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To:

Safe and Healthy Schools Branch
Ministry of Education and Well Being Division
Ministry of Education

By Email:
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Please accept the following submissions by Justice for Children and Youth (JFCY), on your Review and update of the Provincial Model for a Local Police/School Board Protocol (Model Protocol). We thank the Safe and Healthy Branch of the Ministry of Education for the opportunity to provide submissions in writing and request a subsequent opportunity to provide commentary in person.

Outline

These submissions are presented in four parts:

- A – Summary of Our Recommendations
- B - Introduction to JFCY, our work and expertise;
- C – Integrating the Human Rights of Children;
- D – Discussion of Our Recommendations

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A – Summary of Our Recommendations

1. The Purpose of the Model Protocol should include clear statements: 1) that the human rights of children consistent with the United Nations *Convention on the Rights of the Child* (UNCRC) underpin the Model Policy, and 2) acknowledging the systemic inequities that currently create barriers to safe and healthy schools.
2. The Model Protocol must include clear identification of and support for the unambiguous Youth Criminal Justice Act (YCJA) privacy protections that legally mandate the special protection and sometimes prohibition of access to or maintenance of YCJA Records in the school context.
3. The Model Protocol must account for child's rights in the sections that address Notification to Parents, Police Interviews/Arrests of Students and Occurrences of Children Under 12

B – Introduction to JFCY, our work and expertise

JFCY is a child rights organization – a specialty legal clinic, primarily funded by Legal Aid Ontario. We are a child rights organization. For over 45 years, our practice has focused exclusively on the legal issues facing children and youth. We are the only such organization in Canada. We provide legal services - legal information, advice, and representation - to low-income children and youth up to 18, unstably housed young people, and young people with no immigration status until the age of 24 across Ontario. We are expert in a range of legal subject areas. Noteworthy and relevant to these submissions is our expertise in youth criminal justice, education, victim rights, privacy, policing, human rights, health care, child protection and social services.

While JFCY assists young people in a variety of legal areas, a significant part of the clinic's practice is providing legal services to young people who are facing legal issues that span multiple areas of the law. This includes the interaction between young people's legal, social, and cultural vulnerabilities and the broader legal and social systems which compound and magnify those vulnerabilities. JFCY is regularly called upon to address the inherent vulnerability of and systemic discrimination experienced by children and youth, including our young clients in school

settings. JFCY provides trauma-informed, anti-oppressive, and developmentally appropriate legal services, and takes a multi-disciplinary approach to addressing legal issues.

JFCY frequently provides services to young people and their parents who have education related issues including violent incidences, suspensions and expulsions and accommodation related issues. We frequently provide youth criminal justice assistance and representation to both accused, victims, and witnesses. In the past three years alone, we have provide legal advice to over 150 young people and their parents with suspensions and expulsions matters, and over 300 youth with youth criminal justice charges. We see many young people facing both youth criminal justice and disciplinary consequences at school. We understand the variety of considerations that overlap when balancing police investigations, disciplinary investigations, privacy, victim rights, the duty to protect students and staff, the duty to accommodate disabilities, etc.

JFCY provides services to children and youth in Ontario who have been victimized. Those who experience physical, sexual, gender-based and family violence, particularly vertical family violence, and those exploited in the sex trade and human trafficking. The experience of violence leads to legal issues directly related to that experience, as well as a whole range of corollary legal issues that arise – each beset with access to justice barriers, and compounding the experience of trauma. In 2023, we provided victim based legal services to over 260 young people.

JFCY also provides public legal education for young people and the adults who work with and support them, and engages in law reform initiatives regarding the human rights of children and youth. JFCY is regularly consults with governments, youth-serving agencies, lawyers and other professionals, and academics from across the country with respect to child and youth rights issues, including their human and equity rights.

In addition to direct client services to individual youth, JFCY acts in ‘test case’ litigation to assist courts in addressing child and youth rights issues, including acting as *amicus curiae*, and intervening in litigation at Courts of Appeal and the Supreme Court of Canada. We have appeared before the Supreme Court of Canada as experts on nearly every single case that has addresses youth criminal justice.

Our submissions and recommendations are based on our unique perspective and extensive experience providing services, education, and advocacy for children and youth and families in schools and in their contact with the police.

C – The Human Rights of Children – and Equity Seeking Group

The relationship between schools and police is complex. We applaud the Ministry for conducting this review of the Model Protocol. Regular review is necessary to ensure that the Model Protocol is responsive to the issues that arise in complex situations in school boards across the province. By and large, we believe the Model Protocol touches on many of the important interests that are engaged.

