; mutual recognition or *how we are recognized, engaged and referred to by others* gender-wise is, in Ontario schools, now conceivably an area of human rights protection.

A first stream of gender-based scholarship in education examines the experiences of students, teachers, administrators, etc. who are either women, girls, men or boys. Studies in this stream generally take these categories to be stable, homogeneous and exclusively cisgender; for example, 'boys' are frequently studied without consideration of the possibility that some boys are transgender; this is consistent even if the aspect of boys' school experiences under study likely affects cisgender boys and transgender boys who pass as cisgender. Studies in this first stream may also perform inter- or intra-category analyses, such as comparing how survey respondents who are 'boys' or 'girls' respond to various items; this effectively masks intra-category diversity among e.g., girls who may differ from each other in significant ways. This body of research corresponds with commonsense understandings of gender as binary (i.e., as an either/or of men/women, boy/girl, masculine/feminine) and static. Their appeal to commonsense lends these findings considerable credibility such that they are readily taken up in policymaking and educational governance. However, this stream has been critiqued for inciting a ‘flip-flop’ of concern and resource distribution between the educational interests of boys and men, on the one hand, and of girls and women, on the other (see Arnot, 2006; Weaver-Hightower, 2003).

A second stream focuses on the school experiences of students (and sometimes teachers or administrators) who are in some way transgender (e.g., Greytak, Kosciw, & Boesen, 2013; Greytak, Kosciw, & Diaz, 2009; McGuire, Anderson, Toomey, & Russell, 2010). This literature is an effort to diversify how gender is engaged in educational scholarship, but bears a similarity with the first stream in that the ‘transgender student' can become stabilized and homogeneous. While this statement may not hold true for every study, this body of research is taken to indicate 'the state of transgender student experiences in schools' despite the fact that 'transgender' itself is a highly diverse and ever diversifying category, particularly among youth (see Sinclair-Palm & Gilbert, 2018). To this end, research in this second stream has been critiqued (see Airton, 2009, 2013; MacIntosh, 2007; Talburt & Rasmussen, 2010) for its tendency to reify stereotypes of the isolated transgender student who uniquely, necessarily experiences discrimination, harassment and violence for transgressing gender and sexuality categories.

We situate our study in a third stream that tends to de-emphasize gender categories – whether cisgender or transgender ones – and focus on tracking gender as an ongoing process in which everyone participates and is affected, and in which *all* school denizens including *all* students are potentially at risk of harm (including harm conceptualized as discrimination). This stream tends toward poststructuralist analyses of how gender categories are produced and normalized in various educational sites (e.g., Martino & Berrill, 2007; Martino & Cumming-Potvin, 2014; Renold, 2005; Skelton et al., 2009; Thorne, 1993; Walker, 2014; Wohlwend, 2012). Within a poststructuralist theoretical framework, gender is not an individual characteristic or a static category. Rather, gender is instead a relational category constructed through action and discourse; being e.g., a boy or a girl or nonbinary[[4]](#footnote-4) requires continuously ‘doing’ boy, girl, or nonbinary as well as continuous recognition as such by one’s local community of gender practice (Paechter, 2003, 2006; Paechter & Clark, 2007).

We identify the continuous reading of others’ gender expression as an integral part of this construction. By situating our study within this third stream, we also intend a critique of the second stream’s tendency to stabilize a particular sort of transgender youth (as persistently girl- *or* boy-identified across the lifecourse, as well as non-disabled or ‘able-minded’ – see Pyne, 2014, 2017) as the primary and sometimes sole focus of gender diversity research and practice in education (see also Airton, 2013), to the exclusion of fluidity, intra-category diversity among transgender youth, and similarities among transgender and cisgender youth. We observe that studies in the second stream increasingly cite the academic field of transgender studies which problematizes the category transgender, but still tends to engage ‘transgender’ using what Malatino (2006), with a nod to Eve Sedgwick, has called a ‘minoritizing’ view. This view obscures transgender as *phenomena* (Stryker, 2006) and centres transgender as a stabilized *subject* despite how the invention of the ‘transgender umbrella’ was “an important historical move toward identifying a range of gender expressions that stray beyond medicalized conceptions of transsexual realness” (Malatino, 2006, p. 404). We argue that *Toby’s Act* and other cross-Canadainclusions of gender identity and gender expression in human rights law stand to affect transgender and/or nonbinary students *as well as*, for example, gender non-conforming cisgender students precisely because schools are now asked to engage gender expression as an ongoing site of rights and risks for everyone.

