

**From “zero tolerance” to “safe and accepting”:  
surveillance & equality in the evolution of Ontario’s education law & policy**

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**ABSTRACT**

Shifting conceptions of “safety” can have profound effects on law and policy, including in relation to education. In turn, the law and policy options selected can generate serious implications for privacy and equality within schools. This paper explores these shifts by examining the legislative and policy transition in Ontario from a so-called “zero tolerance” model in the 1990s to a “safe and accepting” approach beginning in the early 2000s. Although this transition has involved increased emphasis on proactive responses aimed at addressing underlying causes of discrimination that render schools less safe places for members of equality-seeking communities,<sup>1</sup> Ontario’s policy mix still maintains punitive elements from its “zero tolerance” past. While the current mix better balances proactive and punitive approaches, it also leaves open the possibility for students from equality-seeking communities to be disproportionately exposed to surveillance and punishment.

**INTRODUCTION**

Precipitating events that catch public and media attention can heavily influence social understandings of “safety,” and with these shifts in understanding often come changes in law and policy. At their best, legal and policy changes are shaped through engaged and considered stakeholder consultations. At their worst, legal and policy responses are shaped by tangentially-related considerations. Concerns related to political expediency—for example, public demands for immediate results—too often ignore (and sometimes obscure) the need to address

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· Professor, University of Ottawa Faculty of Law (Common Law Section). Thanks to Maria-Cristina Cavicchia, Sara Shayan and Jordanna Lewis for their excellent research support and to the Social Sciences and Humanities Research Council for funding The eQuality Project, a 7-year partnership initiative of which this work forms a part. Prior versions of this paper were presented at The 7<sup>th</sup> Biennial Surveillance and Society Conference in Barcelona in 2016 and at the *Privacy Implications in the Networked Classroom* workshop and conference co-hosted by The Office of the Information and Privacy Commissioner of Alberta and the Alberta Teachers Association in Edmonton in 2017.

<sup>1</sup> In this paper I use the term “equality-seeking” to describe communities and individuals who continue to strive for a lived social equality in the face of discrimination and oppression premised on identity-based factors such as gender, gender identity, race, Indigeneity, sexual orientation, religion, ethnic origin, socioeconomic status and ability.

underlying systemic issues. In recent years, for example, the concept of “terrorism” has reshaped understandings of safety and risk, yielding profound changes in criminal and immigration law and policy. These changes have precipitated enormous growth in the surveillance state, with acute equality implications for members of Muslim communities.

Shifting perceptions of safety have also influenced Canadian education law and policy. Although safety concerns and education law responses to them may attract less media attention than criminal law responses to terrorism, these concerns nonetheless reshape the type and degree of surveillance present within schools, and disparately affect members of equality-seeking communities. How safety is defined and addressed in the educational context can profoundly impact school climate, and affect the relationships among students, teachers, staff, and administrators. A degree of surveillance, for example, is a well-established and expected component of the in-school experience as teachers, staff, and administrators are vested with the responsibility to watch over and guide students. However, excessive reliance on student surveillance can also diminish relationships of trust, not only between students, but also between students and the adults within the school who are trusted to care for, educate, and guide them.<sup>2</sup>

Elementary and secondary schools are ideally situated to respond to safety concerns not simply through surveillance and punishment, but also through proactive measures. For example, proactive steps could include engaging students in dialogue about issues such as prejudice and discrimination that affect members of equality-seeking groups’ sense of safety and wellness. Because measures designed to respond to underlying systemic issues are often perceived of as more difficult to implement and evaluate, they may appear to offer less obvious and immediate outcomes than punitive responses. However, proactive measures may also offer greater prospects for lasting systemic change, which could, in the long term, reduce the need for surveillance and further promote respectful and understanding relationships in schools.

This paper explores how shifting perceptions of safety have influenced education law and policy responses, and focuses on how those policies in turn have affected privacy and equality in schools. It does so by examining the legislative and policy transition in Ontario from a so-called “zero tolerance” model in the 1990s to a “safe and accepting” approach beginning in the early 2000s. Part I analyses Ontario’s “zero tolerance” model, situating it in the broader context of the war on drugs and a tough-on-crime political agenda which was premised on a conception of “safety” focused largely on one-off incidents of extreme physical violence. Part I also highlights the surveillance implications of the zero tolerance model, and shows how the discriminatory effects and inconsistent application of that policy paved the way for a policy transition in Ontario. Part II analyses Ontario’s transition toward “safe and accepting” schools. It situates this transition within the context of a growing

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<sup>2</sup> Valerie Steeves, Priscilla Regan & Leslie Regan Shade, “Digital Surveillance in the Networked Classroom” in Emmeline Taylor, Jo Deakin & Aaron Kupchik, eds, *Handbook of School Security, Surveillance and Punishment* (Palgrave, forthcoming).

awareness of “bullying” and “cyberbullying,” from which conceptions of “safety” informed by systemic factors (such as racism and homophobia) began to emerge. Part III highlights how the repertoire of education law and policy responses expanded under the “safe and accepting” approach to incorporate proactive systemic responses. It also notes how surveillance-based approaches have endured and expanded. The Conclusion draws together the outcomes from Parts II and III, noting that although shifts in the conception of “safety” over time have influenced Ontario’s chosen policy responses, Ontario’s education law and policy continues to reflect a mix of punitive surveillance and proactive systemic responses.

The current approach still falls short of meaningfully addressing underlying equality issues. Although it moves in the right direction by expanding beyond punishment, this policy mix may still disproportionately expose students from equality-seeking groups to discrimination. Much depends on how these policies are actually being implemented on the ground. Understanding implementation, in turn, depends upon gaining a deeper understanding of the decisions of administrators and teachers on a day-to-day basis.<sup>3</sup>

## I. THE ROAD TO “ZERO TOLERANCE,” ONTARIO STYLE

The American Psychological Association has described “zero tolerance” as a “philosophy or policy that mandates the application of predetermined consequences, most often severe and punitive in nature, that are intended to be applied regardless of the gravity of behavior, mitigating circumstances, or situational context.”<sup>4</sup> A number of Canadian provincial education ministries expressly considered and rejected adoption of zero tolerance policies by school boards within their respective jurisdictions.<sup>5</sup> In contrast, the Ontario provincial government stepped firmly onto the zero tolerance path in 2000,<sup>6</sup> despite evidence showing the discriminatory impacts of zero tolerance in the United States.<sup>7</sup>

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<sup>3</sup> Nora M. Findlay, *The Problem of the Penumbra: Elementary School Principals’ Exercise of Discretion in Student Disciplinary Issues*. (2012) PhD Thesis, online: <http://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1910&context=etd>.

<sup>4</sup> American Psychological Association, Zero Tolerance Task Force, “Are Zero Tolerance Policies Effective in the Schools?” (2008) 63:9 *American Psychologist* 852 at 852 [APA].

<sup>5</sup> See e.g. British Columbia, Ministry of Education Special Programs Branch, *Focus on Suspension: A Resource for Schools* (Victoria: Ministry of Education, 1999), online: <[www.bced.gov.bc.ca/sco/resourcedocs/suspension\\_resource.pdf](http://www.bced.gov.bc.ca/sco/resourcedocs/suspension_resource.pdf)>; British Columbia, Ministry of Education, *Safe, Caring and Orderly Schools: A Guide* (Victoria: Ministry of Education, 2008), online: <[www.bced.gov.bc.ca/sco/guide/scoguide.pdf](http://www.bced.gov.bc.ca/sco/guide/scoguide.pdf)>; Nova Scotia, Department of Education, *Report on School Code of Conduct* (Halifax: Department of Education, 2000) [Nova Scotia].

<sup>6</sup> It is noteworthy, however, that Ontario’s NDP government had indicated in 1994 that zero tolerance was its approach to school violence as well. It developed the *Violence-Free Schools Policy: 1994*, which required school boards to develop

## A. Evolution of “Zero Tolerance” in the United States and Canada

In the United States, zero tolerance approaches originated in the context of drug enforcement. The zero tolerance approach to narcotics offences imposed serious penalties for possession of even small quantities of drugs.<sup>8</sup> This approach first gained prominence in New York, spread to other states, and appeared at the federal level in the late 1980s. Zero tolerance in the context of drug enforcement led to an explosion in U.S. prison populations, staggeringly disproportionate levels of incarceration of Black and Hispanic males, and unprecedented numbers of student referrals into the juvenile justice system.<sup>9</sup>

Notwithstanding strong evidence of the discriminatory impact of zero tolerance in the criminal system, the injustice of imposing penalties incommensurate with offences committed, and solid reason to doubt the deterrent effect of such measures, zero tolerance was imported from the criminal justice system into the U.S. education system in the 1990s.<sup>10</sup> Sold as a necessary response to violence in schools, concerns about student safety in the wake of the Columbine shooting, and predictions about the rise of the “super predator,” zero tolerance took many forms in the U.S. education system. It included, among other things, development of school rules mandating expulsion for violent and drug offences.<sup>11</sup> By 1996-7, 79% of U.S. schools had zero tolerance policies for violence. Between 1997 and 2007, the number of armed guards in US schools tripled.<sup>12</sup> The zero tolerance response was premised on a narrow, security state-like definition of “safety”. It focused on infrequent but extreme instances of physical violence, rather than on the

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violence-free policies that included codes of conduct with set consequences for identified behaviours: Nora Findlay, “Should There Be Zero Tolerance for Zero Tolerance School Discipline Policies?” (2008) 18 *Educ Law J* 103 at 129.

<sup>7</sup> The Civil Rights Project (Harvard University) & The Advancement Project, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline* (Washington, DC: Advancement Project, 2000) at 13-15, online: <[www.civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies/crp-opportunities-suspended-zero-tolerance-2000.pdf](http://www.civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies/crp-opportunities-suspended-zero-tolerance-2000.pdf)> [Harvard].

<sup>8</sup> Charles Bell, “The Hidden Side of Zero Tolerance Policies: The African American Perspective” (2015) 9:1 *Sociology Compass* 14 at 16 [Bell].

<sup>9</sup> *Ibid* at 17.

<sup>10</sup> APA, *supra* note 2 at 852; Bell, *supra* note 6 at 15, 18.

<sup>11</sup> Bell, *supra* note 6 at 18.

<sup>12</sup> *Ibid*.

