

What Is “Gender Expression”? How a New and Nebulous Human Rights Construct Is Taking Shape in Ontario School Board Policy Documents

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Abstract

In 2002, jurisdictions across Canada began adding two new protected grounds to their human rights laws: gender identity and/or gender expression. Gender identity protections generally apply only to transgender people, whereas gender expression protections *may apply* to all Canadians in places like K–12 schools. However, it remains legally unclear what kind of action, utterance, or pattern constitutes gender expression discrimination, and who can access related protections. In search of clarification, this article explores how the meaning of gender expression is being constructed within policy documents ($N = 206$) authored at the level of Ontario’s English public secular school boards.

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

Résumé

En 2002, des ressorts dans l’ensemble du Canada ont commencé à ajouter deux nouveaux motifs de discrimination interdits à leurs lois sur les droits de la personne, soit l’identité sexuelle et/ou l’expression de l’identité sexuelle ou de genre. Les protections entourant l’identité ne s’appliquent en général qu’aux personnes transgenres, alors que les protections entourant l’expression sexuelle ou de genre *peuvent* s’appliquer à tous les Canadiens et Canadiennes dans des endroits tels que les écoles élémentaires et secondaires. Une incertitude juridique demeure toutefois à l’égard du type d’action, de propos ou de schéma de comportement qui constitue une discrimination à l’égard de l’expression sexuelle ou de genre et à savoir qui peut se prévaloir des protections qui en découlent. Dans le but de clarifier cet aspect, cet article explore la manière dont la signification de l’expression sexuelle ou de genre est façonnée dans le cadre des politiques ($N = 206$) adoptées à l’échelon des conseils scolaires publics laïques de l’Ontario.

Mots-clés : l’expression de l’identité sexuelle, l’identité sexuelle, transgenre, politique d’éducation, droit de l’éducation, écoles élémentaires et secondaires, Ontario, Canada

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Introduction

Canada is in the midst of a gender human rights law revolution. Starting in 2002, federal, provincial, and territorial governments¹ across the country began adding two new protected grounds to their human rights laws: gender identity and/or gender expression. In Ontario these protected grounds were enacted via Toby’s Act (2012). Toby’s Act was a tri-partisan bill put forward by Members of the Provincial Parliament from all three major parties (Conservative, Liberal, and New Democrat), which came about as a result of significant and prolonged activism by Ontario’s transgender-spectrum communities. Despite Toby’s Act adding gender identity and gender expression to the Ontario Human Rights Code, however, in each instance these terms were left undefined. In this vacuum, the Ontario Human Rights Commission ([OHRC] 2014) has provisionally defined gender identity as “each person’s internal and individual experience of gender” and gender expression as “how a person publicly presents their gender” (p. 7). Protection from *gender identity discrimination* generally applies only to transgender² people, and only if their transgender status is apparent, self-declared, or disclosed by another. On the other hand, protection from *gender expression discrimination* may be a universal right: something that *all* Canadians enjoy in public service contexts like K–12 schools.

Since the passage of Toby’s Act, then, Ontario schools have been legally required to act from the knowledge that every single student may experience gender-based discrimination born of everyday practices and relational patterns commonly believed to be “just the way things are.” After Toby’s Act, for example, a cisgender,³ heterosexually active male high school student harassed for “non-masculine” interests (e.g., in art or dance) may have experienced gender expression discrimination, which is distinct from

1 Between 2012 and 2017, the federal government, nine provinces, and two territories added both terms to their respective human rights codes. Two of the earliest jurisdictions to amend their human rights codes, the Northwest Territories (2002) and Manitoba (2012), added “gender identity” only.

2 Transgender people are commonly described as people whose gender identity and/or gender expression does not align with stereotypical expectations for people of their assigned sex. One such expectation is that an assigned sex of “male” will lead to a gender identity of “boy” and then “man.” Other expectations pertain to how people assigned male or female are required to express masculinity or femininity, respectively.

