

A Little Privacy Please?

How Privacy Legislation in Nova Scotia Negatively Affects ANS Students

LAWS 2251: African Nova Scotians & The Law
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Introduction

Institutionalized racism is prevalent in every aspect of society. It can take many forms that negatively impact people of colour, and the educational realm is not spared. As a black student, you could be the star of the school basketball team, a “straight A” student, and a pillar of your school’s community, but factors outside of your control can cause the entire school and justice systems to begin to work against you anyways. If you were incorrectly identified in a criminal investigation over an alleged assault, information about you could be shared by the Department of Justice with the school board and your own school’s administration. As a result, your teachers, who previously treated you as just another student, begin to keep a closer eye on you and may even indicate they no longer feel safe around you. The school may suspend you from the basketball team despite interest from college recruiters, and, as a result of the inherent anxiety of the entire situation, your grades begin to slip. What’s worse, after being made aware of your situation, the school board shares information that you were previously in a fight with another student where things briefly turned violent. The school board only tells the DOJ that you hit another student in the face. They do not include the fact that you missed the school bus that day, and as a result, your parents had to drive you since you live so far from school, or that you only got into a fight with that student because they had incessantly insisted on touching your “weird hair” despite your many attempts to get them to stop, and had called you a racial slur when you forcefully told them no. As a result, you are now considered an even more likely suspect because you have a “history of violent behaviour.” Ultimately the investigation is dropped on finding the real offender, but you are left to pick up the pieces in your school life.

This scenario illustrates how the exchange of information between school boards and the DOJ can negatively impact black students. This paper seeks to explain the historical and legal

reasons why student privacy is not adequately protected and how that, along with other educational issues, affects black students in particular. By examining relevant privacy legislation and using the former memorandum of understanding as an example, this paper will show that change is needed in order to adequately prevent the exacerbation of the school-to-prison pipeline by the sharing of information between government departments. This paper will also examine jurisprudence regarding how student information is being used in Canada and remedies to better serve the black community in Nova Scotia in education.

What is The School to Prison Pipeline?

A term coined in the early 2000s in American academia, the school to prison pipeline broadly refers to a pervasive pattern of policies that lead to students being pushed out of mainstream educational systems and into the youth criminal justice system. This push results in higher rates of incarceration for minority youths as opposed to young white people.¹ In the United States, the NAACP defines the pipeline as “the funneling of students out of school and into the streets and the juvenile correction system [perpetuating the] cycle... depriving children youth of meaningful opportunities for education, future employment, and participation in our democracy.”² The pipeline largely impacts minority students for systemic and historical reasons that will be discussed below, including implicit bias against minorities, and ingrained racism in policing and education. A deeper understanding of the school-to-prison pipeline is outside the

¹ Nathan Okilwa, Muhammad Khalifa & Felecia Briscoe, *The School to Prison Pipeline: The Role of Culture and Discipline in School* (Bingley: Emerald Publishing Limited, 2017) 8, Accessed at https://web-s-ebshost-com.ezproxy.library.dal.ca/ehost/ebookviewer/ebook/ZTAwMHhuYV9fMTQyMzcwN19fQU41?sid=cd398c26-abd7-4c54-aebe-3585e6744c1f@redis&vid=0&format=EB&lpid=lp_3&rid=0

² *ibid*

scope of this paper, but it is important to understand that it is a set of actions and policies and that the use of students' private and personal information is a part of it.

Section 1: Background on African Nova Scotian Education

History

When the Black Loyalists came to Nova Scotia in 1782, there were a number of injustices laid upon them. They were given much less land than they were promised, in much smaller sizes than their white counterparts. The land was also of poor quality for farming and was located far from the established urban areas of the time.³ The racist attitudes of the time were expressed in every facet of Nova Scotian society, but rarely more so than in education. Education was seen as the way to achieve social mobility for the African Nova Scotians of the day, but as time went on, teaching methods and subjects in school in black areas stayed the same, while educational practices in white areas improved.⁴ The 1836 *Education Act* amendments entrenched the practice of segregated schools by offering a grant of 70 Pounds Sterling to fund schools specifically for black children, even if there was already a white school in the area.⁵ These schools were regularly underfunded, understaffed, and generally underwhelming in terms of the education provided. Ultimately, by the time the *Free Education Act* was passed in 1865, education for black people in Nova Scotia was either poor or non-existent, despite the efforts of the communities.⁶