**Education Policy and the Trans Legal Studies Critique of Human Rights**

Setting aside our optimism about the radical possibilities of gender expression as a ground of human rights protection, this article and our larger study respond to a debate within the trans legal studies literature on whether human rights frameworks and related legal mechanisms are useful vehicles for improving transgender peoples’ lives (Ashley, 2018; Katri, 2018; Kirkup, 2009, 2018a, 2018b; Mandlis, 2011; Ryder, 2013; Singer, 2017; Vipond, 2015). Trans legal scholars have highlighted how litigation – i.e., formally taking a discrimination case to court or a human rights tribunal – is inaccessible for people in poverty, which includes many if not most transgender-spectrum people, and transgender women in particular (Spade, 2011). Formally claiming one’s right to freedom from discrimination on gender identity or gender expression grounds also means participating in a judicial system that for many transgender people has been a source of harm. Arguably, the most privileged transgender-spectrum people find the most relief in law and, perhaps, in supportive policy as well (Hines, 2009).

While “there is scant literature which documents or addresses a trans-specific policy analysis, especially as it pertains to education systems and the enactment of such policies in specific school contexts” (Martino et al., 2019, p. 303), education scholars have recently begun to extend the trans legal studies critique of human rights to education policy (see Cumming-Potvin & Martino, 2018; Marquez & Brockenbrough, 2013; Meyer & Keenan, 2018; Miller, Mayo, & Lugg, 2018; Stiegler, 2016). Meyer and Keenan (2018) offer a powerful synthesis of this critique in the realm of K-12 schooling:

K-12 school policy that focuses on trans inclusion ... may be limited in achieving that goal beyond the rhetorical level. Such policy, which is not typically written by or developed in consultation with trans people themselves, is often based on a narrow conception of what it might mean to be a trans child or teen, one that is seen only through the lens of a normative dichotomous gender binary, or which fails to account for race and other institutionalized forms of categorization that shape the life of an individual. (p. 738)

We share Meyer and Keenan’s concern that human rights frameworks risk domesticating the gender diversity represented by transgender-spectrum students, whose ways of living gender are capacious and ever-changing. However, we are mindful that in the case of “policies that are avowedly attempts to promote social justice, some outcomes may be unanticipated, unexpected and contradictory” (Maguire, 2019, p. 299). In this spirit, we are interested in tracking how “gender expression” is being constructed by significant actors in the Ontario education system, in part by bracketing prior critiques of human rights law and policy.

**Methodology**

Our approach was one of exploratory qualitative textual research (see Lockyer, 2008), featuring deductive and inductive coding strategies (Saldaña, 2015) informed by critical discourse analysis (Fairclough, 2003; Gee, 2014). The central and exploratory research question guiding the study is as follows: *how is the new human rights ground "gender expression" being defined and constructed by Ontario public school boards?* The larger project aims to delineate findings in relation to two units of analysis: the collective entity "Ontario public school boards," and individual boards so as to identify patterns and tensions in how “gender expression” is explicitly defined and implicitly constructed in each board’s guiding documents. In this initial article, however, we focus on the collective unit of analysis with occasional illustrative references to particular boards.