Our submissions are focused on children as an equity-seeking group, who are entitled to recognition of their dignity and integrity. The Model Protocol must outline, in the purpose and integrate seamlessly throughout the document, the importance of an anti-oppression, equity, rights based lens towards the children and young people who are impacted by the Model Protocol.

i. Children’s as an Equity Seeking Group & the Human Rights of Children

Recognition of the *inherent* vulnerability of children has consistent and deep roots in Canadian law.¹ It is a matter of legal and scientific consensus that children are inherently vulnerable due to their age and stage of brain development.² As a consequence of their developing capacities the following obligations fall to state actors, including school boards and educators: a positive legal obligation to protect children from all forms of harm;³ to ensure that in all decisions that affect them, the best interests of each affected child and the unique vulnerabilities of childhood are imperative considerations⁴; and, to recognize that children experience greater hardship than adults when faced with comparable situations.⁵

¹ *AB v Bragg Communications*, 2012 SCC 46, at paras 17-18.

² *R v Sharpe*, 2001 SCC 2 at para 175-177.

³ *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at para 71; United Nations, *Convention on the Rights of the Child*, Can TS 1992 No 3 [UNCRC].

⁴ *Kanthasamy v Canada (Citizenship & Immigration)*, 2015 SCC 61 at para 41, 58; *Ibid*, art 3. UNCRC, *ibid*.

⁵ *Supra*

The *YCJA* directly incorporates the UNCRC and with that foundation requires that “special safeguards and care, including legal protection” be afforded to young people “by reason of their physical and mental immaturity”.⁶ The *YCJA* establishes enhanced procedural protections at every stage of youth criminal proceedings from the point of police contact and including strict control over youth records. The Supreme Court of Canada has recognized the heightened vulnerability of young people in their interactions with police. As a consequence of their age and relative lack of sophistication, the procedural safeguards generally available to adults in the criminal justice system do not adequately protect young persons.⁷

These enhanced procedural protections are based on the recognition, explicitly captured in the Preamble of the *YCJA*, that all members of society share a responsibility for addressing the developmental challenges and needs of young persons as they evolve into adulthood. Procedural protections are necessary for young people because they are “particularly susceptible to stigmatization” and the detrimental effects of labeling.⁸ Procedural protections are also important to child witnesses and victims.⁹ This is important because often the victims of youth crime are children as well.¹⁰

The purpose of the *Education Act* stipulates that “the purpose of education is to provide students with the opportunity to realize their potential and develop into highly skilled, knowledgeable caring citizens who contribute to society.”¹¹ Schools are a place of safety for children and educators and school boards have the legal obligation of *parens patriae* when a child is at school or at a school related activity. The appropriate safeguards must be in place to ensure that any overlay of police presence and involvement does not unduly interfere with a child’s dignity, integrity, and with their meaningful access to an education. There is research demonstrating that

⁶ *Ibid* at Preamble, art 40, clauses 1 and 2(b)(vii); *Youth Criminal Justice Act*, SC 2001, c 1 at Preamble [*YCJA*]; UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), art 25.

⁷ *R v LTH*, 2008 SCC 49 at paras 1-3.

⁸ *FN (Re)*, [2000] 1 SCR 880, 2000 SCC 35, at para 14 [*FN(Re)*].

⁹ *YCJA*, *supra* note 6, s 111.

¹⁰ Brock Jones, Emma Rhodes & Mary Birdsell, *Prosecuting and Defending Youth Criminal Justice Cases*, vol 1 (Toronto: Emond Montgomery Publications Ltd, 2016), “Chapter 9: The Trial” at 172; See the discussion the crime of robbery, in particular, in Statistics Canada, *Child and Youth Victims of Police-Reported Violent Crime*, 2008, by Lucie Ogrodnik, Catalogue No 85F0033M, no 23 (Ottawa: Statistics Canada, March 2010).

¹¹ *Education Act*, RSO 1990, c E 2, ss 0.1(2).

higher levels of connection to school are protective against offending behaviour, showing that strong school bonds are important aspects of rehabilitation.¹²

Both school boards and police services are duty bearers to the human rights of children and have a positive obligation to help children appreciate and access their rights. As such, a child rights approach is essential to the Model Protocol. According to the UN Committee on the Rights of the Child, a child's rights approach is one that:

Further the realization of the rights of all children as set out in the Convention by developing the capacity of duty bearers to meet their obligations to respect, protect and fulfil rights (art. 4) and the capacity of rights holders to claim their rights, guided at all times by the rights to non-discrimination (art. 2), consideration of the best interests of the child (art. 3, para. 1), life, survival and development (art. 6), and respect for the views of the child (art. 12). Children also have the right to be directed and guided in the exercise of their rights by caregivers, parents and community members, in line with children's evolving capacities (art. 5). This child rights approach is holistic and places emphasis on supporting the strengths and resources of the child him/herself and all social systems of which the child is a part: family, school, community, institutions, religious and cultural systems.¹³

The rights and protections of children must be central to the Model Protocol's articulation of the responsibilities of school boards and police services.

ii. The Role of Police in Schools

It is a legal and normative imperative that educators, especially administrators, and police must act with a duty of care specifically designed to protect children and to safeguard their equity and integrity. This is especially true when a school administrator and the police are acting in consort to address a student on while on school property (regardless where the concerning incident took place). Research shows that strong school bonds deter children from offending behaviour even where other risk factors for offending are present.¹⁴ The role and inclusion of police at school should operate in a manner that as best as possible does not undermine a child's view of a school as a place of inclusion and safety. There should not be an over reliance on police to criminally

¹² *Supra* note 10 at 338.

¹³ UN Committee on the Rights of the Child, General Comment No 13 "The Right of the Child to Freedom from All Forms of Violence" (2011) UNCRCOR, UN Doc CRC/C/GC/13 at para 59 [UN Committee].

¹⁴ Antony Doob, Jane Sprott & Jennifer Jenkins, "The Importance of School: Protecting At Risk Youth from Early Offending" (2005) 3:1 Youth Violence & Juv Just 59.

charge young persons for behaviour that might otherwise be best addressed by school personnel with education-based responses, doing so risks pushing students out of school.¹⁵ Police in schools has not shown to be effective to deal with crime in schools.¹⁶

The phenomenon of a “school-to-prison pipeline” is a critical concern. The Ontario Human Rights Commission has identified that:

Police services across Ontario engage with young people in the public education system often to detain, control or apprehend students for what is perceived as disruptive behaviour. Research shows that police engagement and school based arrests disproportionality affect racialized students and students with disabilities.¹⁷

Schools are often a key site where Black youth have their first encounter with the criminal justice system. The school-to-prison pipeline is reinforced through negative labelling and discriminatory treatment, which leads to exclusion. This exclusion can occur when youth are treated as unwanted outsiders in school.¹⁸ The effects of racial profiling experienced by young people in Ontario is well documented by research undertaken by the Ontario Human Rights Commission and they have noted that, “[t]he racial profiling in particular in the education system and law enforcement is compromising the future of our children and youth.”¹⁹

The Black Legal Action Center conducted a project called Preventing Injustice for School to Prison Pipeline for Children and Youth and one of their key findings was to minimize police presence in schools.²⁰

¹⁵ *Supra* note 10 at 346.

¹⁶ *Ibid.*

¹⁷ Ontario Human Rights Commission, “Framework for Change to Address Systemic Racism in Policing” (Toronto: July 29, 2021), online: < https://www.ohrc.on.ca/en/framework-change-address-systemic-racism-policing#_ednref74>.

¹⁸ Black Youth and the Criminal Justice System: Summary Report of Engagement Process in Canada, Government of Canada, online: < <https://justice.gc.ca/eng/rp-pr/jr/bycjs-yncjs/engagement-resultat.html#:~:text=and%20the%20CJS,-The%20school%2Dto%2Dprison%20pipeline,treatment%2C%20which%20lead%20to%20exclusion.>>

¹⁹ Ontario Human Rights Commission, “Paying the Price: The Human Cost of Racial Profiling” (Toronto: October 21, 2003), *See the Effects of Racial Profiling*, online: < <https://www.ohrc.on.ca/en/paying-price-human-cost-racial-profiling/effects-racial-profiling>>.

²⁰ BLAC, “Links to Justice Community Research Project, School to Prison Pipeline, Recommendation” (2022), *see recommendation 12*, online: <https://www.blacklegalactioncentre.ca/wp-content/uploads/2023/10/Recommendations-List.pdf>

There are also significant concerns about the disadvantages faced by aboriginal children. Specifically, the Council of Provincial Advocates stated that “there is a greater likelihood of involvement in the criminal justice system, including detention in a youth facility, than there is for a high school graduation.”²¹ The Truth and Reconciliation Report states that:

The great vulnerability and disadvantage experienced by so many Aboriginal youth undoubtedly contribute to their overrepresentation, a factor that is intimately tied to the legacy of the residential schools. Many of today’s Aboriginal children and youth live with the legacy of residential schools every day.²²

In order to safeguard against the problems that have come from the presence of police in schools, the updated Model Protocol must make reference to the need for a multidisciplinary, community based, all systems approach to ensure the safety and well-being of all students. The role of the community and community serving organizations cannot be understated.