³ Black Learners Advisory Committee, *BLAC Report on Education: Redressing Inequality – Empowering Black Learners*, vol. 2, 1994 at 10 (*Blac Report*) Retrieved from <https://www.ednet.ns.ca/docs/blac-report-education-redressing-inequity.pdf>

⁴ Ibid, 15

⁵ Ibid, 16

⁶ Ibid, 18

For the first half of the 1900s, education for black children continued to be poor. Areas with schools were often segregated, resulting in 2 schools within very close proximity of each other but which existed under very different circumstances. The black schools were often cold and overcrowded, resulting in an environment that did not encourage much learning. Schools were often only open sporadically, for a term or two, then closed for years. This led to a massive education gap between black and white children over the course of the early to mid-1900s.

By the 1960s, Nova Scotia began to integrate schools while simultaneously trying to deny that racism and segregation had led to poorer educational outcomes for black children.⁷ The laws of the time had permitted schools to be segregated, and some white people strictly observed the laws around schools in order to ensure that black children were kept separate. Once schools began to integrate, the black communities of Nova Scotia were faced with new issues surrounding their education.

To white society and the provincial government, integration meant disbanding the remaining black schoolboards, closing the remaining black schools, and bussing black children to already established white schools.⁸ These schools were in white communities, effectively taking black children away from the areas they knew well and placing them in hostile educational environments. These environments were hostile for many reasons. They often still had segregated entrances, exits, and bathrooms. White students would often berate and sometimes assault black students, and white teachers with no understanding of black history or culture often exclusively punished black children for responding to racial taunts or other acts of violence.⁹ Unsurprisingly, the dropout rate for black students soared. The legacy of black

⁷ Ibid, 26

⁸ ibid

⁹ ibid

education in Nova Scotia is in segregated schools, underfunded black schools, and students who never found a welcoming and comforting learning environment where they were also taught to their full potential.

“Newly” Discovered Issues

In 1994, the Black Learners Advisory Council (BLAC) released a three-volume report that detailed much of the history of black education in Nova Scotia. This resource led to a response by the Department of Education the following year, accepting many of the recommendations put forward by the council.¹⁰ The subsequent action by the government, however, was scattershot. A September 2003 review of the actions taken found that while some recommendations had been implemented, others had not, or had only been half-considered.¹¹ Per the recommendations, the African Canadian Services Division was set up to facilitate the employment of other goals. More scholarships and opportunities were also introduced in an attempt to encourage further education in the black community.

In 2009, the programs set up in response to the BLAC report were reviewed, and new conclusions were reached. The 15-year anniversary report entitled “Reality Check: A Review of key program areas in the BLAC Report for their effectiveness in enhancing the educational opportunities and achievement of African Nova Scotian learners” (Reality Check), reached two key conclusions for this paper:

¹⁰ Nova Scotia, Nova Scotia Department of Education and Culture, *Response to the Black Learners Advisory Committee Report on Education*, (Report), June 1995. Accessed at <https://www.ednet.ns.ca/acs/files-acs/docs/blacresponse.pdf>

¹¹ Nova Scotia, BLAC Implementation Review Committee, *Report of the BLAC Implementation Review Committee*, (Report), September 2003. Accessed at <https://www.ednet.ns.ca/acs/files-acs/docs/reportoftheblacimplementationreviewcommittee-september2003.pdf>

1. There should be more quantitative data on the performance of African Nova Scotian students in order to determine the number of students impacted by the programs that have been implemented.
2. There are too many African Nova Scotian students on Individual Program Plans (IPPs)¹²

The provincial government responded to Reality Check in the Spring of 2010. In their response, they noted that they were committed to having self-identified information be given by students so that they might better understand the impacts of the programs.¹³ They also agreed to survey students in IPPs with regards to their desire to pursue higher education, tacitly acknowledging that they may present a stumbling block to achieving positive outcomes.¹⁴

In the 27 years since the release of the BLAC report, there have been tangible successes in the realms of student engagement, scholarship, and many other areas. Consistent pressure by the community and academics ensured that the provincial government could not sweep the education of black students under the rug. However, many of these changes focused exclusively on educational performance, which, while important, does not paint the full picture of the African Nova Scotian experience with the education system. Issues also stem from the school environment, including interactions with teachers, other students, and even the material itself. Modern times have brought about new issues, and the collection of student information has proven to be a slippery slope that leads to violations of student privacy, increased scrutiny of ANS students, and can grease the school-to-prison pipeline.