**Data Sources and Collection**

Data collection proceeded systematically, one school board at a time, carried out by the third and fourth authors. This began with Google searches, internal website searches, and targeted manual searches using menus and other embedded website structures; searches employed the phrases “gender expression” and “gender identity” as well as a school board’s name or common abbreviations. To each resulting document we applied strict sampling criteria. After the inclusion of the phrases “gender expression” and/or “gender identity,” the primary criterion was that a document must offer explicit direction or guidance to actors within the K-12 schools governed by the board in question. This guided our conceptualization of *policy* documents as opposed to purely information-based documents. Additional sampling criteria were as follows: authored by a school board (and not an individual school); issued or revised since *Toby's Act* (passed in 2012); written in English (more below); and publicly available. Taken together, our search methods yielded 209 documents, which were imported into the qualitative data analysis software program MaxQDA.

**Exclusions: French school boards and Catholic school boards.** The Ontario public K-12 education system is divided into geographical districts governed by school boards (N=76) themselves divided along the lines of language and religion. There are 38 public secular school boards including four French boards, and 38 public separate school boards organized on the basis of religious affiliation; the latter are constitutionally entrenched under section 93 of the *Constitution Act*, 1867 and section 29 of the *Canadian Charter of Rights and Freedoms*. Ontario has one English Protestant, 29 English Catholic and eight French Catholic separate school boards. For this initial strand, we excluded all French boards and Catholic boards. What follows below is a brief justification for this methodological decision.

The French board exclusion stems from the linguistic and cultural specificity of gender diversity. The French corollary of 'gender' is *le genre* as in the term *transgenre* (transgender, in English) and yet the French corollary of “gender expression”, *l'expression de l'identité sexuelle*,invokes “sexual identity” instead of gender in defining this grounds of human rights protection (see Hoo, 2018). Sex and gender are interrelated but are not the same, leading 'gender expression' and *l'expression de l'identité sexuelle* to have differing and culturally-specific connotations. Furthermore, gender pronouns are widely interpreted by human rights commissions and extra-legal actors to be included in gender expression (e.g., OHRC, 2014). However, the absence of standardized gender-neutral pronouns in French means that gender expression protections in French-language contexts may bespeak a radically different order of societal change than in English-language contexts where nouns have no gender and singular they/them (the most common gender-neutral pronoun used by transgender-spectrum people for gender identity reasons) is already in the common lexicon. For these reasons, we have not incorporated policy documents from the French boards in this study.

The religious board exclusion came about after we had collected and coded policy documents from six of the English Catholic boards. It became clear that these boards' construction of gender expression and its sibling term gender identity cannot be studied using the same analytical framework as the public secular boards' construction, due to the influence of Catholic religious doctrine on how gender and sexual diversity are engaged in Ontario Catholic education (see Callaghan, 2018). We have established a secondary strand of the study that brings our research question to Catholic board policy documents, led by research assistants with doctrinal expertise.

**Data Analysis**

Data collection and coding took place sequentially on a board-by-board basis (e.g., all Renfrew County District School Board [DSB] documents were collected and coded before moving on to a subsequent board). A deductive or *a priori* coding scheme was developed based on the research question and an initial or open coding (Saldaña, 2015) of eligible documents from the Toronto DSB and the Ottawa-Carleton DSB, large urban boards widely regarded as diversity and equity leaders. The deductive coding scheme tracked the following: the occurrence of GE and GI in the data set;[[5]](#footnote-5) the occurrence of terms related to gender identity and sex;[[6]](#footnote-6) and explicit definitions for related terms given within the documents with the express purpose of educating the reader.[[7]](#footnote-7) In addition to deductive coding, we inductively coded each passage containing GE with a thematic code in order to identify the ‘about-ness’ of the passage, or, what aspect of school life is being described (or indeed directed) when GE (and GI for comparison) appears in the text. Overall, a total of 162 codes– including and exceeding what we have described in this initial article – were applied 8, 217 times to 209 collected policy documents. Inter-rater reliability was enhanced by a training structure in which the third and fourth authors began coding documents together with feedback from the first author who reviewed all applied codes in advance of weekly verification meetings; once inter-rater discrepancies had disappeared, the remaining school boards were divided between the third and fourth authors with regular inter-rater verification.