“daily threats to psychological and social safety”<sup>13</sup> disproportionately experienced by young people from equality-seeking groups.<sup>14</sup>

The rhetoric of zero tolerance also pervaded Canadian policy discourse in the late 1990s and early 2000s, in part reflecting increased media coverage of violent incidents in a number of Canadian and American schools.<sup>15</sup> The rise of zero tolerance also reflected a federal study on the use of weapons in Canadian schools that reported increasing violence among young people as a “recurring concern.”<sup>16</sup> The federal government released the first major Canadian study on zero tolerance in a report entitled *School Violence and the Zero Tolerance Alternative*.<sup>17</sup> It reported on the results of focus groups with police, teachers, and youth from across Canada, as well as surveys of police, school officials, and print media. The study identified a number of sometimes-conflicting viewpoints.<sup>18</sup> While participants thought that most school misconduct involved more minor infractions, violence had increased over the ten year period prior to the study, with a “small core of students [reported as] violent and malicious” disrupting classes and hassling and bullying others in the halls and schoolyard.<sup>19</sup>

Although many study participants favoured zero tolerance approaches, definitions of “zero tolerance” varied. Notwithstanding that participants readily identified family issues (for example, neglect), peer pressure, media violence, and community breakdown as being “at the root of school violence,” study participants favoured “firm treatment of youth, usually within in the school setting,” using counselling and suspension or expulsion if necessary.<sup>20</sup> Participants also favoured setting clear limits for acceptable behaviour, combined with consequences for violations, and “a swift, sure response to violence, tempered with discretion, especially for milder offences.”<sup>21</sup> In this respect, then, although the study recommended increased student accountability for behaviour, clear rules, and sure

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<sup>13</sup> Nan Stein, “Bullying or Sexual Harassment? The Missing Discourse of Rights in an Era of Zero Tolerance” (2003) 45 Ariz L Rev 783 at 792 [Stein].

<sup>14</sup> Donn Short, “Safe Schools: The Threat from Within?” (2011) 51:3 Education Can 4 at 7 [Short].

<sup>15</sup> See Stephen E Anderson & Sonia Ben Jaafar, “Policy Trends in Ontario Education: 1990-2003” (2003) International Centre for Educational Change Working Paper No 1 at 10, online: <<http://fcis.oise.utoronto.ca/~icec/policytrends.pdf>>; Canadian Press, “Outbreaks of violence at Canadian schools”, *CTV News* (23 May 2007), online: <[www.ctvnews.ca/outbreaks-of-violence-at-canadian-schools-1.242397](http://www.ctvnews.ca/outbreaks-of-violence-at-canadian-schools-1.242397)>; Thomas Gabor, *School Violence and the Zero Tolerance Alternative: Some Principles and Policy Prescriptions* (Ottawa: Solicitor General, 1995) at 28, online: <[www.publicsafety.gc.ca/lbrr/archives/lb%203013.3%20g3%201995-eng.pdf](http://www.publicsafety.gc.ca/lbrr/archives/lb%203013.3%20g3%201995-eng.pdf)> [Gabor].

<sup>16</sup> Gabor, *supra* note 13 at iii.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid* at iii.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

consequences, it also recommended against policies that inhibited reasonable discretion, and suggested that responses need not only be punitive but could also be supportive, assistive in developing coping skills, “compassionate, constructive, fair, protective and, where possible, flexible”<sup>22</sup>

## B. Ontario’s Foray into “Zero Tolerance”

The foray into explicit adoption of zero tolerance language in Ontario emerged over time, first through school board policies in the 1990s and then through a code and legislation put in place by the province. The Scarborough Board of Education, for example, was an early adopter of zero tolerance in its *Safe Schools Policy on Violence and Weapons* in 1993. Similarly, the Toronto District School Board adopted a zero-tolerance focused *Safe Schools Foundation Statement Policy* in the mid-1990s.<sup>23</sup> While both promised zero tolerance and set out mandatory penalties for certain kinds of behaviours, they also listed mitigating factors that meant that a fixed consequence for a given event was not necessarily inevitable.<sup>24</sup>

In 1999, as part of its “common sense revolution” platform, the Ontario Progressive Conservative Party campaigned on the promise of zero tolerance policies for bad behaviour in schools.<sup>25</sup> In April 2000, the Ontario Ministry of Education released a Code of Conduct for Ontario Schools,<sup>26</sup> and one month later introduced the *Safe Schools Act* to amend the *Education Act* to give force to the Code of Conduct and expand the powers of principals and teachers to suspend and expel students.<sup>27</sup>

The *Safe Schools Act* came into force in 2001. However, like its counterparts in board-level policies, while the legislation superficially mandated certain penalties for certain infractions, it also allowed for a level of flexibility that, among other things, enabled inconsistency in application from board to board and school to school. In the result, as Bhattacharjee writes, the issue was not whether there was

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<sup>22</sup> *Ibid* at iv.

<sup>23</sup> Ken Bhattacharjee, *The Ontario Safe Schools Act: School Discipline and Discrimination* (Toronto: Ontario Human Rights Commission, 2003) at 8, online: <[www.ohrc.on.ca/en/ontario-safe-schools-act-school-discipline-and-discrimination](http://www.ohrc.on.ca/en/ontario-safe-schools-act-school-discipline-and-discrimination)> [Bhattacharjee].

<sup>24</sup> *Ibid* at 14, 18.

<sup>25</sup> Ontario Progressive Conservative Party, *Blueprint: Mike Harris’ Plan to Keep Ontario on the Right Track* (Progressive Conservative Party of Ontario, 1999) at 41, online:

<[www.poltext.org/sites/poltext.org/files/plateformes/on1999pc\\_plt\\_26122008\\_84857.pdf](http://www.poltext.org/sites/poltext.org/files/plateformes/on1999pc_plt_26122008_84857.pdf)>.

<sup>26</sup> Bhattacharjee, *supra* note 21 at i; See also Ontario Ministry of Education, “Making Our Schools Safer: Improving learning and teaching environments”, online: <[www.edu.gov.on.ca/safeschl/eng/student.html](http://www.edu.gov.on.ca/safeschl/eng/student.html)> (Note: the 2001 *Code of Conduct* is no longer available on the Ministry website).

<sup>27</sup> Bhattacharjee, *supra* note 21 at 6-7.

a *policy* of zero tolerance, but whether “there [was] a *practice* of ‘zero tolerance’,”<sup>28</sup> an issue that is well-reflected in literature questioning whether, notwithstanding its title, “zero tolerance” in fact always incorporates an element of discretion.<sup>29</sup> In Ontario, much depended upon the interactions between the provincial legislation, board and school policies, and codes of conduct.

The *Safe Schools Act*, among other things, extended to principals the power to expel students and created “mandatory” provisions for situations requiring suspension, expulsion, and police involvement. Suspension was “mandatory” for infractions such as possession of alcohol or illegal drugs, uttering a threat to inflict serious bodily harm, swearing at a teacher or other person in a position of authority, and vandalism causing extensive damage to school property.<sup>30</sup> Expulsion was mandatory for possession of a weapon, committing physical assault leading to bodily harm requiring treatment by a medical practitioner, trafficking in weapons or illegal drugs, giving alcohol to a minor, and engaging in activity for which expulsion is mandatory according to the policy of the board.<sup>31</sup> School board policies had to include the mandatory suspensions and expulsions set out in the *Act*, but could also add infractions where suspension and expulsion were discretionary.<sup>32</sup> The mandatory language of the *Act*, however, remained subject to discretion such that suspension or expulsion was not actually mandatory where the school authority concluded that, (i) the student was unable to control his or her behaviour; (ii) the student was unable to understand the foreseeable consequences of his or her behaviour; or (iii) the student’s continued presence in the school did not create “an unacceptable risk to the safety of any person.”<sup>33</sup>

As a result, notwithstanding the rhetorical overtures toward “zero tolerance” in Ontario, that term was never mentioned in the legislation and whether or not a given act would lead to a given consequence still very much depended upon the exercise of discretion by school authorities. Moreover, the behaviours above and beyond those mandated by the *Act*, for which suspension and expulsion were possible outcomes, varied from board to board and school to school, depending upon the policies adopted locally. In this sense, even Canada’s toughest purported legislative example of zero tolerance was anything but uniform, making it difficult to

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<sup>28</sup> *Ibid* at 18.

<sup>29</sup> See, for example: C.M.T. Ackerman, (2003) *Zero-tolerance: Development of an instrument to measure how zero-tolerance is defined and implemented in schools*. Unpublished doctoral dissertation, The Pennsylvania State University. Available from ProQuest Dissertations and Theses Database. (UMI No. 3200203); A. Faulk, (2006) *Administrators’ views of zero tolerance*. Unpublished doctoral dissertation, University of California, Santa Barbara. Available from ProQuest Dissertations and Theses Database. (UMI No. 3238788).

<sup>30</sup> *Safe Schools Act*, SO 2000, c 12, s 3 (introducing s 306(1)).

<sup>31</sup> *Ibid*, s 3 (introducing s 309(1)).

<sup>32</sup> *Ibid* (introducing s 303).

<sup>33</sup> *Ibid* (introducing ss 306(5), 309(3)); See also *Suspension of a Pupil*, O Reg 106/01 (revoked in February 2008: O Reg 472/07, s 7).

judge from Ontario's experiment whether zero tolerance was actually *effective* in addressing its rhetorical target of "safety."

Evidence from other jurisdictions, however, clearly indicates that "zero tolerance policies as implemented have failed to achieve the goals of an effective system of discipline" for a variety of reasons,<sup>34</sup> including the fact that the stringency of consequences can act as a disincentive to student reporting.<sup>35</sup> Further, and more pressingly, zero tolerance approaches tend to obscure root causes that contribute to school environments where students from equality-seeking groups are more likely to feel unsafe and unwelcome, while also disproportionately exposing students from certain equality-seeking communities to surveillance and punishment.

### **C. Instigators of Policy Change: Shifting Conceptions of "Safety" and Risk" and the Evidence Against Zero Tolerance**

#### **(a) Shifting conceptions of "safety": the impact of "bullying" discourse**

Zero tolerance was positioned as necessary for protecting children from rarely occurring extreme forms of violence, "while the more insidious threats to safety [were] largely ignored."<sup>36</sup> As such, zero tolerance policies ushered the security complex into schools in the form of cameras, security personnel, and profiling, leading to a "school-to-prison pipeline" that disproportionately exposed Black students (especially male students) to surveillance, suspension, and expulsion.<sup>37</sup> In so doing, it set up a model that shifted focus onto badly-behaved individuals, effectively absolving educators of responsibility for addressing root causes by training their time and energies on individual punishment.<sup>38</sup>

The zero tolerance model also failed to address the broader social underpinnings of many of the extreme acts of violence, particularly the element of gender. As Nan Stein argues, in failing to notice that "the majority of these tragedies were perpetrated by White middle-class boys who were upset either about a break-up or rejection by a girl or who did not meet traditional expectations and norms of masculinity and were thus persecuted by their peers," the zero tolerance model obfuscated the need to address prevailing gender norms leading to boys' "maniacally driven, tireless efforts to define oneself as 'not gay.'"<sup>39</sup> By focusing on individual behaviour, zero tolerance approaches shifted focus toward boys' and

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<sup>34</sup> See generally APA, *supra* note 2 at 860.