¹² EnidLee Consultants Inc. "Reality Check: A Review of key program areas in the BLAC Report for their effectiveness in enhancing the educational opportunities and achievement of African Nova Scotian learners.", published November 2009. 11 Accessed at <https://www.ednet.ns.ca/docs/realitycheckfinalreportforweb.pdf>

¹³ Ibid, 15

¹⁴ Ibid, 52 Appendix A

Education in the Information Age

Schools and school boards in Nova Scotia have been collecting information on students for years. Much of this information is related to school performance across the entire student body, but some of the information is kept on a self-identified basis (race, gender, etc.).¹⁵ This self-identified information is occasionally used in calculating rates of suspensions and expulsions for various school boards. In May of 2016, the (then) Halifax Regional School Board (now Halifax Regional Centre for Education) released a report on student suspensions that showed that ANS students accounted for 19.9% of total suspensions in the 2014-15 and 2015-2016 school years. In that same timeframe, they accounted for between just 7-8% of students in the region.¹⁶ Once the report was released, members of the black community in Nova Scotia were not surprised, remarking that this was a known element of being black in Nova Scotia schools.¹⁷ Having the information put out into the public was beneficial, and allowed for scrutiny by ANS communities.¹⁸ Reports to the public were not the only reason for keeping this student information, however.

It was not widely known at the time, but that there existed a Memorandum of Understanding (MoU) between the Department of Education and the Department of Justice. This allowed for the transfer of information about students to the Department of Justice.¹⁹ With the historical context of the educational experience of ANS students framed, the next section will

¹⁵ Nova Scotia, Nova Scotia Department of Education, *Expanding from Equity Supports to Leadership and Results: The Minister of Education's Response to Reality Check*, (Report), 2010, 15, retrieved at <https://www.ednet.ns.ca/acs/files-acsc/docs/realitycheckresponse.pdf>

¹⁶ Halifax Regional School Board, *Report on Student Suspension Data*, (Report), May 25, 2016, 4-5. Retrieved at <https://www.hrce.ca/sites/default/files/hrsb/2016-05-20.pdf>

¹⁷ Richard Woodburry, "Halifax Regional School Board Releases Student Suspension Report", CBC News, May 26, 2016, <https://www.cbc.ca/news/canada/nova-scotia/halifax-regional-school-board-student-suspension-report-1.3601404>

¹⁸ Ibid

¹⁹ *Memorandum of Understanding Between the Nova Scotia Department of Justice (DOJ) and the Halifax Regional School Board (HRSB) on the Sharing of Student Information*, s. 1.1(d) (Memorandum)

outline the relevant legislation that precipitated the Memorandum of Understanding and the implications for both ANS students and Privacy law in Nova Scotia.

Section 2: Privacy Law and the Memorandum of Understanding

2.1: Applicable Privacy Law

Despite the emphasis on following all the regulations set out in *FOIPOP*, there are still issues that arise from the MoU. In this section, I will give a brief overview of the relevant Privacy law that governs information gathering and dissemination in Nova Scotia. Next, the contents of the MoU laid out earlier will be compared against the relevant provisions to ensure that they are not breaching any applicable privacy law.

Freedom of Information and Protection of Privacy Act

The *Freedom of Information and Protection of Privacy Act (FOIPOP)* is Nova Scotia's main governing privacy legislation. Sections 24, 26, and 27 deal with the treatment, use, and disclosure of personal information. HRCE, as an agent of the Department of Education, is able to collect information on students as it relates to "an operating program or activity" under section 24 (the activity being schooling).²⁰ Under section 27 of *FOIPOP*, disclosure of personal information is only allowed under certain circumstances.²¹ These include, but are not limited to:

- when consent is given by the individual;
- when the information is subpoenaed;
- to meet the necessary requirements of government operation; and

²⁰ *Freedom of Information and Protection of Privacy Act*, SNS 1993, c-5 s. 24(1)(c)

²¹ *Ibid*, s.27

- if health or safety are affected.²²

Outside of the listed disclosures in section 27, information can only be disclosed for research purposes, public interest, or by public archives.²³ For the purposes of the MoU, the main reasons for disclosure listed are for the safety of HRCE employees when they are requesting information, and with consent or by subsections 27(g) (meeting the requirements of a government body) and 27(f) (information necessary to the duties of an officer/employee/minister). Aside from these exceptions, personal information may only be used “for the purpose for which it was obtained.”²⁴

In general, *FOIPOP* sets out the regulations surrounding the use, collection, and disclosure of personal information about individuals, including students. All of the above sections are about the use of personal information, including the information collected by the HRCE about students, which was then shared with the DOJ under the MoU.