3 The term cisgender refers to the vast majority of people: whose gender identity aligns with stereotypical expectations for people of their assigned sex, that is, a female-assigned infant who comes to identify as a girl and then a woman later in life.

homophobia, a form of sexuality-based discrimination (Airton, 2009). Furthermore, behaviours perceived by teachers to be “serious” and requiring intervention in girls and boys have been found to map onto gender-stereotypical norms of behaviour (e.g., Kokkinos, Panayiotou, & Davazoglou, 2004; Meyer, Stafford, & Airton, 2016), and behaviour is a component of gender expression as defined by the Ontario Human Rights Commission (2014). There is also a long-observed gender-stereotypical pattern in the labelling of students with behavioural disorders (e.g., oppositional defiant disorder [ODD]) or attention-related disorders (e.g., attention deficit-hyperactivity disorder [ADHD]) (see Jackson & King, 2004; Lloyd & Norris, 1999; Swanson et al., 1998). School staff have been found more likely to label highly active girls with a behavioural disorder, and more likely to label similarly active boys with ADHD. Further, behavioural disorders are stigmatizing in the language used to describe them (e.g., “spiteful or vindictive” in the case of ODD—see Frick & Nigg, 2012); the idea that there is something pathologically oppositional about “active” girls, whereas “active” boys are seen simply to lack focus, maps on to stereotypical expectations about normative boy and girl behaviour. In sum, the notion that “boys will be boys” is no longer simply quaint or colloquial. When common sense, stereotypical ideas about gender justify teacher or administrator decisions that affect students (e.g., in the identification of exceptionality, as described above), this may run afoul of gender expression protections in human rights law. “May” is the operative word at this time, however, as it remains legally unclear what kind of action, utterance, or pattern constitutes gender expression discrimination, and who can access related protections (Kirkup, 2018).

Despite this lack of legal clarity, the meaning and scope of gender expression is being decisively constructed outside of courts and human rights tribunals (Kirkup, Airton, McMillan, & DesRochers, in press). This article takes up the challenge of tracking this discursive construction, and reports initial findings from a qualitative study of how “gender expression” is being constructed by policy documents produced by and circulating within Ontario’s publicly funded school boards. While Ontario is our case study, the gender identity and gender expression definitions provided by human rights commissions across the country are virtually identical. Our findings thus have national implications for how gender diversity is understood in public education systems across the country. Our more pragmatic aim is to assist K–12 students and their families in invoking protections that they have but may not know about, and to assist school staff in understanding their

responsibilities in relation to gender expression protections without posing commonsensical yet incorrect limits on who can experience gender expression discrimination; every student (and staff member) is conceivably protected against this form of discrimination, and not only people who are transgender.

Overview of the Article

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

Literature Review and Theoretical Framework

We grounded our analysis of how Ontario school board policy documents are constructing gender expression in three bodies of relevant scholarship: (a) the extensive body of educational research that explores how and with what effect gender is produced in and produces the contours of everyday life in K–12 schools; (b) scholarship on the intersection of gender diversity and human rights law or policy; and (c) socio-legal scholarship that explores the complex, iterative processes through which law on the books becomes law in action, including through the daily activities of extra-legal actors like school boards and not only as a result of court or tribunal decisions.

Approaches to Studying Gender in K–12 Education

In educational studies, we observe that there are three broad “streams” of scholarship on how gender functions and why it matters in schooling. These can be delineated by their approach to gender as an object of research and locus of problems or possibilities.

Streams one and two take a primarily “gender identity” approach, seeing gender as a fairly self-evident individual *characteristic*, whereas the third stream approaches gender as an *ongoing process* of achieving recognition from others; our own study is sited in this third stream. If schools are required to ensure protection against discrimination on the grounds of gender expression as public institutions subject to Ontario law, including the Ontario Human Rights Code, this means that school actors are called to attend to gender as *more* than an identity; mutual recognition or *how we are recognized, engaged, and referred to by others* gender-wise is, in Ontario schools, now conceivably an area of human rights protection.

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

A second stream focuses on the school experiences of students (and sometimes teachers or administrators) who are underneath the transgender umbrella (e.g., Greytak, Kosciw, & Boesen, 2013; Greytak, Kosciw, & Diaz, 2009; McGuire, Anderson, Toomey, & Russell, 2010). This literature is an effort to diversify how gender is engaged in educational scholarship, but bears a similarity with the first stream in that the “transgender student” can become stabilized and homogeneous. This body of research is frequently cited in educational policy documents, including those in our sample, and taken to indicate “the state of transgender student experiences in schools” despite the fact that “transgender”

itself is a highly diverse and ever-diversifying category, particularly among youth (Sinclair-Palm & Gilbert, 2018). To this end, research in this second stream has been critiqued (Airton, 2013; MacIntosh, 2007; Talburt & Rasmussen, 2010) for its tendency to reify stereotypes of the isolated transgender student who uniquely, necessarily experiences discrimination, harassment, and violence for transgressing gender and sexuality categories.