<sup>35</sup> Valerie Steeves, "Young Canadians in a Wired World, Phase III: Talking to Youth and Parents about Life Online" (Ottawa: MediaSmarts, 2012) at 22-24, online: <[www.mediasmarts.ca/sites/mediasmarts/files/pdfs/publication-report/full/YCWWIII-youth-parents.pdf](http://www.mediasmarts.ca/sites/mediasmarts/files/pdfs/publication-report/full/YCWWIII-youth-parents.pdf)>.

<sup>36</sup> Stein, *supra* note 11 at 795.

<sup>37</sup> APA, *supra* note 2 at 855.

<sup>38</sup> See Shaheen Shariff, *Cyber-Bullying* (New York: Routledge, 2008) at 155, 249.

<sup>39</sup> Stein, *supra* note 11 at 795-797.



girls' individual psychology "instead of looking at institutional, structural changes that need[ed] to be made."<sup>40</sup>

In the early 2000s, "bullying" and "cyberbullying" began to eclipse single extreme acts of physical violence as a primary risk to safety. With this shift came a glaring need to address underlying systemic issues such as homophobia and racism that render students from certain equality-seeking groups more vulnerable to attack.<sup>41</sup> Recognition of this need holds promise for moving towards a discourse about the broader goal of social transformation rather than reactive individual punishment. However, burying these and other discriminatory prejudices in the language of "bullying" runs the equally disturbing risk of pushing educational approaches too heavily toward a focus on addressing *individual* social and psychological deficits, such as lack of empathy, once again usurping time and resources from building recognition of structural discrimination and respect for fundamental rights. To avoid this result, Stein has suggested,

Rather than wake up one day to notice our civil rights and anti-harassment laws have been eroded in the name of controlling meanness, we need to work towards restoring a discourse and framework of rights.<sup>42</sup>

As the limitations of zero tolerance became more widely recognized, a number of alternatives came to the fore. Bullying prevention, threat assessments and restorative justice,<sup>43</sup> transformation of school culture, and improved classroom management techniques for teachers were suggested and adopted in varying degrees.<sup>44</sup> In this way, the shift in the discourse from zero tolerance focused largely on physical violence toward bullying prevention. Diversity education played a role in opening up the possibility of more than semantic change in terms of the privacy and dignity rights of students from equality-seeking groups. Perhaps even more important in Ontario's transition, though, was mounting evidence of the discriminatory effects of zero tolerance, which culminated in a complaint by the Ontario Human Rights Commission ("OHRC").

### **(b) Zero tolerance as a practice of inequality**

While the role of zero tolerance policies in obscuring underlying causes presents a significant challenge, the most pressing problem arising from zero tolerance is its discriminatory impact on equality-seeking groups, particularly Black and Indigenous male students, and students with disabilities. Notwithstanding early

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<sup>40</sup> *Ibid* at 798.

<sup>41</sup> Michael Higdon, "To Lynch a Child: Bullying and Gender Nonconformity in Our Nation's Schools" (2011) *Indiana LJ* 827 at 831-832.

<sup>42</sup> *Ibid* at 799.

<sup>43</sup> APA, *supra* note 2 at 856.

<sup>44</sup> Harvard, *supra* note 5 at viii, 22-39.

claims that zero tolerance would remove subjective treatment and therefore be fairer to students traditionally over-represented in school discipline, under zero tolerance in the U.S., African American students are suspended at higher rates than non-racialized students.<sup>45</sup> Recent U.S. studies show Black males are four times more likely to be suspended than their peers, and often for subjective offences like showing disrespect<sup>46</sup> rather than for objective reasons, with higher rates of suspension of Black male students at all levels from preschool to middle school to high school.<sup>47</sup> Further, U.S. federal statistics show that Black children (especially Black boys) are disciplined more often and more severely than any other minority group, and that while Black and white students are equally likely to be disciplined for serious acts of misconduct like weapon or drug possession, Black children are far more likely to be disciplined in subjective categories, such as disrespectful behaviour.<sup>48</sup>

The discriminatory impact of zero tolerance policies has also been observed in Canada. For example, in recommending against adoption of a zero tolerance approach in Nova Scotia, the Nova Scotia Department of Education noted in 2000,

Cultural issues associated with behaviour and discipline require sensitive and culturally specific responses. Zero tolerance policies have not been flexible enough to accommodate diversity issues in this regard. The result is often disproportionate numbers of minority students being referred for discipline. This point was reinforced by the BLAC Report on Education.<sup>49</sup>

In 2003 an OHRC report concluded that, “in the Greater Toronto Area (GTA) and other parts of Ontario, the *Safe Schools Act* and school board policies were having a disproportionate impact on racial minority students, particularly Black students, and students with disabilities.”<sup>50</sup> Noting that statistics were not kept in Ontario with respect to the specific impact of zero tolerance on racial minorities or students with disabilities, the OHRC report found strong perceptions of discrimination against racialized and disabled students in interviews with community members, although principals and school board officials tended not to share those perceptions.<sup>51</sup> While noting that intentional discrimination could sometimes happen, most interview participants believed the issue was systemic. Participants felt that Black students

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<sup>45</sup> *Ibid* at 854.

<sup>46</sup> *Ibid* at vi.

<sup>47</sup> Bell, *supra* note 6 at 18.

<sup>48</sup> Harvard, *supra* note 5 at 8.

<sup>49</sup> Nova Scotia, *supra* note 3 at 3. See also Black Learners Advisory Committee, *BLAC Report on Education: Redressing Inequity – Empowering Black Learners* (Halifax: Black Learners Advisory Committee, 1994), online: <[www.crrf-fcrr.ca/en/resources/clearinghouse/14-education-ed/21342-blac-report-on-education-vol-2-redressing-inequity-empowering-black-learners](http://www.crrf-fcrr.ca/en/resources/clearinghouse/14-education-ed/21342-blac-report-on-education-vol-2-redressing-inequity-empowering-black-learners)>.

<sup>50</sup> Bhattacharjee, *supra* note 21 at 3.

<sup>51</sup> *Ibid* at v-vi.

were more likely to be suspended more for subjective offences where there was greater leeway for racial stereotyping and bias to enter into decision-making processes. Participants also pointed to a lack of Indigenous resolution mechanisms and a failure to fully accommodate disabled students as reasons why zero tolerance policies disproportionately disadvantaged Indigenous and disabled students.<sup>52</sup>

In 2005, the OHRC initiated a complaint against the Ministry of Education and the Toronto District School Board (TDSB) alleging that application of the *Safe Schools Act* and related school policies disparately affected racialized and disabled students.<sup>53</sup> The OHRC, the Ministry, and the TDSB settled the complaint in 2007. The Statement of Agreed Principles provided the framework for the next step in Ontario's education policy. Interestingly, the Statement emphasized both the "widespread perception" that the then-current safe schools approach in Ontario disproportionately affected racialized and disabled students, while noting that the *Act* did not specifically refer to zero tolerance, "nor should there be any language in legislation, regulations or policies that suggests the concept of zero tolerance."<sup>54</sup> Further, the Ministry committed itself to a "comprehensive review of the safe schools provision of the *Education Act*," to be conducted by a Safe Schools Action Team, starting with public consultations.<sup>55</sup> Along with specifically moving away from the concept of zero tolerance, the Ministry noted its commitment to developing alternative preventative programming, including in relation to "bullying prevention initiatives that promote a safe environment for learning" and development of curriculum and educational strategies and techniques that "value diversity."<sup>56</sup> Finally, the Statement signalled a turn toward a more robust understanding of "safety" by focusing on bullying prevention and "school climate in the context of racism, homophobia, and students with special needs," including training for teachers on these topics.<sup>57</sup>

### III. ON THE ROAD TO "SAFE AND ACCEPTING"

The OHRC report and settlement, the inconsistent application of the *Act* in schools across the province,<sup>58</sup> the need to ensure an adequate margin for judgment

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<sup>52</sup> *Ibid* at viii.

<sup>53</sup> Ontario Human Rights Commission, "Commission to investigate application of safe schools legislation and policies" (8 July 2005), *Ontario Human Rights Commission*, online: <[www.ohrc.on.ca/en/news\\_centre/commission-investigate-application-safe-schools-legislation-and-policies](http://www.ohrc.on.ca/en/news_centre/commission-investigate-application-safe-schools-legislation-and-policies)>.

<sup>54</sup> *Ibid*.

<sup>55</sup> *Ibid*.

<sup>56</sup> *Ibid*.

<sup>57</sup> *Ibid*.

<sup>58</sup> In 2006, for example, some Ontario boards reported suspension rates of 0.5% in 2003-4, while others had rates of 36%: Ontario Ministry of Education, News Release, "McGuinty Government Receives Report on Safe Schools Act Review" (26 June 2006), online: <<http://news.ontario.ca/archive/en/2006/06/26/McGuinty->

in meting out discipline, the importance of paying greater attention to prevention rather than punishment,<sup>59</sup> and growing public consciousness of “bullying” and “cyberbullying” all helped to motivate Ontario’s adoption of a more robust conception of “safety” extending beyond one-off incidents of extreme violence and its arguably still-ongoing transition to a “safe and accepting” policy response. Implementation of Ontario’s transition has involved both key findings and reports of the Safe Schools Action Team as well as codification of progressive discipline, equity and inclusivity mandates, and curriculum reform in legislation, as well as provincial, school board, and school policy. Questions remain, however, as to whether the shift from zero tolerance to safe and accepting schools actually signals a fundamental restructuring of the concept of safety in a way that fully integrates equality and social justice.<sup>60</sup>

#### **A. The Safe Schools Action Team’s *Shaping Safer Schools* Report**

In 2004, the Ministry of Education of the then-relatively newly elected Liberal government created the Safe Schools Action Team (“the Team”). The Team was mandated to develop a “comprehensive and coordinated approach to address physical and social safety issues in all Ontario schools,” including with respect to bullying prevention, and to report back to government with recommendations.<sup>61</sup> In its 2005 *Shaping Safer Schools* report, the Team described its province-wide consultations with educators, police, parents, students, student advocates, and those working in a variety of sectors including children’s services, health care, and bullying prevention groups.<sup>62</sup> The Team’s principal recommendation was that,

Bullying prevention should be identified as a priority for every school board and every school. Each school board in the province should adopt a bullying prevention policy and, flowing from that policy, each school in the province should, as a priority, implement an effective bullying prevention program.<sup>63</sup>

Further, the Team recommended that the Ministry of Education provide “immediate and mandatory training on bullying prevention” for school administrators, teachers, and other school staff; fund a toll free 24/7 Anti-Bullying Hotline; provide school boards with a bullying prevention framework; fund school purchase of evidence-

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Government-Receives-Report-On-Safe-Schools-Act-Review.html?\_ga=1.220204248.1302718141.1447292193>.