Upon collecting and coding all eligible documents from one school board, we completed board-level analytic memos on the following: consistency or inconsistency in how GE appears among the board's documents: consistency or inconsistency in how GE appears among a board's documents; to what extent the board's deployment of GE and GI aligns with *Toby’s Act* and the related OHRC (2014) policy, overlap with other boards (whether general or via direct citation), and observed idiosyncrasies. We re-visited and added to the memos as subsequent boards were completed. Once the data set of all 209 documents from the 34 included school boards was completely coded and all board-level analytic memos were finalized, we performed simple counts or quasi-statistical analyses (see Becker, 1970; Maxwell, 2010; Sandelowski, Voils, & Knafl, 2009) of code occurrence and distribution among the documents, as well as more discursively-oriented analyses of numerically-prevalent codes and their data, guided by the research question and analytic memos.

**Findings, Inferences and Recommendations**

As this is the first article from the larger study, we share high-level descriptive broad inferences and related recommendations in the sub-sections below. More detailed thematic findings will be forthcoming in a second article.

**GE in Gender-Based versus Generic Documents**

Our search methods yielded two ‘genres’ of policy documents that include GE: documents on supporting gender diversity and/or transgender-spectrum students (N=29, hereafter referred to as *gender-based documents*), and *generic documents* (N=183). Our first finding is that *over half of Ontario public secular school boards (18/34) do* not *have a policy* *containing specific direction on providing an environment free from GE (and GI) discrimination*.[[8]](#footnote-8) This absence is more acute among school boards serving small population centres (see Statistics Canada, 2011),[[9]](#footnote-9) or those with a population of 1,000 to 29,999 people. We identified only two of the latter boards (N=12) as having a gender-based policy; we identified the majority (10/14) of school boards serving large urban population centres as having a gender-based policy.

That said, our sampling criteria limited data collection to *publicly* available documents. It may well be the case that these documents exist and are in circulation within these 18 boards, but are unavailable to the general public, including students and their families. Given that our study’s knowledge mobilization plan aims to assist *all* students in activating protections that they have but may not know about, we are concerned that these documents’ inaccessibility may reduce the impact of *Toby’s Act* in schools; this impact could come about through a student realizing, naming, and communicating to teachers and/or administrators that they are facing GE- and/or GI-based discrimination at school. We deem it highly unlikely that a layperson would bring the same degree of systematicity to their searching as we did in the course of our data collection, and still we were unable to locate gender-based documents in most boards. We do not imply any ill-will on the part of these 18 boards, nor do we imply that supportive work is not being undertaken therein. For example, our local Limestone DSB in Kingston, ON responded immediately to our query by sharing their extant (but hitherto not public) policy with us, and later making it available to the public online. *We nevertheless recommend that all school boards (not only those listed in footnote 8) review the online availability of their gender-based policy document(s), ensuring that they are not just publicly posted but also* intuitively *findable by the public.*

In addition to gender-based policies being either non-existent or not findable, we identified another accessibility issue: whether related content appears in a standalone document, or is included in an omnibus generic document. For example, we identified Bluewater DSB as *not* having a gender-based policy (see footnote 8) because our extensive search methods did not yield one. However, one appendix in Bluewater DSB’s (2017) ﻿*Prevention and resolution of harassment, discrimination, objectionable behaviour and human rights violations* is a best practices checklist reproduced from the OHRC (2014) *Policy on preventing discrimination because of gender identity and gender expression.* The checklist is framed as the Board’s administrative procedure to be followed in instances of GE and GI discrimination. Confusingly, given the overall document’s focus on addressing *acts* of individual discrimination, the checklist contains best practices for the *everyday* accommodation of transgender people, be they employees or students. This includes ensuring the confidentiality of trans students’ or employees’ gender information, using correct pronouns and chosen names, and planning for gender transition. While arguably an effort to pre-empt discriminatory acts, this thoroughly *proactive* content is buried within a document otherwise devoted to *reactive* procedure (we will return to proactive/reactive framing below). While we are encouraged to see this content included and therefore endorsed by the Board, we wonder whether school constituents would be able to find and leverage the same for advocacy purposes if it is so buried in an omnibus document. *We therefore recommend that all boards offer clearly-titled and standalone gender-based policy documents (on supporting gender diversity and/or transgender-spectrum people in schools)*.