We situate our study in a third stream that tends to de-emphasize gender categories—whether cisgender or transgender ones—and focus on tracking gender as an ongoing process in which everyone participates and is affected, and in which *all* school denizens, including *all* students, are potentially at risk of harm (including but not limited to discrimination). This stream tends toward post-structuralist analyses of how gender categories are produced and normalized in K–12 schools (e.g., Martino & Cumming-Potvin, 2014; Renold, 2005; Skelton et al., 2009; Thorne, 1993; Walker, 2014; Wohlwend, 2012). Within a post-structuralist theoretical framework, gender is not an individual characteristic or a static category. Rather, gender is instead a relational category constructed through action and discourse; being, for example, a boy or a girl or non-binary⁴ requires continuously “doing” boy, girl, or non-binary as well as continuous recognition as such by one’s local community of gender practice (Paechter, 2003, 2006; Paechter & Clark, 2007).

We identify the continuous reading of others’ gender expression as an integral part of this construction. By situating our study within this third stream, we also intend a critique of the second stream’s tendency to stabilize a particular sort of transgender youth (as persistently girl- or boy-identified across the life-course, as well as non-disabled or “able-minded” [see Pyne, 2014, 2017]) as the primary and sometimes sole focus of gender diversity research and practice in education (see also Airton, 2013), to the exclusion of fluidity, intra-category diversity among transgender youth, and similarities among transgender and cisgender youth. We observe that studies in the second stream increasingly cite the academic field of transgender studies, which problematizes the category transgender, but still tends to engage “transgender” using what Malatino (2015), with a nod to Eve Sedgwick, has called a “minoritizing” view. This view obscures transgender as *phenomena* (Stryker, 2006) and centres transgender as a stabilized *subject* despite how the invention of the “transgender umbrella” was “an important historical move toward

4 “Non-binary” is a gender identity that does not reside on either side of the man/woman or boy/girl binary. “Non-binary” people are generally included within the category “transgender.”

identifying a range of gender expressions that stray beyond medicalized conceptions of transsexual realness” (Malatino, 2015, p. 404). We argue that Toby’s Act and other inclusions of gender identity and gender expression in human rights laws across Canada stand to affect transgender and/or non-binary students *as well as*, for example, gender non-conforming cisgender students, precisely because schools are now asked to engage gender expression as an ongoing site of rights and risks for everyone.

Education Policy and the Trans Legal Studies Critique of Human Rights

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

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

K–12 school policy that focuses on trans inclusion...may be limited in achieving that goal beyond the rhetorical level. Such policy, which is not typically written by or developed in consultation with trans people themselves, is often based on a narrow conception of what it might mean to be a trans child or teen, one that is

seen only through the lens of a normative dichotomous gender binary, or which fails to account for race and other institutionalized forms of categorization that shape the life of an individual. (p. 738)

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

Methodology

Our approach of qualitative textual analysis (see Lockyer, 2008) “does not attempt to identify the ‘correct’ interpretation of a text, but is used to identify what interpretations are possible and likely” (p. 865). Our method featured deductive and inductive coding strategies (Saldaña, 2015) informed by critical discourse analysis (Fairclough, 2003; Gee, 2014). Critical discourse analysis is an approach to studying “the effects of texts in inculcating and sustaining or changing ideologies” (Fairclough, 2003, p. 9) that holds texts to be both sites and active components of social practice. The central research question guiding the study is as follows: *How is the new human rights ground of “gender expression” being defined and constructed by Ontario public school boards?* In this section, we detail our sampling parameters, data sources, data collection procedures, and data analysis.

Sample: Ontario English Public Secular School Boards

The Ontario public K–12 education system is divided into geographical districts governed by school boards ($N = 76$) that are divided along the lines of language and religion. There are 38 public secular school boards including four French boards, and 38 public separate school boards organized on the basis of religious affiliation; the latter are constitutionally

entrenched under section 93 of the Constitution Act, 1867 and section 29 of the Canadian Charter of Rights and Freedoms. Ontario has one English Protestant, 29 English Catholic, and eight French Catholic separate school boards. For this strand of the study, we excluded all French boards and Catholic boards. Below we provide brief justifications for this methodological decision.