<sup>59</sup> *Ibid.*

<sup>60</sup> Short, *supra* note 12 at 8.

<sup>61</sup> Ontario, Safe Schools Action Team, *Shaping Safer Schools: A Bullying Prevention Action Plan* (Toronto: Ministry of Education, 2005) at cover letter, online: <[www.edu.gov.on.ca/eng/healthysafeschools/actionTeam/shaping.pdf](http://www.edu.gov.on.ca/eng/healthysafeschools/actionTeam/shaping.pdf)> [Shaping Safer Schools].

<sup>62</sup> *Ibid* at 5.

<sup>63</sup> *Ibid.*

based bullying prevention programs; require schools to appoint a Safe Schools coordinator; appoint a Safe Schools Implementation Coordinator; provide schools with centralized data analysis; and encourage community partners to support bullying prevention initiatives.<sup>64</sup> The Team also made recommendations to other government Ministries, including the Ministry of Community Safety and Correctional Services, to

encourage police training courses for school liaison officers on bullying prevention, the Safe Schools Act, investigations in schools, and school/police protocols; to recognize school liaison officers as eligible community policing officers under the “1,000 officers” initiative.<sup>65</sup>

Describing bullying as a “relationship problem” where those who are “repeatedly bullied are trapped in an abusive relationship,”<sup>66</sup> the Team included within bullying, “name-calling, mocking, sexual harassment or racist or homophobic comments,” noting that bullies were exerting power over others, sometimes based on knowledge of “another’s vulnerability.”<sup>67</sup> The team also noted research showing that bystanders “have a significant impact,” with peers observing bullying episodes being part of the problem 75% of the time, since 53% simply watched passively, and 22% helped the bully (even though in 57% of cases where peers intervened positively, the bullying stopped within 10 seconds.)<sup>68</sup>

Meaningfully addressing bullying, the Team concluded, required more than “putting policies into place.”<sup>69</sup> Instead it required “a community-wide model that celebrates positive behaviours—behaviours carried by our students into their adult lives.”<sup>70</sup> In that regard, the Team noted,

When we create safe, respectful learning environments, we build and nurture safer communities for all our citizens.<sup>71</sup>

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<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.* The “1000 officers” initiative was a program also implemented by the Liberal government in 2003. It aimed to “put more police on the streets” to “keep our communities safe, strong and vibrant,” and to “help fight gun crimes and child pornography”: Allison Dunfield, “Ontario to hire 1,000 new police officers, Eves says”, *The Globe and Mail* (5 May 2003), online: <[www.theglobeandmail.com/news/national/ontario-to-hire-1000-new-police-officers-eves-says/article1160880](http://www.theglobeandmail.com/news/national/ontario-to-hire-1000-new-police-officers-eves-says/article1160880)> [Dunfield].

<sup>66</sup> Shaping Safer Schools, *supra* note 57 at 10.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid* at 11.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

In order to achieve that environment, the Team advocated for, among other things, “recogniz[ing] bullying as a relationship problem that requires relationship-based solutions” and “promot[ing] respect, tolerance and empathy”.<sup>72</sup>

In addition to school-wide education embedded in the curriculum, the Team recommended “routine interventions targeted for students in the early stage of bullying” and “intensive intervention strategies for those involved in repeated bullying and victimization with possible referral to community/social service resources.”<sup>73</sup> Among other things, the Team noted that blanket prevention programs—rather than differentiated programs aimed at students at different levels of risk, and those “not based on improving the social and emotional skills development of students” including bullies, victims and bystanders—were programs that were the least likely to be effective.<sup>74</sup>

The Team recommended that students with a history of bullying should be “taught how to use their power in a positive way”; victims should be shown that what is happening is not acceptable and there is help available; and bystanders should be shown how to “intervene in safe, secure and positive” ways, including reporting to teachers and staff.<sup>75</sup> Moreover, the Team stressed that students needed to “perceive that action will be taken,” such that demonstrated consequences could deter future bullying and “instil confidence” in other students.<sup>76</sup> As the Team reported,

Recognizing and enforcing bullying prevention policies is crucial in sending a message to the broader school population that bullying concerns will not be ignored.<sup>77</sup>

Recommended interventions included empathy training and instruction on positive uses of power for bullies, as well as training on friendship development and potentially social agency support for victims.<sup>78</sup>

The Team also recommended an “effective climate survey” to determine whether—and if so, how often—students experience bullying, as well as encourage student leaders to model inclusive behaviour.<sup>79</sup> According to the Team, an effective bullying strategy would enable students to, (i) recognize bullying, including the role of unequal power, the role of the bystander, and the impact of bullying; (ii) report bullying “confidently,” with knowledge of school procedures; (iii) respond to bullying “safely” by knowing when to intervene as a bystander; and (iv) prevent bullying by demonstrating positive relationship skills like “negotiation, assertive

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<sup>72</sup> *Ibid* at 12-13.

<sup>73</sup> *Ibid* at 12.

<sup>74</sup> *Ibid* at 13.

<sup>75</sup> *Ibid* at 18.

<sup>76</sup> *Ibid*.

<sup>77</sup> *Ibid*.

<sup>78</sup> *Ibid* at 19.

<sup>79</sup> *Ibid*.

refusal ... problem solving,” non-violent conflict resolution, motivation to “intervene when bullying happens,” and knowing how to get adult assistance in prevention.<sup>80</sup>

Following the *Safe Schools Report*, Ontario implemented school climate surveys and school safety audits, developed an online registry of bullying prevention resources, distributed 2,000,000 copies of a bullying prevention pamphlet, partnered with Kids Help Phone to provide 24/7 counselling services for youth, and mandated a bullying prevention program in every publicly-funded Ontario school. The province also instituted bullying prevention education for teachers and established a Safe Schools Implementation Coordinator to assist schools in sharing best practices.<sup>81</sup>

## **B. The Safe Schools Action Team’s *Safe Schools Policy and Practice Report***

In 2006, following settlement of the OHRC’s human rights complaint regarding zero tolerance, the Team released its review of the *Education Act* provisions enacted as a result of the passage of the *Safe Schools Act*.<sup>82</sup> Noting that “[s]afety is a precondition for learning,”<sup>83</sup> the Team’s report summarized the results of its review, as well as widespread consultations with parents, educators, students, and other community members. It ultimately identified eight themes for “priority action”: prevention, progressive discipline, community and parental involvement, application of the *Safe Schools Act*, programs for suspended/expelled students, education and training, communication and the provincial safe schools framework.<sup>84</sup>

With respect to prevention, the Team emphasized not only creating programs to address violence prevention and healthy relationships, but also paying careful attention to school climate: to development of positive school climates “founded in mutual acceptance and inclusion, and modelled by all” such that “a culture of respect becomes the norm.”<sup>85</sup> The Team went on to stress the importance of “a visible adult presence in schools”—made up of administrators, teachers, staff, as well as volunteers, custodians, lunch monitors and hall supervisors—to “enhance students’ feeling of safety.”<sup>86</sup> The Team’s specific prevention recommendations included school board support and maintenance of positive school climates that “enhance safety, focus on prevention and early intervention, are inclusive ..., reinforce bullying prevention messages through programs addressing discrimination based on age, race, sexual orientation, gender, faith, disability and

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<sup>80</sup> *Ibid* at 19-20.

<sup>81</sup> Dunfield, *supra* note 61.

<sup>82</sup> Safe Schools Action Team, *Safe Schools Policy and Practice: An Agenda for Action* (Toronto: Ontario Ministry of Education, 2006) at 9, online: <[www.edu.gov.on.ca/eng/ssareview/report0626.pdf](http://www.edu.gov.on.ca/eng/ssareview/report0626.pdf)>.

<sup>83</sup> *Ibid* at 5.

<sup>84</sup> *Ibid*.

<sup>85</sup> *Ibid* at 6.

<sup>86</sup> *Ibid* at 7.

ethnicity, improve learning outcomes for students.”<sup>87</sup> Board strategies were to include “a continuum of preventative strategies and empowerment programs” focused on a number of issues including healthy relationships, empathy, restorative practice and bullying prevention.<sup>88</sup>

With respect to progressive discipline, the Team clearly recommended a shift away from rigid zero tolerance approaches towards developmentally-appropriate consequences involving a wide range of strategies and taking into account a wide range of relevant mitigating factors. This shift included using a stepped approach, with suspension and expulsion as last options.<sup>89</sup> The Team also recommended using other forms of support for students and their families, including restorative practice and healing circles, and measures to safeguard students who report bullying against reprisal.<sup>90</sup>

In keeping with its recommendation in favour of progressive discipline, the Team clarified that the Provincial Code of Conduct incorporated in the *Education Act* (as a result of the *Safe Schools Act* amendments) was intended to set a clear standard for behaviour to “ensure that all members of the school community are treated with respect and dignity.”<sup>91</sup> While the *Act* provided for mandatory consequences in the event of certain kinds of incidents, the Team asserted that the *Act* did not support zero tolerance, even though it recognized the *Act* was being applied that way in some boards.<sup>92</sup> To resolve that inconsistency, the Team stressed the need, in every school, for a thorough and considered process for fully investigating incidents and taking all relevant factors into account prior to determining an appropriate consequence.<sup>93</sup>

In short, the Team recommended against a mechanistic approach in favour of a more certain process founded on a contextual investigation and graduated approach to discipline. To achieve that end, it recommended, among other things, expanding the list of mitigating factors in the *Act*, narrowing suspension powers to principals and vice principals only, including in-school suspensions as remedial options, and narrowing expulsion power to school boards alone.<sup>94</sup> Finally, the Team recommended development of the Provincial Safe Schools Framework, incorporating the *Safe Schools Act* and regulations, a Code of Conduct, a Policy on Anti-Racism and Ethnocultural Equity (PPM 118), a Violence-Free Schools Policy (PPM 120), a Police/School Board Protocol, and other related policy statements.<sup>95</sup>

### **C. Codification of Progressive Discipline**

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<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid* at 8.

<sup>90</sup> *Ibid* at 9.

<sup>91</sup> *Ibid* at 12.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid* at 13.

<sup>95</sup> *Ibid* at 21.