School Board Privacy Policies

The Department of Education has its own privacy policy that is set out for the regional education centres to follow.²⁵ It generally falls in line with *FOIPOP* and reinforces the use of consent forms, providing an example. However, it only explicitly refers to the publishing of student academic information as the purpose of collection. All of these policies fail to adequately protect the privacy of students, especially students of colour, as the main focus of them is more

²² Ibid, s.27(b), (f), (g), (o)

²³ Ibid, s.29, 30, 31

²⁴ Ibid, s. 26(a)

²⁵ Nova Scotia, Nova Scotia Department of Education, *Provincial Privacy of Student Information Policy*, (Policy Document) July 2016

towards obtaining information in a way that does not appear to infringe privacy too much, as opposed to determining what information should not be infringed upon.

Youth Criminal Justice Act

The *Youth Criminal Justice Act* is the governing legislation in Canada regarding youth criminal justice. Particular to student privacy in this legislation is section 125(6). The section outlines when the record of a youth offender, or any young person charged with an offence, can be shared with schools. It allows for the information on a young person to be shared with school officials when the disclosure is “necessary” to ensure compliance, safety, or to facilitate rehabilitation of the young person.²⁶

2.2: The Memorandum of Understanding

Until 2018, there existed a Memorandum of Understanding (MoU) between the Department of Justice and the Halifax Regional School Board. This MoU allowed for the exchange of information regarding students between the HRCE and the DOJ.

Contents

The Memorandum was broken down into eight sections: Purpose, Collection and use of information, Disclosure to the DOJ, Disclosure to the school board, Request for *YCJA* records, Student transfers, Monitoring, and Coming into force. For the purposes of this paper, the main sections looked at will be the purpose, collection and use, and both disclosure sections.

²⁶ *Youth Criminal Justice Act*, SC 2002, c. 1, s.125(6)

Purpose

The main purposes of the MoU are stated to be:

1. “To implement a standardized process [to] exchange student information... to administer and enforce the provisions of the *Youth Criminal Justice Act* and *Youth Justice Act*”²⁷; and
2. To establish a process for the exchange of student information with the HRSB in order to facilitate appropriate educational planning for a young person as part of a plan for rehabilitation or reintegration from custody to the community.²⁸

This exchange of information is all governed by principles in *FOIPOP*.²⁹ This means that nothing in the MoU was explicitly breaking the law when it came to violating student privacy. This does not mean that there are no inherent privacy concerns with the memorandum, only that the issues are not covered by the relevant privacy statutes.

Collection and Use of Information

This section outlines the DOJ statutory requirements by which they “may require personal student information).³⁰ These reasons include administering extra-judicial sanctions authorized by the DOJ, assisting a probation officer in preparing a report required under the *Youth Criminal Justice Act (YCJA)*, and assisting the Provincial director in determining

²⁷ supra note 19, s. 1.1(a)

²⁸ Ibid, s. 1.1(d)

²⁹ Ibid, s. 1.1(b)

³⁰ Ibid, s. 2.1

additional custody conditions and supervision orders regarding a youth.³¹ Again, this section repeats the commitment to *FOIPOP* and proper procedure.

Disclosure to the DOJ

This section outlines the procedure by which the DOJ would request (or demand) information from the HRCE. Section 3.3 in particular notes that the DOJ can just demand the information if the circumstances allow pursuant to section 27(f), 27(g), and 27(o) of *FOIPOP*.³² The information format that is shown includes name, birthday, and school, along with any additional requested information. Lastly, the section states that any information procured is only to be used for the reasons listed in Collection/Use.³³

Disclosure to the HRCE

Much like the previous section, the details involve the process and restrictions by which the HRCE may request information from the DOJ. Of particular importance is section 4.2, which states that disclosure of *Youth Justice Act (YJA)* records must be in accordance with section 32 of the *YJA*, which mandates that there be no disclosure of the information unless it is desirable in the interest of the proper administration of justice or in accordance with regulations.³⁴ Disclosure to the HRCE is only to be made to ensure the safety of staff or students at schools. Much of the information is meant to be disclosed in conjunction with “reintroducing” students to schools or

³¹ Ibid, s. 2.1(a), (b), (f)

³² Ibid, s. 3.3

³³ Ibid, s. 3.6

³⁴ Ibid, s. 4.2

planning an alternative program.³⁵ *YCJA* records are only to be disclosed for the safety of students/staff.