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

The religious board exclusion came about after we had collected and coded policy documents from six of the English Catholic boards. It became clear that these boards’ construction of gender expression and its sibling term gender identity cannot be studied using the same coding framework as the public secular boards’ construction, due to the influence of Catholic religious doctrine on how gender and sexual diversity are engaged in Ontario Catholic education (see Callaghan, 2018). The English Catholic boards are the topic of a separate and ongoing strand of the study.

Data Collection

Data collection progressed systematically, one school board at a time, carried out by the third and fourth authors. This began with Google searches, internal website searches, and targeted manual searches using menus and other embedded website structures; searches

employed the phrases “gender expression” and “gender identity” as well as a school board’s name or common abbreviations. To each resulting document we applied strict sampling criteria. After the inclusion of the phrases “gender expression” and/or “gender identity,” the primary criterion was that a document be a policy document. For our purposes, a “policy document” offers explicit direction or guidance to actors within the K–12 schools governed by the board in question. Board documents that *only* offer supplemental information (e.g., resource lists) but do not direct or guide school actors were excluded. Additional sampling criteria were as follows: authored by a school board (and not an individual school), issued or revised since Toby’s Act (passed in 2012), written in English, and publicly available. Taken together, our search methods yielded 206 documents, which were imported into the qualitative data analysis software program MaxQDA.

Data Analysis

Data collection and coding took place sequentially on a board-by-board basis (e.g., all Renfrew County District School Board [DSB] documents were collected and coded before moving on to a subsequent board). A deductive or *a priori* coding scheme was developed based on the research question and an initial or open coding (Saldaña, 2015) of eligible documents from the Toronto DSB and the Ottawa-Carleton DSB, large urban boards widely regarded as diversity and equity leaders. The deductive coding scheme tracked the following: the occurrence of gender expression and gender identity in the data set, the occurrence of terms related to gender identity and sex,⁵ and explicit definitions for related terms given within the documents with the express purpose of educating the reader.⁶ In addition to deductive coding, we inductively coded each passage containing gender expression with a thematic code in order to identify the “about-ness” of the passage, or, what aspect of school life is being described (or indeed directed) when gender expression (and gender identity for comparison) appears in the text. Overall, a total of 162 codes—including and exceeding what we have described in this initial article—were applied 8,204 times to 206 collected policy documents. Inter-rater reliability was enhanced by a

5 The tracked gender identity terms are man, woman, girl, boy, non-binary, Two Spirit, transgender, cisgender, gender-fluid, and the tracked sex-related terms are sex, biological sex, female, male, transsexual, intersex.

6 This included gender expression and gender identity themselves, all of the above gender identity and sex terms, and transition, gender binary, transphobia, harassment, and discrimination.

training structure in which the third and fourth authors began coding documents together with feedback from the first author, who reviewed all applied codes in advance of weekly verification meetings. Once inter-rater discrepancies had receded, the remaining school boards were divided between the third and fourth authors with regular inter-rater verification.

Upon collecting and coding all eligible documents from one school board, we completed board-level analytic memos on the following: consistency or inconsistency in how gender expression appears among the board’s documents, to what extent the board’s deployment of gender expression and gender identity aligns with Toby’s Act and the related OHRC (2014) policy, overlap with other boards (whether general or via direct citation), and observed idiosyncrasies. We revisited and added to the memos as data analysis for subsequent boards was completed. Once the data set of all 206 documents from the 34 included school boards was completely coded and all board-level analytic memos were finalized, we performed simple counts or quasi-statistical analyses (see Becker, 1970; Maxwell, 2010; Sandelowski, Voils, & Knafl, 2009) of code occurrence and distribution among the documents, as well as more discursively-oriented analyses of numerically-prevalent codes and their data, guided by the research question and analytic memos.

Findings, Inferences, and Recommendations

In this section, we share high-level descriptive findings, broad inferences and related recommendations regarding how gender expression appears in gender-based versus generic documents, gender expression’s persistent omission from lists of protected grounds, how gender expression takes shape as a matter of reactive and not proactive concern on the part of school boards, and the absence of gender expression from (publicly available) policy documents that guide school actors in providing athletics programming and overnight field trips. The latter are the areas of school life that, we argue, are among the most pervasively gendered.