**The Omission of GE (and the Appearance of a Ghost)**

We now turn to the generic documents (N=183) i.e., that are *not* focused on supporting gender diversity and/or transgender-spectrum students but nevertheless contain GE or GI. Whereas the gender-based documents tend to be visually stimulating and idiosyncratic, the generic documents tend to have repetitive, simple formatting that lacks any visual appeal. In a subsequent paper we will explore this distinction via design theory and visual rhetoric, and only raise it here to illustrate the boilerplate way in which generic documents include GE or GI (and sometimes only GI – more below): as one item in a ‘laundry list’ of grounds protected by the *Ontario Human Rights Code*. The *Code* protects against discrimination and harassment in a variety of provincially-regulated contexts, including employment, housing, services, and schools, on the basis of “race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, *sex*, sexual orientation, *gender identity, gender expression*, age, marital status, family status, disability or the receipt of public assistance” (*Ontario Human Rights Code*; added emphasis). Laundry lists appeared 361 times across the generic documents; in fact, the code ‘laundry list’ was applied more often than all other codes (N=162) with only four exceptions.[[10]](#footnote-10) Given its numerical dominance, and that there are so many more generic documents (N=183) than gender-based documents (N=26) in our data set, we infer that *tinkering with ‘laundry lists’ is the most pervasive way that Ontario public secular school boards have attended to the policy changes necessitated by Toby’s Act in 2012.*

We deliberately use the colloquial term ‘tinkering’ because ‘laundry lists’ are sites of considerable interpretive license despite the generic documents’ repetitious character. One kind of tinkering involves omitting GE altogether; we found that *“gender expression” is often commonly absent even when “gender identity” has been added*. In fact, only 40% (160/394) contain GE at all*.*[[11]](#footnote-11) This is significant given that the various other ‘laundry list’ grounds tend to be appear identically to how they are set out in the *Code*. The following two ‘laundry lists’ exemplify[[12]](#footnote-12) styles of GE omission common across the generic documents:

…﻿whether the infraction for which the student might be disciplined was related to any harassment of the student because of race, ethnic origin, religion, creed, disability, *gender or gender identity*, sexual orientation, or harassment for any other reason. (﻿Moose Factory Island District School Area Board, 2014,﻿ *Student Discipline: Suspension*,[[13]](#footnote-13) p. 3; added emphasis)

…respect and treat others fairly, regardless of their race, ancestry, place of origin, colour, ethnic origin, citizenship, religion, *gender, gender identity*, sexual orientation, age or disability. (Simcoe County DSB, 2018a, *﻿Administrative Procedures*

*Memorandum A7630: Code of Conduct*, p. 3; added emphasis)

In addition to GE being omitted altogether, from a legal perspective there is something else of interest going on in the above: “gender” is included, but it is a ghostly ground, by which we mean it does not exist in the *Code*. In fact, it has never existed therein. The first time the word “gender” ever appeared in the *Code* was when the grounds of “gender identity” and “gender expression” were added in 2012. And yet, “gender” haunts Ontario education policy in this and conceivably other areas as well.