Section 3: Legal Analysis and Critique

Jurisprudence

There are clear breaches of student privacy inherent in this MoU. The existence of the MoU is precipitated by section 125(6) of the *Youth Criminal Justice Act*³⁶ and sections 27(f), 27(g), and 27(o) of *FOIPOP*.³⁷ These sections allow for the disclosure of DOJ information on a young person to the requisite school board. As noted above, the provisions of *FOIPOP* allow for the DOJ to collect information from HRCE. Both *FOIPOP* and the *YCJA* allow for disclosure only when “necessary” to complete the body’s function.

Unfortunately, there is not a great deal of jurisprudence on section 125(6) of the *YCJA*. However, there was a similar provision in section 38 of the *Young Offenders Act*, which was repealed in 2003.³⁸ The courts interpreted this section with regard to the disclosure of information. In *Peel Board of Education v. B (W.)*, “publication” of information about an accused was prohibited.³⁹ The facts involve a student who was charged with sexual assault outside school grounds, whom the school district was attempting to expel. The court ruled that in this case, expulsion prior to conviction would expose the student that was accused and amount to “expulsion without trial,”⁴⁰ which would be against the student’s *Charter* right to the

³⁵ *Ibid*, s. 4.7

³⁶ *Supra* note 27

³⁷ *Supra* note 26

³⁸ *Young Offenders Act*, RSC 1985, c. Y-1 (Repealed), s. 38

³⁹ *Peel Board of Education v. B*, [1987], 59 O.R. (2nd) at 654

⁴⁰ *Ibid*

presumption of innocence.⁴¹ Further, it is noted that punishment without trial is contradictory to the fundamental principles of our justice system.⁴² In the case of the MoU, information was being disclosed to school boards, who were taking action based on said information about a child who had not yet been convicted, representing the very issue that the case was seeking to rectify.

The *Peel* approach was overruled in 1995 in the case of *G. (F.) v. Scarborough (City) Board of Education*. It was ruled that school boards had the right to enforce discipline in schools and that the *YOA* did not deprive them of this right.⁴³ The new ruling allowed schools separate jurisdiction to punish children regardless of what was transpiring in a criminal investigation. It also confirmed that the authority to suspend students is statutorily granted.⁴⁴

In the Nova Scotian context, authority is granted by section 27 of the *Nova Scotia Education Act*.⁴⁵ This separates it from any sort of criminal justice proceeding and can result in students being suspended from school for actions that are still being dealt with in court. The legislation calls for suspensions in cases of “unacceptable behaviour” if at a school event, and behaviour that “significantly disrupts the learning climate of the school” regardless of if it was on school grounds or not.⁴⁶ With the introduction of the MoU, schools were more easily able to access information about children that in turn led to a “disruption” of the learning environment regardless of what stage the legal proceedings were at.

Much of the jurisprudence surrounding the issue of information about students in the youth criminal justice system and schooling revolves around the idea that people, especially children, should not be punished for offences until they have been proven guilty of them. In the

⁴¹ *Constitution Act 1982*, RSC 1985, App II, s. 11d

⁴² *Supra* note 38 655

⁴³ *G. (F.) v. Scarborough (City) Board of Education*, [1994] O.J., 240 at para 11.

⁴⁴ *Ibid*, para 15

⁴⁵ *Education Act*, SNS c. 1 Sched. A, s. 27

⁴⁶ *ibid*

criminal context, this burden of proof is required to be beyond a reasonable doubt. In the educational sphere, it is simply a charge that is required for punishment to be doled out. This punishment can be made regardless of if guilt is eventually proven or if the charges are dropped, so long as there is a sufficiently disrupted learning climate. The MoU allowed a considerable amount of confidential information about students to be shared and action to be taken, even if the outcome was not yet determined.

Legislative Continuation

The MoU was repealed in 2018. This was a positive step forward for protecting the privacy of school children, especially ANS students. However, it did not address the roots of these children's issues when the education and justice systems cross paths. Nor did it even truly prevent many of the same issues from being able to occur. The key issue is that Information on children is still available to different government agencies through *FOIPOP* and the *YCJA*. *FOIPOP* lists "health and safety" as one of the mitigating factors that would cause an information disclosure to not be a breach of privacy.⁴⁷ The issue is that there is not a clear description of what health and safety specifically refer to.