Gender Expression in Gender-Based versus Generic Documents

Our search methods yielded two “genres” of policy documents that include gender expression: documents on supporting gender diversity and/or transgender-spectrum

students ($N = 26$, hereafter referred to as *gender-based documents*), and *generic documents* ($N = 180$). Our first finding is that, at the time of publication, *half of Ontario public secular school boards (17/34) do not have a publicly available policy containing specific direction on providing an environment free from gender expression (and gender identity) discrimination.*⁷ This absence is more acute among school boards serving small population centres (see Statistics Canada, 2011),⁸ or those with a population of 1,000 to 29,999 people. We identified only two of these boards ($N = 12$) as having a gender-based policy; we identified the majority (10/14) of school boards serving large urban population centres as having a gender-based policy.

We remind the reader that our sampling criteria limited data collection to *publicly* available documents. It may well be the case that these documents exist and are in circulation within these 17 boards, but are unavailable to the general public, including students and their families. Our study’s knowledge mobilization plan aims to assist *all* students in activating protections that they have but may not know about; as such, we worry that the inaccessibility of these documents may reduce the impact of Toby’s Act in schools. For example, this impact could be realized in one school by a student who names and communicates to teachers and/or administrators that they are facing gender expression- and/or gender identity-based discrimination. In order to locate the documents in our data set, we performed multi-step searches involving redundancies and complex lists of keywords, and made use of several search platforms. And yet, we were unable to locate gender-based documents from most boards. We do not imply any ill-will on the part of these 17 boards, nor do we imply that supportive work is not being undertaken therein; that is beyond the scope of our study and also contradicted by our first-hand knowledge of gender diversity supports in schools throughout the province. *We nevertheless recommend that all school boards (not only those listed in footnote 7) review the online availability of*

7 The 17 Ontario public secular school boards without a (publicly available) document on supporting gender diversity and/or transgender-spectrum students are Algoma DSB, Avon Maitland DSB, Bluewater DSB, District School Board Ontario North East, Grand Erie DSB, Halton DSB, James Bay Lowlands Secondary School Board, Keewatin-Patricia DSB, Lambton Kent DSB, Moose Factory Island District School Area Board, Moosonee District School Area Board, Near North DSB, Rainbow DSB, Rainy River DSB, Superior-Greenstone DSB, Upper Canada DSB, and York Region DSB.

8 Our calculations of population centre size used data from the most recent (2016) Canadian census.

their gender-based policy document(s), ensuring that they are not just publicly posted but also intuitively findable by the public.

In addition to gender-based policies being either non-existent or not findable, we identified another accessibility issue: whether related content appears in a standalone document, or is included in an omnibus generic document. For example, we identified Bluewater DSB as *not* having a gender-based policy (see footnote 7) because our extensive search methods did not yield one. However, one appendix in Bluewater DSB’s (2017) “Prevention and Resolution of Harassment, Discrimination, Objectionable Behaviour and Human Rights Violations” is a best practices checklist reproduced from the OHRC (2014) *Policy on Preventing Discrimination Because of Gender Identity and Gender Expression*. The checklist is framed as the board’s administrative procedure to be followed in instances of gender expression and gender identity discrimination. Confusingly, given the overall document’s focus on addressing *acts* of individual discrimination, the checklist contains best practices for the *everyday* accommodation of transgender people, be they employees or students. This includes ensuring the confidentiality of trans students’ or employees’ gender information, using correct pronouns and chosen names, and planning for gender transition. While arguably an effort to pre-empt discriminatory acts, this thoroughly *proactive* content is buried within a document otherwise devoted to *reactive* procedure (we will return to proactive/reactive framing below). While we are encouraged to see this content included and therefore endorsed by the board, we wonder whether school constituents would be able to find and leverage the same for advocacy purposes if it is so buried in an omnibus document. *We therefore recommend that all boards offer clearly titled and standalone gender-based policy documents (on supporting gender diversity and/or transgender-spectrum people in schools).*

The Omission of Gender Expression (and the Appearance of a Ghost)