A corresponding issue is the pervasive omission of sex, which is a protected ground in the *Code*; *we found that* *sex is included in less a third (114/394) of the laundry lists, sometimes – and confusingly – along with “gender”.* GE was added to the *Code* in 2012 and yet is more common in the laundry lists than sex, added forty years earlier in 1972. There is a societal tendency to prefer the nomenclature of “gender” over “sex” given that “sex” carries the tinge of sexuality, which many find uncomfortable. This is likely what has happened in this aspect of public life and policymaking, and likely in many others across and outside of Ontario. By contrast with the previous examples, consider the one below from Upper Grand DSB’s (2018) *Code of Conduct Procedures Manual 213-A*:

…respect and treat others fairly, regardless of their age, ancestry, colour, race, citizenship, ethnic origin, place of origin, creed, disability, family status, marital status, *gender identity*, *gender expression*, socio-economic status, employment, housing, *sex*, and sexual orientation. (p. 2; added emphasis)

While we note some interpretive license in the ordering of the grounds, which departs from the *Code*, we deem this laundry list to be accurate. Further, *only 19% (75/394) of laundry lists are correct i.e., include the real grounds GE, GI and sex, but no erroneous (or ghostly) additions*.

As education tends to be a leading sector in relation to diversity, equity and human rights, and that Ontario public secular school boards are one of the largest organs of public life, it is conceivable that these boards are collectively contributing a great deal to the general public’s understanding of and access to GE protections. And yet, barely a fifth of the generic documents’ laundry lists accurately reflect *Code* grounds related to gender. We therefore recommend that *each Ontario* *school board immediately verify that its board-level policy documents reflect* only *the grounds actually included in the Ontario Human Rights Code: sex, GE, and GI.*

**GE as a Matter of Reactive and Not Proactive Concern**

The Group B documents easily fell into three broad categories, from which we infer how their collective authorship may conceptualize ‘where’ and ‘when’ GE might become significant in document users’ everyday work in schools. The overwhelming majority of Group B documents (N=183) belong to one of the following categories: safe schools, or discrimination, harassment and bullying (N=59); code of conduct, or discipline, expulsion, and suspension (N=69); and equity, human rights and inclusive education (N=55). These areas of school board policymaking can be aspirational, but are more commonly episodic. By “episodic” we mean that, across each category, the generic documents focus on describing individualized episodes of undesirable behaviour as well as spelling out in clear and practical terms what must be done when these take place, and by whom. This is unsurprising given the long-standing critique of human rights frameworks as individualizing systemic injustices (e.g., Spade, 2011).

From this categorical occurrence, we infer that *Ontario public secular school board policy documents construct GE as a matter of reactive and not proactive concern.* To flesh out this inference, consider that *only one* of the 183 generic documents is a high-level strategic planning document. Strategic planning is a proactive, long-term area of board-level governance, as opposed to the reactive, episodic nature of the above categories. The one high-level strategic planning document in our data set is Hastings and Prince Edward DSB’s (2018) ﻿*Board Improvement Plan for Student Achievement and Well-Being* (BIPSAW).[[14]](#footnote-14) BIPSAWs were mandated by the Ontario Ministry of Education, and direct school boards’ long-term planning in relation to the student experience. One element included in the Professional Learning Priorities Action Plan within Hastings and Prince Edward DSB’s BIPSAW is the creation of a “Gender Identity and Expression Resource” with the rationale that “aligning policies and procedures with new Ministry language” is an “Urgent Student Learning Need” (pp. 32-33). No Ministry of Education source is cited, but this text implies that the impetus for inclusion in the BIPSAW is a Ministry change around the data of issue, not earlier changes to the higher authority of the law in the form of the *Ontario Human Rights Code* in 2012. Nevertheless, our argument here is less about the curious GE content in this one BIPSAW and more so about the apparent absence of this issue from board-level strategic planning, represented by our data set. Given that the most self-evident GE-related (and GI-related) changes in schools require significant board-level leadership and funding allocation (e.g., whole-school professional development, renovation or new construction of all-gender washrooms and changing facilities), *we recommend that* *school boards develop proactive strategic planning goals aimed at reducing systemic GE (and GI) discrimination on a broad scale.*