This paper is not meant to argue that education professionals should not be told of violent issues that materially affect their immediate safety. However, people of colour, especially black people, are often considered safety threats more readily than other groups are. Researchers in Ontario have found that black men are five times more likely to be incarcerated than white

⁴⁷ Supra note 20, s. 27(o)

men.⁴⁸ Black women are three times more likely to be incarcerated.⁴⁹ This is despite the fact that many offences, including drug possession offences, occur at roughly the same rates across racial lines.⁵⁰ This illustrates that black people in Canada, including African Nova Scotians, are considered to be threats or deviants more so than white people. Black children are similarly given less leeway in the classroom before they are asked to be removed from class, sent to the principal's office, or suspended, as seen in the school suspension reports.⁵¹ From the historical context, this mistrust comes from the fact that schools in Nova Scotia are not places that were built to include black children. The language of *FOIPOP* allows for judgement calls to be made with respect to safety, which allows for implicit bias against ANS students.

Disclosure of personal information in *FOIPOP* is also allowed without being a violation if it is consented to in writing by the person whom the information is about or their guardian.⁵² This allows schools to obtain the consent of children via their guardians in order to access records about them. This is problematic for two reasons. Firstly, if a school is asking for access to a child's DOJ information, there is a good chance that they already have a suspicion about the child that would inform their decisions on disciplinary matters. Secondly, a massive power imbalance exists between a school board requesting information and a child and their guardian(s). A government body such as a school board, requesting that an individual sign off on having records released when they already appear to have made at least a partial decision on guilt, creates a definite imbalance toward an individual who is labelled a "problem child." When

⁴⁸ Akwasi Owusu-Bempah et al. "Race and Incarceration: The Representation and Characteristics of Black People in Provincial Correctional Facilities in Ontario, Canada" (2021), page 6. Retrieved from <https://journals.sagepub.com/doi/pdf/10.1177/21533687211006461>

⁴⁹ Ibid

⁵⁰ Ibid, 4

⁵¹ Michelle Williams, *African Nova Scotians and the Law course*, Class 5 discussion notes.

⁵² Supra note 20, s. 20(4)

there is great pressure from an outside body to consent to revealing private information, it is often given.

The DOJ also has the right to request information under sections 27(f), (g), and (o) of *FOIPOP*.⁵³ These three sections essentially act as a lite version of the MoU. The DOJ's collection of information is usually more out of necessity than a school board's, though. However, the types of information that the DOJ can request are unlimited. Pulling suspension data on a young person that the DOJ is considering charging allows them to paint a negative interpretation of the child that is not necessarily related to what they are being investigated for. This collection of personal information by the DOJ can also create a ricochet effect, whereby their requests for information about a child leads to the school board conducting their own investigation of the student. Since current jurisprudence allows schools more leeway in handling disciplinary matters, they can go further in their investigations of children, hand over further information to the DOJ, and punish the student before there is any movement on their legal case.

Section 4: Social Issues

As discussed, there is a long history of racism in education in the province of Nova Scotia. Because of this, the collection of information and associated legal issues discussed in the last section is particularly damaging to ANS students. This section will examine the legal issues and how they specifically impact ANS students.

ANS students have long dealt with an implicit bias towards them from "authority" figures, whether these be police officers, superiors in the workplace, or teachers in school. As shown by the HRCE statistics, black students are suspended at a much higher rate than their

⁵³ Supra note 32

white counterparts.⁵⁴ Young black offenders in Nova Scotia are incarcerated at similarly higher rates than other young offenders.⁵⁵ Studies have shown that black people are more often seen by white people as threats to safety than other groups, despite engaging in similar actions.⁵⁶ This becomes a legal issue when safety is an allowable measure for the distribution of personal information without it being a privacy breach. If an ANS student is seen to be a greater threat as a baseline than other students, it makes it more likely that information about them will be requested under section 27(o) of *FOIPOP*. Alternatively, ANS students are more likely to be disciplined and suspended, leading to personal information about them revealing “difficulties” in school. This information would subsequently be available should the DOJ request it, despite not accounting for racialized issues.

As stated earlier, schools in Nova Scotia were not designed to be shared with African Nova Scotians. Racial taunting, violence, or other forms of degradation by fellow classmates may also contribute to ANS students’ perceived behavioural issues. If a student is called a racial slur and responds with physical violence, they are often seen to have started a fight, to have an anger issue, to lack self-control, or in any other way disturb a school environment. This goes on their record. In effect, it may say “X student got into a fight” instead of “they may have been provoked into a fight based on racial taunting that needs to be dealt with at the school so that ANS students can have a more positive learning experience.”