We now turn to the generic documents ($N = 180$), in other words, those that are not focused on supporting gender diversity and/or transgender-spectrum students but nevertheless contain gender expression or gender identity. Whereas the gender-based documents tend to be visually stimulating, the generic documents tend to have repetitive, simple formatting that lacks any visual appeal. Generic documents tend to include gender expression or gender identity (and sometimes only gender identity—more below) in a

boilerplate fashion: as one item in a “laundry list” of grounds protected by the Ontario Human Rights Code. The Code protects against discrimination and harassment in a variety of provincially-regulated contexts, including employment, housing, services, and schools, on the basis of “race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, *sex*, sexual orientation, *gender identity*, *gender expression* [emphasis added], age, marital status, family status, disability or the receipt of public assistance” (Ontario Human Rights Code). Laundry lists appear 361 times across the generic documents; in fact, the code “laundry list” was applied more often than all other codes ($N = 162$) with only four exceptions.⁹ Given its numerical dominance, and that there are so many more generic documents ($N = 180$) than gender-based documents ($N = 26$) in our data set, we infer that *tinkering with “laundry lists” is the most pervasive way that Ontario public secular school boards have attended to the changes necessitated by Toby’s Act in 2012.*

We deliberately use the colloquial term “tinkering” because “laundry lists” are sites of considerable interpretive license despite the generic documents’ repetitious character. One kind of tinkering involves omitting gender expression altogether; we found that *gender expression is often commonly absent even when gender identity has been added.* In fact, only 41% of the “laundry lists” (161/393) contain gender expression at all.¹⁰ This is significant given that the various other “laundry list” grounds tend to appear identically to how they are set out in the Code. The following two “laundry lists” exemplify¹¹ styles of gender expression omission common across the generic documents:

...whether the infraction for which the student might be disciplined was related to any harassment of the student because of race, ethnic origin, religion, creed, disability, *gender or gender identity* [emphasis added], sexual orientation, or

9 The only codes with more instances than the “laundry list” code are gender expression, gender identity, an *in vivo* code (Saldaña, 2015) that tracked gender expression and gender identity’s appearance with the term “sexual orientation,” and the omnibus code “violence, harassment, discrimination, harm, assault, exclusion” (to be discussed with our thematic findings in a subsequent publication).

10 We note that most generic documents offered a confusing “buffet” of laundry lists: some with gender expression, some without, some with “gender” and sex, some with “gender and gender identity,” and so on. A subsequent article will explore this inconsistency *within* particular documents and boards, and its implications.

11 To illustrate, 64 other “laundry lists” also contain “gender or gender identity” like in the Moose Factory Island District School Area Board example here.

harassment for any other reason. (Moose Factory Island District School Area Board, 2014, *Student Discipline: Suspension*,¹² p. 3)

...respect and treat others fairly, regardless of their race, ancestry, place of origin, colour, ethnic origin, citizenship, religion, *gender, gender identity* [emphasis added], sexual orientation, age or disability. (Simcoe County DSB, 2018a, *Administrative Procedures Memorandum A7630: Code of Conduct*, p. 3)

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

A corresponding issue is the pervasive omission of sex, which is a protected ground in the Code; *we found that sex is included in less than a third (154/393) of the laundry lists, sometimes—and confusingly—along with “gender.”* Gender expression was added to the Code in 2012 and yet is more common in the laundry lists than sex, added forty years earlier in 1972. There is a societal tendency to prefer the nomenclature of “gender” rather than “sex” given that sex carries the tinge of sexuality, which many find uncomfortable. This is likely what has happened in this aspect of public life and policy making, and likely in many others across and outside of Ontario. By contrast with the previous examples, consider the one below from Upper Grand DSB’s (2018) *Code of Conduct Procedures Manual 213-A*:

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

12 We are aware that including a source’s title in a parenthetical reference does not follow APA 6th edition citation guidelines; however, we wish to offer titles here in order to contextualize each quotation.

While we note some interpretive license in the ordering of the grounds, which departs from the Code, we deem this laundry list to be accurate. However, *only one in five (76/393) laundry lists is correct (i.e., includes the real grounds gender expression, gender identity and sex, but no erroneous—or ghostly—additions)*.

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

Gender Expression as a Matter of Reactive and Not Proactive Concern

The Group B, or generic, documents easily fell into three broad categories, from which we infer how their collective authorship may conceptualize “where” and “when” gender expression might become significant in document users’ everyday work in schools. The overwhelming majority of generic documents ($N = 180$) belong to one of the following categories: safe schools, or discrimination, harassment, and bullying ($N = 57$); code of conduct, or discipline, expulsion, and suspension ($N = 68$); and equity, human rights, and inclusive education ($N = 56$). These areas of school board policy making can be aspirational, but are more commonly episodic. By “episodic” we mean that, across each category, the generic documents focus on describing individualized episodes of undesirable behaviour as well as spelling out in clear and practical terms what must be done when these take place, and by whom. This is unsurprising given the long-standing critique of human rights frameworks as individualizing systemic injustices (e.g., Spade, 2011).