The Ontario government's first step in responding to the Team's recommendations was tabling the *Education Amendment Act (Progressive Discipline and School Safety), 2007* ("the EAA"), which came into force in 2008.<sup>96</sup> The EAA repealed provisions relating to suspensions and expulsions in ss 306-311 of the *Education Act*. Other key changes included,

(i) *discretionary* suspensions for activities *at school, at a school-related activity*, or in situations that *will have an impact on the school climate*, including threats of serious bodily harm, drug or alcohol possession, being under the influence of alcohol, swearing at a teacher or other person in a position of authority, vandalism causing extensive damage, bullying, and any other activity the principal can suspend a student for under a policy of the local school board;<sup>97</sup>

(ii) a requirement for principals, before issuing a discretionary suspension, to consider the same mitigating factors listed in the prior version of the provision,<sup>98</sup> as well as a new set of factors including the pupil's history, whether progressive discipline had been used with the student, whether the activity related to racial, ethnic origin, religious, ability, gender or sexual orientation harassment of another pupil, the pupil's age, and particular considerations for students with individual education plans (to ensure consideration of whether the behaviour related to the student's disability, etc);<sup>99</sup>

(iii) *mandatory* suspensions for weapon possession, use of a weapon to cause or threaten bodily harm, physical assault causing bodily harm requiring treatment by a medical practitioner, sexual assault, trafficking weapons or illegal drugs, committing robbery, giving alcohol to a minor, and any other activity for which a board policy mandates suspension. Suspensions could last for up to 20 school days, with duration being determined after taking into account any mitigating and other factors referred to in (ii) above. Interestingly, however, these mitigating factors no longer played a role in the determination of *whether* the student should be

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<sup>96</sup> *Education Amendment Act (Progressive Discipline and School Safety)*, SO 2007, c 14 [EEA].

<sup>97</sup> *Ibid* at s 4 (enacting new s 306(1)).

<sup>98</sup> These included, (i) whether the pupil had the ability to control their behaviour, (ii) whether the pupil could understand the foreseeable consequences of their behaviour, and (iii) whether their continuing presence in school created an unacceptable risk to the safety of any person: O/Reg 472/07, s 2.

<sup>99</sup> *EEA*, *supra* note 92 at s 4 (enacting new s. 306(2)); O/Reg 472/07, s 3.

suspended;<sup>100</sup>

(iv) a mandatory procedure to consider whether a student issued a *mandatory* suspension should be expelled, with the final decision relating to expulsion to be made by the board. Before ordering expulsion, the board was required to consider any mitigating or other factors referred to in (ii) above, as well as the submissions of the parties to the expulsion hearing;<sup>101</sup> and

(v) a requirement that every board have a least one program available for suspended or expelled students to attend.<sup>102</sup>

The government supported these legislative initiatives with funding earmarked for hiring support workers (such as child and youth workers), maintaining programs for suspended and expelled students,<sup>103</sup> and supporting “Urban Priority High Schools” with student populations facing regular problems with respect to poverty, criminal/gang activity, and lack of resources at home and in the school community.<sup>104</sup> The Ministry also issued Policy/Program Memoranda (PPM) on board programs for suspended and expelled students, as well as on bullying prevention and intervention, progressive discipline, and promoting positive behaviour.<sup>105</sup> Further, it revised the PPM on the provincial and school board codes of conduct to “include a statement that all members of the school community must not engage in hate propaganda or other forms of behaviour motivated by hate or bias.”<sup>106</sup>

#### **D. The Safe Schools Action Team’s *Shaping A Culture of Respect* Report**

In 2008, the Ontario government took another step toward addressing discriminatory attitudes and practices negatively affecting school culture, by engaging the Team to review issues of gender-based violence, homophobia, and inappropriate sexual behaviour in Ontario schools, including any barriers to reporting.<sup>107</sup> The Team submitted its final report, *Shaping A Culture of Respect in Our Schools: Promoting Healthy Relationships*, to the Minister in December 2008. In the report, the Team indirectly connected concerns around safety with issues of

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<sup>100</sup> *Ibid* at s 4 (enacting new s 310).

<sup>101</sup> *Ibid* at s 4 (enacting new ss 311.2-311.3).

<sup>102</sup> *Ibid* at s 5 (enacting new s 312(1)(a)(b)).

<sup>103</sup> Safe Schools Action Team, *Shaping a Culture of Respect in Our Schools: Promoting Safe and Healthy Relationships* (Toronto: Ontario Ministry of Education, 2008) at 3, online: <[www.edu.gov.on.ca/eng/teachers/RespectCulture.pdf](http://www.edu.gov.on.ca/eng/teachers/RespectCulture.pdf)> [Shaping a Culture of Respect].

<sup>104</sup> *Ibid*.

<sup>105</sup> *Ibid*.

<sup>106</sup> *Ibid*.

<sup>107</sup> *Ibid*.

discrimination and intolerance, noting that a positive school climate “enables all members of the school community to feel safe, comfortable and accepted.”<sup>108</sup>

The Team defined “inappropriate sexual behaviour” as “sexual behaviour [by] a young person that places [them] or another individual ‘at risk’ physically, psychologically, or socially and/or is [inappropriate to their age or developmental stage]”, including unprotected sex, viewing of pornography at a young age, or posting sexual information online.<sup>109</sup> The Team went on to define homophobia and sexual harassment as types of “bullying/harassment,” with consequences that can damage many kinds of interactions in school and the learning environment in general.<sup>110</sup> The Report pointed to research showing that sexual harassment and gender-based violence disproportionately affects girls, with girls marginalized by race, class, sexual minority status and disability being more vulnerable.<sup>111</sup> Moreover, it noted that LGBTQ youth were more likely to experience physical or verbal harassment than heterosexual youth, and often had limited access to supportive relationships.<sup>112</sup> The Report also acknowledged the influence of electronic media on youth— particularly the violence, gender-based violence, and stereotypes that proliferate in media—as well as the impact these representations can have on youth perceptions and interactions.<sup>113</sup>

The Team articulated six guiding principles in the 2008 report: (i) “safety is a precondition for learning”; (ii) “every student is entitled to learn to the best of his or her ability”; (iii) “every student is entitled to a safe and caring learning environment”; (iv) “every student is entitled to learn in an environment free from harassment and violence”; (v) “a quality education is about more than academic achievement – it is about the development of the whole person”; and (vi) “the commitment to safe schools is a shared responsibility of government, [school board and school administrators and staff], parents, police and other community partners.”<sup>114</sup> Based on consultations with educators, students, parents, principals, trustees, and community agencies, the Team emphasized that remaining silent about harassing comments might be interpreted as condoning discriminatory treatment, making active response and prevention critical.<sup>115</sup> To that end, the Team identified ten key areas for focus: curriculum, effective partnerships with community agencies, prevention/awareness raising/intervention, response and supports, reporting, local police/school board protocols, student leadership, parent/family engagement, training, and evaluation and accountability.<sup>116</sup>

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<sup>108</sup> *Ibid* at 2.

<sup>109</sup> *Ibid* at 4.

<sup>110</sup> *Ibid* at 5-6.

<sup>111</sup> *Ibid* at 6.

<sup>112</sup> *Ibid* at 7.

<sup>113</sup> *Ibid* at 7.

<sup>114</sup> *Ibid* at 8.

<sup>115</sup> *Ibid* at 9.

<sup>116</sup> *Ibid* at 10.

With respect to curriculum, the Team reported that issues related to sexual health—including gender-based violence, homophobia, sexual harassment and inappropriate sexual behaviour—were not consistently and effectively integrated into the curriculum in all schools.<sup>117</sup> Moreover, students reported that topics like healthy relationships and sexuality, gender stereotyping, and homophobia were introduced too late into the curriculum, particularly in light of the relatively young ages at which students reported having their first sexual encounter.<sup>118</sup> The Team also noted concern from participants about exposure to stereotypes and violent or disrespectful behaviour in media, including in video games where violence (especially against women) can be normalized, and a concomitant concern that there was not sufficient opportunity to discuss these issues in school.<sup>119</sup>

As a result, the Team recommended, among other things, (i) ensuring that curriculum revisions are consistent with a commitment to “equity, inclusion and respect for all students”; (ii) taking a cross-curricular approach to integration of issues of gender-based violence, homophobia, sexual harassment and inappropriate sexual behaviour; and (iii) ensuring that healthy relationships are incorporated into the Healthy Living component of the physical education curriculum, and that issues about gender stereotypes, homophobia, sexual identity, dating violence, contraception, and gender-based violence, are introduced in an age-appropriate way starting in grade six.<sup>120</sup> Moreover, the Team recommended that the issues of gender-based violence, homophobia, sexual harassment, and inappropriate sexual behaviour be incorporated into critical literacy training as part of media literacy and media studies curriculum, and that issues of internet safety and the “long-term implications of sharing personal details, especially [...] sexually explicit [ones]” be addressed in Ontario schools.<sup>121</sup>

With respect to interventions, the Team noted the importance of consistent intervention by staff where discriminatory comments or gestures are made. In addition, it pointed to the need to disseminate prevention and awareness-raising strategies; work with agencies with expertise in these areas; ensure character education and equity policies address gender-based violence, homophobia, sexual harassment, and inappropriate sexual behaviour; and support student-based initiatives and initiatives to provide teachers with strategies and information on these issues.<sup>122</sup> Moreover, the Team recommended expanding school climate surveys to include, within the bullying/harassment component, questions about homophobia and sexual harassment.<sup>123</sup>

With respect to responses and supports, the Team noted that students are often reluctant to tell teachers and administrators about incidents of homophobic

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<sup>117</sup> *Ibid* at 11.

<sup>118</sup> *Ibid*.

<sup>119</sup> *Ibid*.

<sup>120</sup> *Ibid* at 13-14.

<sup>121</sup> *Ibid* at 15.

<sup>122</sup> *Ibid* at 21.

<sup>123</sup> *Ibid* at 22.

and sexual harassment. The Team therefore recommended that steps be taken to provide staff with the necessary skills and information to respond in supportive ways and to provide resource information, as well as to distinguish situations where matters can be resolved without involvement of police or other agencies,<sup>124</sup> versus situations where that reporting is required.<sup>125</sup> While the Team noted that policies were in place to clarify principals' obligations to report student-on-student violence to police, there were not consistently clear policies outlining teachers' responsibilities to report incidents to principals.<sup>126</sup> Therefore, the Team recommended, among other things, that teachers be required to report student-on-student sexual assault to principals.<sup>127</sup> In addition, the Team recommended additional training on protocols between local school boards and police to ensure that reporting requirements were met.<sup>128</sup>

Further, the Team acknowledged the benefits of peer-to-peer initiatives, and recommended that all publicly-funded schools be required to encourage student-led initiatives and, in particular, support school-led clubs promoting healthy relationships including Gay/Straight Alliances.<sup>129</sup> Further, the Team recommended that principals, teachers, and staff be provided with sensitivity training and training on effective intervention practices with respect to gender-based violence, homophobia, sexual harassment, and inappropriate sexual behaviour.<sup>130</sup>

#### **E. Ontario's *Keeping Our Kids Safe at School Act***

In 2009, the Ontario government enacted its first legislative response to the Team's report on cultivating cultures of respect as an aspect of creating a safe school climate. The *Education Amendment Act (Keeping Our Kids Safe at School), 2009*<sup>131</sup> came into effect in 2010. The *Act* required board employees to report violent incidents that could lead to suspension or expulsion to the principal, and also required principals to contact the parents of victimized students.<sup>132</sup> It also mandated staff who work directly with students to respond to incidents at school

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<sup>124</sup> For example, situations where there are reasonable grounds to suspect a child is being hurt by his or her caregiver must be reported under the *Child and Family Services Act*, RSO 1990, c C.11, s 72.