While contributing to a negative school record, these social issues also tend to distance ANS students from education itself. Studies have shown that black students often feel they have no representation in schools and that, along with other factors such as commute times and

⁵⁴ Supra note 16

⁵⁵ Supra note 47, page 3

⁵⁶ Laura Green, “Stereotypes: Negative Racial Stereotypes and Their Effect on Attitudes Toward African-Americans” (1998) vol 11, No. 1, *Perspectives on Multiculturalism and Cultural Identity*

separation from the community, has a negative impact on how they view education.⁵⁷ This leads to higher rates of missed time at school, poor attendance/performance, or even dropping out altogether.⁵⁸ Dropping out of school is an action that greatly increases a youth's chances of winding up in the criminal justice system.⁵⁹ This perpetuates the idea of the school-to-prison pipeline. A student who is disengaged with school stops going and is more likely to engage in illegal activity, getting them caught up in the justice system. Often, black students drop out due to valid concerns about systemic issues and as a reaction to prejudices faced, both subtle and overt.

None of this social context is captured in privacy legislation. There is no qualification of why an event happened when making the records, only that it happened, and assumptions are made in response to them- having no critical race lens when reviewing or collecting information on ANS youth makes no correction against implicit bias and can only exacerbate it. These biases are not present for many other youths and are generally not at the forefront of the minds of policymakers. These biases against black youth in all areas, combined with racially dispassionate legislation, result in worse outcomes for ANS students and push them down the school-to-prison pipeline. These are the reasons that privacy issues raised in this paper negatively affect ANS students in a disproportionate way.

Section V: Remedies

The history, legal issues, and social issues have been laid out. Education in Nova Scotia has rarely been developed with African Nova Scotians in mind, *FOIPOP* and the *YCJA* keep the

⁵⁷ Supra note 47, 3

⁵⁸ Ibid

⁵⁹ Ibid

spirit of the previous MoU alive, and the lack of critical race understanding leads to a disproportionately negative impact on ANS students. So, what can be done? There are various solutions that can be brought forward to help mitigate the problems that currently exist. The remedies break down into two broad categories: Social/Educational Remedies and Legal remedies. These remedies seek to fix different parts of the problem of pushing black students towards the school-to-prison pipeline via privacy overreach.

Social and Educational Remedies

Ensuring that ANS students are engaged in schooling can go a long way to preventing the use of information from ever being necessary in the first place and preventing schools from being pipelines to prison for ANS students. This means tackling other remaining systemic inequalities that affect ANS students today. Many of these solutions deserve their own extensive reports and papers, but I will list a few in order to outline the availability of in-school, ground-level approaches:

1. Promotion of Afrocentric learning groups, and even possibly investment in black focused schools; and
2. Either limiting, eliminating, or greatly altering the goals of IPPs to ensure that black students are not left on an educational island with no progression until they are phased out of the school system.

Cultural Competency Training and Policies

Eliminating implicit bias in policing and education is an ongoing battle that has been waged for a long time. Progress has been made, but there is still a long way to go. The recent street

checks issue in Nova Scotia has revealed that institutional racism is still alive and well in the province. The social remedies, in this case, include changes to how we teach educators and police. For education, increased cultural competency and anti-racism training is required. The training should focus on three things:

- Historical understanding of educational racism in Nova Scotia, including segregated schooling, desegregation and bussing, and the school-to-prison pipeline;
- Understanding the educational needs of ANS students that they may be required to provide; and
- Understanding implicit bias against black youth in various levels of society, including in education.

The remedy aims to raise the awareness of educators in the province as to the lived experiences and situations of the students they are teaching. The best-case scenario outcomes of this remedy would result in school boards providing the training as a requirement of employment, and lead to schools with teachers that better understand issues that ANS students face and are better equipped to be more proactive allies and helpful mentors. Having teachers that better understand their students can encourage higher attendance rates and greater student satisfaction as a result of having their experiences better understood. Increased student satisfaction and understanding will lead to greater engagement; and, hopefully, a lower dropout rate over time.

While focusing on promoting racial equity is necessary, so too is seeking to extinguish racism in schools. Therefore, schools should enact anti-racism policies that go beyond the current racial equity policy. This new policy can be made through consultation with various communities but should include keeping records of racial hate and violence exhibited by students

in the classroom and on school property. This information can later be used to supplement other information on any violent incidents that occur on school grounds where ANS students are involved.