From this categorical occurrence, we infer that *Ontario public secular school board policy documents construct gender expression as a matter of reactive and not proactive concern*. To flesh out this inference, consider that *only one* of the 180 generic documents is a high-level strategic planning document. Strategic planning is a proactive, long-term area of board-level governance, as opposed to the reactive, episodic nature of the above categories. The one high-level strategic planning document in our data

set is Hastings and Prince Edward DSB’s (2018) *Board Improvement Plan for Student Achievement and Well-Being* (BIPSAW).¹³ BIPSAWs are mandated by the Ontario Ministry of Education, and direct school boards’ long-term planning in relation to improving the student experience. One element included in the “Professional Learning Priorities Action Plan” within Hastings and Prince Edward DSB’s BIPSAW is the creation of a “Gender Identity and Expression Resource” with the rationale that “aligning policies and procedures with new Ministry language” is an “Urgent Student Learning Need” (pp. 32–33). No Ministry of Education source is cited, but this text implies that the impetus for inclusion in the BIPSAW is a Ministry change around this time, and not earlier Toby’s Act (2012) changes to the higher authority of the law in the form of the Ontario Human Rights Code. Nevertheless, our argument here is less about the curious gender expression content in this one BIPSAW and more so about the apparent absence of board-level strategic planning documents from our data set. Given that the most self-evident gender expression-related (and gender identity-related) changes in schools require significant board-level leadership and funding allocation (e.g., whole-school professional development, renovation or new construction of all-gender washrooms and changing facilities), *we recommend that school boards develop proactive strategic planning goals aimed at reducing structural gender expression (and gender identity) discrimination on a broad scale.*

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

Whereas our search methods were systematic and intended to be exhaustive of all publicly-available Ontario public secular school board documents containing gender expression (and gender identity), the final descriptive finding shared in this article is a gaping hole among the generic documents where we had expected to see documents governing what are arguably the most pervasively gendered aspects of school life: athletics and overnight field trips. Two of the 34 boards—Simcoe County DSB (2018b) and Thames Valley DSB (2017)—provide our data set’s only generic documents ($N = 2$) in this area. When students play on sports teams or share overnight accommodations, the sex/gender

13 We note that Durham DSB’s (2018) equity and diversity policy is framed as a strategic planning document, but we are categorizing it along with other equity and human rights documents given its clear focus.

binary becomes rigid and explicit; students try out for either male or female sports teams, are paired with “same sex” roommates, and are supervised by “same sex” chaperones. While commonsensical, sex segregation imperatives can be connected to broader moral panics about teen (hetero-) sexuality (see Elliot, 2010). As stated in a previous section, the category “transgender” is rapidly diversifying away from an imperative to identify as *either* a boy/man *or* a girl/woman (a gender identity issue), and away from the singular goal of passing as a non-transgender man or woman (a gender expression issue). Non-binary students—who are not either girls *or* boys—throw a wrench in these works (gender identity), as do transgender girls and boys who do not follow or may be perceived as not following stereotypical expectations of girls or boys (gender expression).¹⁴ Many transgender-spectrum students have ways of living and expressing gender that obfuscate the sex/gender binary, meaning that separating “opposite sexes”—a familiar means of assuaging concern about student (hetero-) sexual activity—can become meaningless. All of this bears heavily on how schools navigate the gender binary terrain of athletics and overnight field trips. With more and more K–12 transgender-spectrum students coming out at school, and inhabiting “transgender” in more and more diverse ways, schools are undoubtedly in need of guidance on how to manage arenas where the rubric of “opposite sexes” has provided an easy answer: boys over here, girls over there.