<sup>125</sup> Shaping a Culture of Respect, *supra* note 99 at 25.

<sup>126</sup> *Ibid* at 28.

<sup>127</sup> *Ibid* at 31.

<sup>128</sup> *Ibid* at 34.

<sup>129</sup> *Ibid* at 36.

<sup>130</sup> *Ibid* at 41.

<sup>131</sup> *Education Amendment Act (Keeping Our Kids Safe at School), 2009*, SO 2009, c 17 [*Keeping Our Kids Safe at School Act*].

<sup>132</sup> *Education Act*, RSO 1990, c E-2, as amended by *Education Amendment Act (Keeping Our Kids Safe at School) 2009*, SO 2009 c 17, ss 300.2, 300.3(1). The infractions for which an employee must report to the principal are listed in s 306(1) and s 310(1) of the *Education Act*.

that have a negative impact on school climate.<sup>133</sup> In order to communicate clearly with parents, the government issued a plain language document setting out the requirements of the amendments.<sup>134</sup> Training resources were also made available to staff.

#### **F. The Ministry's Equity and Inclusive Education Strategy**

The Ontario Ministry of Education also released *Ontario's Equity and Inclusive Education Strategy* in 2009 ("the Strategy").<sup>135</sup> The Strategy committed the government to inclusive education in which "students see themselves reflected in their curriculum, their physical surroundings, and the broader environment, in which diversity is honoured and all individuals are respected."<sup>136</sup> Noting the continuing presence of racism, homophobia, religious intolerance, and gender-based violence in Canadian communities (particularly in schools and on the internet), the Strategy emphasized the obligation to provide positive, harassment-free environments for all students.<sup>137</sup> Notwithstanding a growth in the diversity of the student body in Ontario schools, the Strategy noted that only 43 of 72 school boards reported having an equity policy as of 2009.<sup>138</sup> The Strategy aimed to put in place a system-wide approach that would contribute to achieving the Ministry's "three core priorities of improving student achievement, reducing achievement gaps, and increasing public confidence in our education system."<sup>139</sup>

Positive school climate, the Strategy noted, would require ensuring "that all members of the school community feel safe, comfortable, and accepted" and that students and staff value diversity, demonstrate respect for others and show a commitment to "establishing a just, caring society."<sup>140</sup> The Strategy envisioned the Ministry providing direction and guidance for achieving a positive school environment, while school boards would develop policies and guidelines on equity and inclusion.<sup>141</sup> Furthermore, each "school [would be responsible] to create and

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<sup>133</sup> *Keeping Our Kids Safe at School Act*, *supra* note 127 at s 1 (enacting s 300.4).

<sup>134</sup> See Ontario Ministry of Education, "Safe Schools: Reporting And Responding to Incidents: A Resource for Board Employees" (2009), online: <[www.edu.gov.on.ca/eng/safeschools/reportingResponding.html](http://www.edu.gov.on.ca/eng/safeschools/reportingResponding.html)>.

<sup>135</sup> Ontario, Ministry of Education, *Ontario's Equity and Inclusive Education Strategy* (Toronto: Ministry of Education, 2009), online: <[www.edu.gov.on.ca/eng/policyfunding/equity.pdf](http://www.edu.gov.on.ca/eng/policyfunding/equity.pdf)>.

<sup>136</sup> *Ibid* at 4.

<sup>137</sup> *Ibid* at 7.

<sup>138</sup> *Ibid* at 9.

<sup>139</sup> *Ibid* at 10.

<sup>140</sup> *Ibid* at 10.

<sup>141</sup> Segeren and Kutsyuruba have noted the misfit between the top-down nature of mandated board-wide policies and the need for bottom-up input to develop equity policies at each individual school that are meaningful for each particular community: Allison Segeren & Benjamin Kutsyuruba, "Twenty Years and Counting:

support a positive school climate that fosters and promotes equity, inclusive education, and diversity.”<sup>142</sup> The Strategy aimed to ensure both that “issues such as gender-based violence, homophobia, sexual harassment, and inappropriate sexual behaviour are discussed and addressed in our schools and classrooms,” and that respect for diversity was modelled in schools.<sup>143</sup>

After listing examples of several diversity initiatives in a number of Ontario school boards, the Strategy ended with a four-year action plan. Initiatives included, (i) providing \$4 million in funding to “support and promote equity and inclusive education and school safety, and to address harassment in schools” (year 1); (ii) expanding school climate surveys to gather data to inform policies (year 1); (iii) encouraging and empowering students to share ideas and get involved (year 1); (iv) putting procedures and policies in place for harassment reporting (year 2); and (v) implementing strategies developed in years 1 and 2 (year 3).<sup>144</sup>

### **G. The Accepting Schools Act**

It was not until 2012, after a series of high profile teen suicides, that the government more fully responded to many of the other recommendations in the Team’s *Shaping Cultures of Respect* report. The *Accepting Schools Act* (“ASA”) was tabled in 2011 and came into force in 2012.<sup>145</sup> The ASA amended the *Education Act* to better support bullying prevention and intervention, incorporating a definition of “bullying,”<sup>146</sup> which included “cyber-bullying,”<sup>147</sup> into the *Act* for the first time.<sup>148</sup> The ASA also,

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An Examination of the Development of Equity and Inclusive Education Policy in Ontario (1990-2010)” (2012) 136 Can J Educational Administration & Policy 1 at 31, online: <[www.umanitoba.ca/publications/cjeap/pdf\\_files/segeren-kutsyuruba.pdf](http://www.umanitoba.ca/publications/cjeap/pdf_files/segeren-kutsyuruba.pdf)>

<sup>142</sup> *Ibid* at 11.

<sup>143</sup> *Ibid* at 15.

<sup>144</sup> *Ibid* at 19-23.

<sup>145</sup> *Accepting Schools Act*, SO 2012, c 5 [ASA].

<sup>146</sup> The *Accepting Schools Act* defined “bullying” as, “aggressive and typically repeated behaviour by a pupil where,

- (a) the behaviour is intended by the pupil to have the effect of, or the pupil ought to know that the behaviour would be likely to have the effect of,
  - (i) causing harm, fear or distress to another individual, including physical, psychological, social or academic harm, harm to the individual’s reputation or harm to the individual’s property, or
  - (ii) creating a negative environment at a school for another individual,and
- (b) the behaviour occurs in a context where there is a real or perceived power imbalance between the pupil and the individual based on factors such as size, strength, age, intelligence, peer group power, economic status, social status, religion, ethnic origin, sexual orientation, family circumstances, gender, gender

(i) required school boards to provide professional development about bullying prevention, and programming for students witnessing bullying;<sup>149</sup>

(ii) amended sections of the *Act* to require the Ministry to develop a model bullying intervention and prevention plan that school boards could use to develop their own plans, which schools were required to implement;<sup>150</sup>

(iii) required school boards to support students wishing to establish Gay-Straight Alliances (GSAs) or similar groups seeking to promote anti-bullying and a positive school climate;<sup>151</sup>

(iv) expanded the list of behaviours for which suspension was mandatory to include bullying if the pupil had previously been suspended for bullying and their continuing presence in school presented an unacceptable risk to the safety of another person; and any activity for which suspension was an option if that activity was motivated by bias, hate or prejudice based on, among other things, race, colour, sex, age, gender identity, and gender expression;<sup>152</sup>

(v) required school boards to develop an equity and inclusive education policy;<sup>153</sup>

(vi) required school boards to administer School Climate Surveys at least once every two years to provide schools with data to inform bullying prevention and intervention initiatives;<sup>154</sup> and

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identity, gender expression, race, disability or the receipt of special education; (“intimidation”): *Ibid*, s 1(1).

Further, the *Act* specified that “bullying” behaviour could incorporate physical, verbal, electronic, written or other means: *Ibid*, s 1(2).

<sup>147</sup> The *Act* defined “cyberbullying” as “bullying by electronic means,” including web pages or blogs created and falsely attributed to another person, impersonating someone as the author of content online, and communicating material to or posting information online that is available to more than one person: *Ibid*, s 1(2).

<sup>148</sup> *Ibid*, s 2(2).

<sup>149</sup> *Ibid*, s 4.

<sup>150</sup> *Ibid*, s 13.

<sup>151</sup> *Ibid*, s 12.

<sup>152</sup> *Ibid*, s 14.

<sup>153</sup> *Ibid*, s 2(1).

<sup>154</sup> *Ibid*, s 3(2). See e.g. Ontario, Ministry of Education, “School Climate Surveys”, (2013), online: <[www.edu.gov.on.ca/eng/safeschools/climate.html](http://www.edu.gov.on.ca/eng/safeschools/climate.html)>.



(vii) established Bullying Awareness and Prevention Week in November of each year.<sup>155</sup>

It is notable that although bullying was added to the list of behaviours for which suspension is mandatory, unlike the other behaviours in that list (e.g. committing robbery, giving alcohol to a minor), principals maintain a certain degree of discretion. Principals can decide not to suspend a student previously suspended for bullying in relation to a subsequent bullying infraction so long as their continued presence in school does not present an unacceptable risk to the safety of another person. At the same time, however, the ASA also expanded the list of mandatory suspension behaviours by adding in any activities for which a student *could* be suspended, where the activity in question was motivated by identity-based bias, prejudice, or hate. In these cases, suspension is mandatory and principals maintain no discretion to determine whether the student presents an unacceptable safety risk.

## H. The Comprehensive Action Plan for Accepting Schools

The ASA formed part of a broader strategy among provincial agencies<sup>156</sup> in Ontario called the *Comprehensive Action Plan for Accepting Schools*. In addition to the ASA amendments, that plan included more mental health workers for schools, revising curriculum to embed bullying prevention and equity principles, a public anti-bullying awareness campaign, and an Accepting Schools Expert Panel to advise on evidence-based resources and practices focusing on “a whole school approach” to include bullying intervention and prevention strategies.<sup>157</sup>

Following passage of the ASA, the Ministry of Education issued a bulletin to school boards outlining their obligations to revise their policies and guidelines to comply with changes effected by the ASA.<sup>158</sup> Among other things, the bulletin noted school boards’ and schools’ responsibility to foster a safe, inclusive, and accepting school climate, including the learning environment and the relationships found within the school and school community, with “equity and inclusive education embedded in the learning environment” to promote a “culture of mutual respect.”<sup>159</sup> Speaking of the need for “systemic change,” the bulletin listed characteristics of positive school climate, including, among other things, that students, staff and

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<sup>155</sup> *ASA, supra* note note 141, s 7.