Legal Remedies

The legal remedies available revolve largely around changing aspects of *FOIPOP* and the *YCJA* and taking advantage of the existence of school board privacy policies for a more bottom-up approach. Changes to *FOIPOP* can be made to better protect student information and to apply a greater critical race understanding to the legislation. Of particular concern are the sections cited in the former MoU that allowed the DOJ and HRCE to continue to share information beyond the memorandum. These sections (27(f, g, o)) are important for the free movement of information and better functioning of government, as they allow the free sharing of information between departments, so removing them entirely and making government function more difficult could lead to other unforeseen issues. Therefore, I do not suggest repealing the sections. Instead, I believe the addition of safeguards to protect students is the necessary change, particularly in subsection (o). As currently written, subsection (o) states that a public body may disclose personal information “if the head of the public body determines that compelling circumstances exist that affect anyone’s health or safety.”⁶⁰ Amending this to make it safer for ANS students can take the form of including a list of factors for the head of the public body to consider for schools, including:

- i. Documented uttering of threats on school grounds
- ii. Previous acts of physical or emotional violence in school

⁶⁰ Supra note 20, s. 27(o)

iii. Confirmation of safety risk by multiple persons in the requesting school

These changes would allow for a more objective standard for safety that removes implicit bias against ANS students by forcing there to either be documented reasons why health and safety are at risk or multiple people either bringing the issue or being willing to support it.

The biggest changes can be made in school board privacy policies. As currently constructed, school board privacy policies merely restate the school board's obligations and requirements under *FOIPOP*, how they collect, store, and protect information, and what they plan to do in the case of a breach. These policies should be amended to restrict the reasons for providing information and accessing it from the DOJ. These documents can present a ground-level block to the provision of information about students in a way that damages their educational experience. With input from all communities in each region, paying particular attention to ANS communities who are disproportionately impacted. Modified school board privacy policies should acknowledge and take into account the history of racism and segregation in this province that also recognizes the systemic inequalities that persist today.

General Remedies

Lastly, and somewhat paradoxically, the recording and provision of more information is a key remedy. Over the course of this paper, I sought to find information that was either not recorded consistently, such as suspension rates, or was completely unavailable, like the number of students on IPPs. In order to more fully understand the scope of the issue at hand, there needs to be a collection of disaggregated data on the black experience at school. This will go a long way towards allowing academics and policymakers to affect more positive change.

Ultimately, there is no one remedy that provides a clear way forward, and the implementation of multiple remedies is required to achieve the desired effect. However, these are

some of the actions that can be taken, both big and small, to ensure that all students, and specifically ANS students, can thrive in a safe and respectful environment that leads to a corner office instead of a prison cell.

Conclusion

Due to the centuries of institutionalized racism in this province that permeated all levels of society, education was never meant to be a space for black bodies to excel in Nova Scotia. Segregated schools resulted in ANS students lacking education, and receiving inconsistent, typically sub-par teaching by overworked and underpaid teachers for random lengths of time in the event that the schools were even open. Just as black schools were finding their footing, desegregation led to black children being bussed away from their communities and into white areas where racist attitudes prevailed and hindered the educational experience even further. Modern remnants of this institutionalized racism still exist in the forms of anti-black bias in both schooling and policing, which has led to the creation of the school-to-prison pipeline. Perpetuating this pipeline is the collection and free sharing of information about students between the Department of Justice and the regional school boards. Highlighted by the decade-plus use of the Memorandum of Understanding, sharing of information on students without a critical race lens or any other sort of racial consideration led to a disproportionate impact on ANS students. Even after the MoU was repealed, the principles inherent within the *YCJA* and *FOIPOP* allow for that information to still change hands in a way harmful to students. Jurisprudence such as *Scarborough Board of Education* has allowed schools to punish conduct that involves any of their students, in any way they see fit, regardless of any actual legal outcome. This, along with many other factors, including IPPs and entrenched anti-black racism,

has perpetuated ANS student dissatisfaction with the school system leading to higher dropout rates and more contact with the legal system. Remedies for these issues exist, and it is possible to have schools be a place where every student, regardless of race, is treated equally and educated so that they may each achieve their fullest potential. There are steps that need to be taken before that can be a reality, though, and the issues and remedies laid out in this paper are but one piece of an overall change that needs to be made in society to ensure fair treatment and protection of privacy of all people.

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