Athletics and field trip-related content can be found in some *gender-based* documents (i.e., documents on supporting gender diversity and/or transgender-spectrum students). That said, this silence among the *generic* documents is cause for concern. Earlier, we were critical of gender-based content being buried in omnibus generic documents, but our recommendation here takes a seemingly opposite turn. Staff (including coaches) and administrators conceivably reach for the guidance found in gender-based documents when they know they have a transgender student (which is subject to their own understanding of what this means). On the other hand, generic documents may engender *pro-active* consideration if planning for gender diversity is framed as simply another aspect of providing athletics opportunities or arranging field trips; generic document inclusion would assume, from the beginning, that there *are* students for whom binary sex/gender just does not work. Generic policies may also have considerable educative potential given

14 We further note that Simcoe County DSB’s (2018b) field trip policy and Thames Valley DSB’s (2017) student athletics policy contain only gender identity, with no mention of gender expression.

that they are likely accessed in a wide variety of circumstances, and not only when school staff know that they have a transgender student in front of them. *We therefore recommend that Ontario school boards take action to include gender expression (and gender identity) guidance in all policies on student athletics and overnight field trips, and not only include this guidance in gender-based documents.* At a minimum, this guidance should cover how to provide a gender diversity-inclusive overnight field trip (which varies based on the students at hand), and how to support a non-binary student in selecting a sports team (see Thames Valley DSB, 2017, for one example).

Conclusion

Despite usually travelling in the company of gender identity, gender expression is the focus of this article, and of our larger research project. This is because of gender expression’s striking under-interpretation in the case law (see Kirkup, 2018; Kirkup, Airton, McMillan, & DesRochers, in press), coupled with its potential to trigger systemic change in how public institutions like K–12 schools organize structures, programs, and practices with regard to gender. In our view, gender expression could prove to be a singularly transformative human rights construct precisely because it reflects how gender functions as a *relational category* in everyday interaction, and not only as an individual identity. How and whether a student receives discrimination or harassment due to the way they do gender can have little or nothing to do with their gender *identity*—with their internal sense of who they are (OHRC, 2014). We argue that gender expression and gender identity, as *separate* grounds of anti-discrimination protection, actually reflect how gender-based harm plays out in everyday life: through interactions where some people are perceived to be (and thereby produced as) non-normative for reasons that may not correspond with who they hold themselves to be. In fact, the first Canada-wide study on high school students’ experiences of homophobia, transphobia, and biphobia (Taylor et al., 2011) found that one in four *non-LGBTQ* students reported being verbally harassed about their gender expression, and 10% reported being physically harassed or assaulted for the same. On this basis, Taylor et al. (2011) argued that “any given school is likely to have as many heterosexual [and/or transgender] students as LGBTQ students who are harassed about their... gender expression” (p. 26). Pivotaly, gender identity may have little to do with whether

one experiences gender expression discrimination, inside and outside of schools. We are encouraged by emerging large-scale survey research with youth that compares the experiences of students who are socially assigned as gender non-conforming (e.g., Klemmer et al., 2019) and the experiences of those who are not so assigned, regardless of gender identity.

The descriptive findings reported in this article suggest a patchwork quality in Ontario school board policy-based responses to Toby’s Act that, we suspect, is not unique to this province’s boards. Over half of Ontario’s 34 English public secular school boards have no publicly available policy to guide school staff in implementing gender expression and gender identity protections, which are different from each other, or to guide students and their families in accessing the same. We also found that the Code’s protected grounds are also systemically mischaracterized, with gender expression often omitted altogether. Gender expression also tends to occur in document genres that speak to reactive, individualized incident management and not board-wide structural change, and documents on the most pervasively gendered aspects of school life are all but absent from our data set.

We wonder what administrators, teachers, students, and parents/guardians must make of all this when they come to these documents seeking guidance on these newest human rights protections, whether in response to an experience of discrimination or in order to proactively change their school cultures and practices. We are concerned that the various erasures and omissions of gender expression that we have identified across our data set may function to constrain school actors’ understanding of gender expression discrimination: that it is only applicable in situations involving transgender students. As research (e.g., Klemmer et al., 2019; Taylor et al., 2011) has shown, however, this understanding is inaccurate. Tracking gender expression’s construction by school boards is vital precisely because of how explicit guidance shapes complex, abstract concepts like gender expression and gender identity, including in ways that may prevent gender expression from doing its transformative work in the interests of all students, not only those who are transgender. Ontario and other education jurisdictions across Canada have been provided with a powerful tool to create systemic, structural changes in the ordinary life of gender during the school day, and school boards have a key role to play in ensuring that all students know about and can access their right to express gender in their own way.

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