<sup>156</sup> Various areas of the Ministry of Education, as well as the Ministry of Children and Youth Services, were included in the strategy.

<sup>157</sup> Ontario, Ministry of Education, “Creating Safe and Accepting Schools: Information for Parents about the *Accepting Schools Act* (Bill 13)” (Toronto: Queens Printer for Ontario, 2012) at 2, online: <[www.edu.gov.on.ca/eng/safeschools/SafeAccepSchools.pdf](http://www.edu.gov.on.ca/eng/safeschools/SafeAccepSchools.pdf)>.

<sup>158</sup> Ontario, Ministry of Education, “Bullying Prevention and Intervention”, Policy Program Memorandum No 144 (Toronto: Ministry of Education, 19 October 2009).

<sup>159</sup> *Ibid.*

parents feel safe and are safe, accepted and included, as well as the existence of bullying prevention and awareness-raising strategies that are reinforced through curriculum-linked programs.<sup>160</sup> The bulletin went on to tie positive school climate to ASA requirements to consider suspension for bullying, and mandating suspension for repeat bullying presenting a threat to safety, as well as the mandatory suspension requirement for behaviours, including bullying, that are motivated by hate, bias or prejudice.<sup>161</sup> It encouraged school board and school staff to be aware of bullying and cyberbullying and to be prepared to intervene “with a few moments of coaching and support” at critical times, in order to remind students of their obligations to maintain positive relationships with others.<sup>162</sup> The bulletin then detailed the required elements of board prevention and intervention plans.

### **I. Model Bullying Prevention and Intervention Plan**

In accordance with the ASA, the Ministry also released a Model Bullying Prevention and Intervention Plan in January 2013, which was developed by PREVNet in collaboration with the Accepting Schools Experts Panel (“the Model Plan”).<sup>163</sup> The Model Plan suggested incorporating the definition of bullying from the *Act* and recommended, among other things, “identifying how biases, prejudice and hate can lead to bullying.” It also recommended identifying “different manifestations and underlying factors of bullying such as body image, racism, sexism, homophobia, disability, etc”;<sup>164</sup> developing awareness of the factors contributing to a safe, inclusive, caring and accepting school climate; and making students aware of “how they can help prevent and address bullying.”<sup>165</sup>

The Model Plan positioned school climate surveys as tools for evaluating existing weaknesses and strengths, with subsequent surveys allowing for testing the efficacy of responses adopted.<sup>166</sup> It recommended identifying the children and youth involved with bullying (including the bully, the target, and those who witnessed or were affected) and conducting a risk assessment with respect to those identified.<sup>167</sup> The Plan also stressed the importance of communicating policies, procedures, and guidelines to the entire school community (including parents), as well as reviewing

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<sup>160</sup> *Ibid* at 2.

<sup>161</sup> *Ibid*.

<sup>162</sup> *Ibid*.

<sup>163</sup> Ontario, Ministry of Education, “Working Draft: Safe and Accepting Schools Model Bullying Prevention & Intervention Plan” (Toronto: Queen’s Printer for Ontario, 2013), online: <<https://education-leadership-ontario.ca/en/resource/model-bullying-prevention-plan>>.

<sup>164</sup> *Ibid* at 2.

<sup>165</sup> *Ibid* at 3.

<sup>166</sup> *Ibid*.

<sup>167</sup> *Ibid*.

those materials or developing new ones to address discrimination and harassment.<sup>168</sup>

In terms of prevention, the Model Plan noted that “fostering a positive learning and teaching environment” should help to reduce discrimination, harassment and bullying incidents. Among other strategies, the Plan recommended “regular check-ins with students at risk of engaging in bullying, and those who have witnessed or been affected by bullying,” as well as aligning supervision plans to address where and when bullying happens, as identified in school climate surveys.<sup>169</sup>

Where intervention and support were concerned, the Plan recommended (i) considering a range of options for deciding how to address behaviour as it happens, (ii) following up with students, parents, and teachers after bullying incidents happen, and (iii) identifying strategies (including school-based resources and referrals to public health or mental health services) to support students who bully, are targeted, and who witness bullying, all “while respecting privacy.”<sup>170</sup>

The Ministry also worked with the OHRC to develop *Supporting Bias-Free Progressive Discipline in Schools: A Resource Guide for Schools and System Leaders*, to assist schools in taking a bias-free approach to progressive discipline and in implementing early prevention and intervention approaches to support positive student behaviour.<sup>171</sup>

## **J. Curriculum Reform 2015**

In 2015 the Ontario Ministry of Education revised the Health and Physical Education curriculum for grades 1-8 and 9-12 (the Revised Curriculum).<sup>172</sup> The Revised Curriculum implements, in part, equity and inclusive education guidelines, and reflects many of the Team’s recommendations about curricular reform in its *Shaping A Culture of Respect* report. Notwithstanding public allegations about the

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<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid* at 4.

<sup>170</sup> *Ibid* at 4-5.

<sup>171</sup> See Ontario Ministry of Education & Ontario Human Rights Commission, *Supporting Bias-Free Progressive Discipline in Schools: A Resource Guide for Schools and System Leaders* (Toronto: Ontario Public Service, 2013), online: <[www.edu.gov.on.ca/eng/policyfunding/SupportResGuide.pdf](http://www.edu.gov.on.ca/eng/policyfunding/SupportResGuide.pdf)>.

<sup>172</sup> Ontario, Ministry of Education, *The Ontario Curriculum Grades 1-8, Health and Physical Education* (Toronto: Ontario Public Service, 2015), online: <[www.edu.gov.on.ca/eng/curriculum/elementary/health1to8.pdf](http://www.edu.gov.on.ca/eng/curriculum/elementary/health1to8.pdf)> [Revised Curriculum 1-8]; Ontario, Ministry of Education, *The Ontario Curriculum Grades 9-12, Health and Physical Education* (Toronto: Ontario Public Service, 2015), online: <[www.edu.gov.on.ca/eng/curriculum/secondary/health9to12.pdf](http://www.edu.gov.on.ca/eng/curriculum/secondary/health9to12.pdf)>.

radical nature of the Revised Curriculum,<sup>173</sup> Gillian Angrove suggests that in some ways it does not go far enough, writing,

While incorporating educational initiatives aimed at alerting students to risk and ways of protecting themselves from risk [such as cyberbullying], the revised curriculum also specifically incorporates units for elementary students on understanding and challenging media stereotypes, developing healthy relationships, and respect for diversity, and content for secondary students on consent and sexual limits, and factors affecting gender identity and sexual orientation (including unrealistic and exclusionary media bias and stereotyping and how to challenge them). While not necessarily explicitly teaching children and youth the meaning of equality, development of these kinds of skills academically may well contribute to a “growing recognition of the gender-specific consequences of cyberbullying,” and hopefully, a more effective means of prevention and intervention.<sup>174</sup>

The Revised Curriculum mobilizes “safety” and “inclusivity,” noting that a “healthy, caring, safe, inclusive and accepting” learning environment is key to students realizing their full potential.<sup>175</sup> It further provides that a positive school climate is one where “students of all backgrounds, abilities and experiences feel comfortable and welcome.”<sup>176</sup>

The Revised Curriculum addresses safety both in a physical sense (including in relation to sexual activity)<sup>177</sup> and in an emotional sense (in terms of risks such as bullying and online harassment).<sup>178</sup> It also addresses a number of risks, including the “benefits and dangers” of using technology, and dangers including “misuse of private information, [...] [and] cyberstalking.”<sup>179</sup> The solutions proposed in the Revised Curriculum include not writing or posting about things “if you do not want someone else to know” about them, and saving and printing harassing messages and

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<sup>173</sup> See e.g. Trinh Theresa Do, “Ontario’s new sex-ed curriculum ‘the most up-to-date’ in the country”, *CBC News* (25 February 2015), online:

<[www.cbc.ca/news/canada/ontario-s-new-sex-ed-curriculum-the-most-up-to-date-in-the-country-1.2969654](http://www.cbc.ca/news/canada/ontario-s-new-sex-ed-curriculum-the-most-up-to-date-in-the-country-1.2969654)>; The Canadian Press, “Ontario parents opposed to sex ed changes threaten to pull kids from school”, *CBC News* (3 May 2015), online: <[www.cbc.ca/news/canada/toronto/ontario-parents-opposed-to-sex-ed-changes-threaten-to-pull-kids-from-school-1.3059455](http://www.cbc.ca/news/canada/toronto/ontario-parents-opposed-to-sex-ed-changes-threaten-to-pull-kids-from-school-1.3059455)>.

<sup>174</sup> Gillian Angrove, “She’s Such a Slut!: The Sexualized Cyberbullying of Teen Girls and the Education Law Response” in Jane Bailey & Valerie Steeves, eds, *eGirls, eCitizens*, (Ottawa: University of Ottawa Press, 2015) 307 at 323.

<sup>175</sup> Revised Curriculum 1-8, *supra* note 168 at 3.

<sup>176</sup> *Ibid* at 27.

<sup>177</sup> *Ibid* at 218.

<sup>178</sup> *Ibid* at 182.

<sup>179</sup> *Ibid* at 194.

reporting them to a trusted adult.”<sup>180</sup> The Curriculum further provides that students should be taught about, (i) the “significant risks” of sexting, (ii) behaviours to minimize the risk of messages becoming public, (iii) legal penalties for sharing images without consent, and (iv) the importance of “respecting privacy and treating others with respect.”<sup>181</sup> Students are also to learn about the impact of “different types of bullying or harassment,” and be encouraged to develop skills to prevent or resolve incidents, including by “reporting events involving themselves or others, encouraging others to understand the social responsibility to report others [...] rather than maintaining a code of silence or viewing reporting as ‘ratting.’”<sup>182</sup> Among the kinds of responses suggested are recognizing that “everyone needs to take responsibility for the words they use and also to challenge others who [...] put people down, whether in person or online.”<sup>183</sup>

The Revised Curriculum emphasizes the responsibility of students to intervene on bullying and to report to trusted adults.<sup>184</sup> It also stresses helping students become “more independent and more responsible for their own safety and that of others.”<sup>185</sup> For example, it would prompt bystanders to online attacks to consider standing up for the targeted person, telling them to get offline, helping them if possible, and telling a trusted adult.<sup>186</sup> Further, it encourages teaching bystanders to help those targeted figure out ways to “stand up for” themselves.<sup>187</sup>

The Revised Curriculum also encourages dialogue with students focused on “repair processes such as restorative justice [...] in order to prevent [incidents] from happening again.”<sup>188</sup> It emphasizes that participation in the process needs to be voluntary and overseen by trained facilitators, to prevent further harm from being done.<sup>189</sup> Finally, it stresses the role of educators in promoting student understanding of “healthy relationships that do not tolerate abusive, controlling, violent, bullying/harassing or other inappropriate behaviours.”<sup>190</sup>

## **K. Equality and Surveillance in a “Safe and Accepting” Era**

Ontario’s transition to a “safe and accepting” approach ushered in significant legislative and policy changes that expanded the discourse about “safety” from one focused on one-off acts of extreme violence under “zero tolerance” towards one that explicitly recognizes the social and emotional toll exacted from members of

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<sup>180</sup> *Ibid* at 195.