**A Hole in the Data Set: Athletics and Overnight Field Trips**

Whereas our search methods were systematic and intended to be exhaustive of all Ontario public secular school board documents containing GE (and GI), the final descriptive finding shared in this article is a gaping hole among the generic documents where had we expected to see documents governing the most pervasively gendered aspects of school life: athletics and overnight field trips. When students play on sports teams or share overnight accommodations, the sex/gender binary becomes rigid and explicit; students try out for either male *or* female sports teams, are paired with “same sex” roommates, and are supervised by “same sex” chaperones. 2/34 boards – Simcoe County DSB (2018b), and Thames Valley DSB (2017) – provide the two generic documents in this area. As stated in a previous section, the category ‘transgender’ is rapidly diversifying away from an imperative to be *either* male *or* female (a GI issue), and away from the singular goal of passing as a non-transgender man or woman (a GE issue). Non-binary students throw a wrench in these works (GI), as do transgender girls and boys who may be perceived as not following stereotypical expectations of girls or boys (GE).[[15]](#footnote-15) All of this bears heavily on how schools navigate the gendered terrain of athletics and overnight field trips.

Athletics- and field trip-related content can be found in some gender-based documents (i.e., documents on supporting gender diversity and/or transgender-spectrum students). That said, this silence among the generic documents is cause for concern. Earlier, we were critical of gender-based content being buried in omnibus generic documents, but our recommendation here takes a seemingly opposite turn. Staff (including coaches) and administrators conceivably reach for the guidance found in gender-based documents when they know they have a transgender student (which is subject to their own understanding of what this means). On the other hand, generic documents may engender *proactive* consideration if planning for gender diversity is framed as simply another aspect of providing athletics opportunities or arranging field trips: generic document inclusion would assume, from the beginning, that there *are* students for whom binary sex/gender just do not work. Generic policies may also have considerable educative potential given that they are likely accessed in a wide variety of circumstances, and not only when school staff know that they have a transgender student in front of them. *We therefore recommend that Ontario school boards take action to include GE (and GI) content in all policies on student athletics and overnight field trips, not only include same in gender-based documents.*

**Conclusion**

Despite usually travelling in the company of gender identity, gender expression is the focus of this article and of our larger research project. This is because of GE’s radical under-interpretation in the caselaw, coupled with its radical potential to trigger systemic change in how public institutions like K-12 schools organize structures, programs and practices with regard to gender. In our view, gender expression could prove to be a singularly transformative human rights construct precisely because it reflects how gender functions as a *relational category* in everyday interaction, and not only as an individual identity. Pivotally, identity – including but not limited to gender identity – may have little to do with who may experience GE discrimination, inside and outside of schools.

Taylor et al. (2011) completed a landmark Canada-wide study on high school students’ experiences of homophobia, transphobia and biphobia, finding that one in four *non*-LGBTQ students reported being verbally harassed about their gender expression, and 10% reported being physically harassed or assaulted for the same. On this basis, Taylor et al. argue that “any given school is likely to have as many heterosexual [and/or transgender] students as LGBTQ students who are harassed about their … gender expression” (p. 26). And yet, our initial descriptive findings suggest a patchwork quality in school board policy-based responses to *Toby’s Act*: over half of these 34 school boards have no publicly available policy to guide school staff in implementing GE and GI protections, or to guide students in accessing the same; the list of protected *Code* grounds is systemically mischaracterized in the data set, with GE often omitted; GE occurs in document genres where it is construed as a matter of reactive, individualized incident management and not board-wide systemic change; and documents on the most pervasively-gendered aspects of school life are all but absent from our data set.

We wonder what document end users must make of all this when they come to these documents seeking guidance on these newest human rights protections, whether in response to an event of discrimination or in order to proactively change what happens in their school(s). How might the presence of “gender” or the absence of sex obfuscate GE (and GI)? Does the ghostly presence of “gender” relegate GE and GI to transgender-spectrum people alone, which in our view runs counter to the *Code*? While our document-based study cannot answer these questions about peoples’ usage and interpretation, our findings and inferences have generated a number of critical questions for future research.