<sup>181</sup> *Ibid*.

<sup>182</sup> *Ibid* at 198.

<sup>183</sup> *Ibid*.

<sup>184</sup> *Ibid*.

<sup>185</sup> *Ibid* at 127.

<sup>186</sup> *Ibid* at 141.

<sup>187</sup> *Ibid* at 158.

<sup>188</sup> *Ibid* at 198.

<sup>189</sup> *Ibid* at 198-9.

<sup>190</sup> *Ibid* at 66.

equality-seeking groups in environments characterized by discrimination and harassment. With this more robust conception of “safety,” and the threats to it, has come an emphasis on prevention and more nuanced response options that extend beyond suspension to include support for anti-oppression student alliances, curricular reform, and community-based mechanisms for restoration. However, while these more proactive approaches seem to invite less oppressive top-down surveillance, punishment and surveillance continue to be centrepieces in the repertoire of available responses. A form of “mandatory” suspension born in the “zero tolerance” era continues to apply, although with an added element of discretion in relation to “bullying” and “cyberbullying.”

Whether this modified form of punishment is being applied in ways that disproportionately disadvantage members of equality-seeking groups, therefore, remains a troubling concern. Further, the emphases on bystander intervention and students’ responsibility to protect themselves introduced specifically in relation to bullying and cyberbullying open up new avenues for increased peer-to-peer surveillance and the potential for victim-blaming, which merit further attention and consideration. It would be unfortunate to open the door to more diverse, respectful, and welcoming environments on one hand, while closing that door by cultivating cultures of suspicion and peer policing with the other.

## **CONCLUSION**

The evolution of Ontario’s education law and policy from 2000 to 2015 illustrates how different understandings of “safety” can influence policy approaches. In the education context, risks to safety defined as extreme one-off acts of physical violence have invited punitive “zero tolerance” responses, modelled on the “war on drugs,” that emphasize top-down policing and surveillance. In contrast, risks to safety defined to incorporate the day-to-day social, emotional, and sometimes physical toll taken by a systemically discriminatory and unwelcoming environment have expanded the policy repertoire to include proactive responses aimed at prevention, attitude shifts, and long-term social transformation. These kinds of shifts are visible in Ontario’s transition from the version of “zero tolerance” first codified in 2000, toward the “safe and accepting” approach that began to take shape around 2004 (although a mix of punitive and proactive approaches remain).

Rooted in the “war on drugs” in the United States, zero tolerance found its way into American schools as a way to respond to weapons-based violence (although the policy of “automatic” consequences also applied to a much wider and more subjective variety of behaviours). This resulted in an atmosphere of intense surveillance and distrust that led to the disproportionate punishment of Black and Hispanic male students.

Motivated to be seen as “tough on crime,” and notwithstanding the discriminatory effects of “zero tolerance” policies in the U.S., the Ontario government in 2000 adopted the rhetoric of “zero tolerance” in its education law and policy. However, the margin of discretion left for those meting out punishments under the policy produced inconsistent results between schools (even within the same board), and ultimately generated an OHRC complaint highlighting the

discriminatory impacts of “zero tolerance” on Black, Indigenous, and disabled students. While “zero tolerance” cloaked subjective and discretionary decision-making in the garb of objective clarity, in a systemically unequal society, its application structurally disadvantaged members of these equality-seeking communities, even where decision-makers may individually have felt they acted with the best of intentions. Further, by characterizing individual bad actors and physical violence as the heart of the problem, “zero tolerance” obscured structural root causes of violence, including poverty, racism, homophobia, and misogyny and the social and emotional tolls that oppressive environments can exact on a daily basis from students, teachers, principals, and staff from equality-seeking communities.

A number of events and wider social developments catalyzed Ontario’s law and policy transition. Important among these were the 2007 settlement of the OHRC complaint and the rise of the discourse around “bullying” and “cyberbullying,” both of which incited expansion of policy responses beyond reactive approaches focused on punishing individuals, toward approaches that incorporate proactive, whole-school orientations aimed at cultivating cultural and structural transformation.

Ontario’s Safe Schools Action Team played a critical role in the transition, focusing on a more robust approach to “safety” that incorporated not just physical violence, but also social and emotional harm as well. The Team’s 2004 *Shaping Safer Schools Report* emphasized the need to develop safe, respectful learning environments through preventative responses to issues such as “bullying.” It further recognized the ways in which structural discrimination left students from many equality-seeking groups more exposed to attack. In a 2006 review of discipline methods, and in the 2008 *Shaping A Culture of Respect* report, the Team focused on the importance of creating school environments that reflect a commitment to equity, inclusion, and respect for diversity. The 2008 report, in particular, more directly connected “safety” with discrimination and intolerance, noting that gender-based violence and homophobia meant that girls and LGBTQ++ students did not have equal opportunity to feel safe at school.

Law and policy in Ontario lagged behind the Team’s recommendations, although many recommendations are reflected in changes to legislation, regulations, and policy memoranda over time. Ontario’s 2009 Equity and Inclusive Education Strategy set out commitments to harassment-free environments and emphasized the need for school-based equity and inclusion policies. However, the *Keeping our Kids Safe at School Act, 2009*, responded only nominally to that strategy and to the Team’s 2004 and 2008 reports, by clarifying systems for reporting violence in schools.

Significant strides toward implementation of the Team’s more proactive vision were made in 2012, as part of the Comprehensive Action Plan for Accepting Schools. In 2012, the *Accepting Schools Act* reflected more of the Team’s 2008 recommendations by, among other things, mandating professional development for teachers, supporting development of model prevention plans, and requiring schools to support anti-oppression organizations formed by students (such as Gay-Straight Alliances). It also explicitly defined “bullying” and “cyberbullying” as infractions for

which suspension was mandatory for students previously suspended for bullying, while leaving discretion to principals to determine whether the continuing presence in school of the student who committed the infraction presented an unacceptable threat to the safety of others. Suspension also became mandatory for any suspendible infraction where the behaviour in question was motivated by bias relating to issues such as gender, race, sexual orientation, and gender identity. In so doing, the government arguably signalled a commitment to treating attacks on students from equality-seeking communities seriously, an issue identified in the Team's 2008 report. In 2013, the Ontario government released a Model Bullying Prevention Plan that recognized bias-based attacks, and emphasized the need for climate surveys and offering a range of responses beyond one-off punishments, such as suspensions.

Perhaps the most proactive and (strangely) controversial reform, however, came with Ontario's 2015 curriculum reform initiative. This reform appeared to respond directly to the Team's 2008 recommendation to educate students about underlying systemic issues relating to sexuality, gender identity, and media stereotypes. The curriculum reform document expressly recognizes "safety" as emotional, social, as well as physical, and initiates dialogue around issues that threaten this more robust conception of safety. It also offers the opportunity to address at least some of the systemic issues that disproportionately expose students from certain equality-seeking groups to harassment and violence. While the reform emphasizes teaching students about preventative strategies and information touching on equality issues, it does not actually mandate instruction or discussion about equality *per se*. Moreover, by encouraging bystander intervention and instruction to students on how to protect themselves, it opens up prospects for responsabilization of individual students and peer surveillance, which risks obscuring underlying structural issues once again.

There are many reasons to be optimistic about Ontario's transition from education law and policies emphasizing "zero tolerance" to those expanded to inculcate a "safe and accepting" environment. Among other things, the transition symbolizes a more robust conception of "safety" that moves beyond extreme but infrequent acts of physical violence toward one that recognizes the cumulative significance of everyday acts of harassment and environments structured by discrimination and prejudice that nurture and enable those acts. As spaces of learning for young people, educational institutions are especially well-placed to provide opportunities for the kind of dialogue and growth that are essential to long term social transformation. Simply put, the more we learn to respect the diversity among us, the less we should have to police and protect ourselves against transgressions.

This paper ends, however, with much more guarded optimism for two reasons. First, many aspects of the underlying "mandatory suspension" model associated with "zero tolerance" remain in the *Education Act*, including allowing individual boards to add to the list of mandatorily suspendible infractions. With that come all of the frailties and concerns about disparate negative impacts on equality-seeking communities. Much depends not just on what the words in the law and policy say, but in how the concepts in the law and policy are being *practised* on the



ground day-to-day. More work, like that of Donn Short,<sup>191</sup> and Nora Findlay<sup>192</sup> is needed to better understand these day-to-day practices. Second, the “safe and accepting” model incorporates new forms of peer surveillance, which require further consideration because they fly in the face of young people’s expressed desire to be freed from the intense scrutiny associated with their seamlessly integrated online/offline existences, rather than being subjected to more of it.<sup>193</sup> Bystander intervention, at its best, can encourage individuals to understand their role and membership in maintaining a healthy community. At its worst, it can deputize individual students to surveil and control their peers. Because it seems unlikely that students from equality-seeking communities will understand themselves to be so empowered, and because history suggests disproportionate policing of the marginalized, the effect of increased peer-to-peer surveillance could well be to re-trench existing power disparities based on race, gender, class, and other axes of discrimination and their intersections. Again, much depends on how these policies, which have their origins in the transition from “zero tolerance” to “safe and accepting” are being, and will be, implemented on the ground. It is toward better understanding these daily practices that future research should turn.

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<sup>191</sup> See e.g. Donn Short, *Don't Be So Gay: Queers, Bullying, and Making Schools Safe* (Vancouver: UBC Press, 2014).

<sup>192</sup> *Supra* note ??.

<sup>193</sup> See Jane Bailey, “A Perfect Storm: How the Online Environment, Social Norms, and Law Shape Girls’ Lives” in Jane Bailey & Valerie Steeves, eds, *eGirls, eCitizens* (Ottawa: University of Ottawa Press, 2015) 21 at 39.