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1. Between 2012 and 2017, the federal government, nine provinces, and two territories added both terms to their respective human rights codes. Two of the earliest jurisdictions to amend their human rights codes, the Northwest Territories (2002) and Manitoba (2012), added “gender identity” only. [↑](#footnote-ref-1)
2. Transgender people are commonly described as people whose gender identity and/or gender expression does not match stereotypical expectations for people of their assigned sex. One such expectation is that an assigned sex of ‘male’ will lead to a gender identity of ‘boy’ and then ‘man.’ Other expectations pertain to how people assigned male or female are required to express masculinity or femininity, respectively. [↑](#footnote-ref-2)
3. The term “cisgender” refers to the vast majority of people: whose gender identity matches stereotypical expectations for people of their assigned sex i.e., a female-assigned infant who comes to identify as a girl and then a woman later in life. [↑](#footnote-ref-3)
4. “Nonbinary” is a gender identity term used by those whose gender identities do not fit neatly on either side of the man/woman or boy/girl binary. “Nonbinary” people are generally include within the category transgender. [↑](#footnote-ref-4)
5. In the remainder of the article ‘GE’ abbreviates gender expression, and ‘GI’ abbreviates gender identity. [↑](#footnote-ref-5)
6. The tracked gender identity terms are man, woman, girl, boy, nonbinary, Two-Spirit, transgender, cisgender, gender-fluid), and the tracked sex-related terms are sex, biological sex, female, male, transsexual, intersex. [↑](#footnote-ref-6)
7. This included GE and GI themselves, all of the above gender identity and sex terms, and e.g., transition, gender binary, transphobia, harassment, and discrimination. [↑](#footnote-ref-7)
8. The 18 Ontario public secular school boards without a (publicly available) document on supporting gender diversity and/or transgender-spectrum students are: Algoma DSB, Avon Maitland DSB, Bluewater DSB, District School Board Ontario North East, Grand Erie DSB, Halton DSB, Hamilton-Wentworth DSB, James Bay Lowlands Secondary School Board, Keewatin-Patricia DSB, Lambton Kent DSB, Moose Factory Island District School Area Board, Moosonee District School Area Board, Near North DSB, and Rainbow DSB. [↑](#footnote-ref-8)
9. Our calculations of population centre size used data from the most recent (2016) Canadian census. [↑](#footnote-ref-9)
10. The only codes with more instances than the ‘laundry list’ code are GE, GI, an *in vivo* code (Saldaña, 2015) that tracked GE and GI’s appearance with the term ‘sexual orientation’, and the omnibus code ‘﻿violence, harassment, discrimination, harm, assault, exclusion’ (to be discussed with our thematic findings in a subsequent section). [↑](#footnote-ref-10)
11. We note that most generic documents offered a confusing ‘buffet’ of laundry lists: some with GE, some without, some with “gender” and sex, some with “gender and gender identity”, and so on. A subsequent paper will explore this inconsistency *within* particular documents and boards, and its implications. [↑](#footnote-ref-11)
12. To illustrate, 64 other ‘laundry lists’ also contain “gender or gender identity” like in the Moose Factory Island District School Area Board example here. [↑](#footnote-ref-12)
13. We are aware that including a source’s title in a parenthetical reference does not follow APA 6th edition citation guidelines; however, we wish to offer titles here in order to contextualize each quotation. [↑](#footnote-ref-13)
14. We note that Durham DSB’s (2018) equity and diversity policy is framed as a strategic planning document, but we are categorizing it along with other equity and human rights documents given its clear focus. [↑](#footnote-ref-14)
15. We further note that Simcoe County DSB’s (2018b) field trip policy and Thames Valley DSB’s (2017) student athletes policy contain only GI, with no mention of GE. [↑](#footnote-ref-15)