JFCY calls on the update to the Model Protocol to identify: (1) the unacceptable overrepresentation of Black and Indigenous students in the youth criminal justice system, and with poor educational outcomes compared with their peers and (2) accept the systemic issues related to police presence in schools. All local protocols must give thoughtful consideration on how to breakdown these barriers.

D – Discussion of Recommendations

- 1. The Purpose of the Model Protocol should include clear statements: 1) that the human rights of children consistent with the United Nations *Convention on the Rights of the Child* (UNCRC) underpin the Model Policy, and 2) acknowledging the systemic inequities that currently create barriers to safe and healthy schools.**

This foundation for this recommendation is articulated in Section C.

- 2. The Model Protocol must include clear identification of and support for the unambiguous YCJA privacy protections that legally mandate the special protection**

²¹ Carla Cesaroni, Chris Grol & Kaitlin Fredericks, “Overrepresentation of Indigenous Youth in Canada’s Criminal Justice System: Perspectives of Indigenous Young People” (2019) 52:1 Aus N Z J Crim at 111-128. <<https://doi.org/10.1177/0004865818778746>>.

²² Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: 2015) at 178.

and sometimes prohibition of access to or maintenance of YCJA Records in the school context.

a. Added YCJA Provisions Required in S. 9(b) of the Model Protocol

Justice for Children and Youth applauds the Ministry of Education's inclusion of parts of the statutory framework for access to and disclosure of youth records as outlined in Part 6 of the YCJA in Section 9(b) of the Protocol. We recommend the addition of subsection 126(7), 129 and 138 of the YCJA to ensure that the proper force and effect of Part 6 is sufficiently articulated. Without identifying the additional these sections, the enhanced privacy protections mandated for young people are understated and ambiguous. These provisions highlight that police disclosures to a school board must kept separate and apart from a student's education records, prevents a school board from making further disclosures, and identifies the seriousness of a failure to abide by Part 6 (it is an YCJA offence).

The Full Text of the Provisions we Recommend be Included:

Section 126(7) states information disclosed to a school must be kept separate from the education records.

A person to whom information is disclosed under subsection (6) shall

- (a)** keep the information separate from any other record of the young person to whom the information relates;
- (b)** ensure that no other person has access to the information except if authorized under this Act, or if necessary for the purposes of subsection (6); and
- (c)** destroy their copy of the record when the information is no longer required for the purpose for which it was disclosed.

Section 129 explicitly prevents subsequent disclosure of YCJA records:

No person who is given access to a record or to whom information is disclosed under this Act shall disclose that information to any other person unless the disclosure is authorized under this Act.

Subsection 138(1) which states the consequences of violating Part 6 of the YCJA:

Every person who contravenes subsection 110(1) (identity of offender not to be published), 111(1) (identity of victim or witness not to be published), 118(1) (no access to records unless authorized) or 128(3) (disposal of R.C.M.P. records) or section 129 (no subsequent disclosure) of this Act, or subsection 38(1) (identity not to be published), (1.12) (no subsequent disclosure), (1.14) (no subsequent disclosure by school) or (1.15) (information to be kept separate), 45(2)

(destruction of records) or 46(1) (prohibition against disclosure) of the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985,

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.²³

b. Added Commentary Required Under s. 12 School and Police Investigations of Incidents to Ensure School Boards do not Unlawfully Identify a Young Person as having been dealt with under the YCJA in School Disciplinary Proceedings

Justice for Children and Youth recommends the inclusion of an explanatory note regarding YCJA privacy protections that prohibit identifying justice-involved young people in school board records that are created in the course of disciplinary proceedings. This includes Safe Schools Incident Report Forms²⁴ and principals reports resulting from suspensions under s. 306 of the *Education Act* and suspensions pending possible expulsions under s. 310 of the *Education Act*.

It is our day to day experience advocating on behalf of students and families in suspension appeals, expulsion proceedings and expulsion appeals that school boards do not understand the privacy obligations owed to any and all of their knowledge of a young person's contact with the police.

Despite the fact that a school board may lawfully know about a young person's youth criminal justice involvement from a police officer or unlawfully from the young person or their parent, principals cannot rely on this information to justify a suspension or expulsion. Despite this, we regularly see that a young person's youth criminal justice involvement and police contact is regularly referenced in investigative reports prepared by principals.²⁵ This is unlawful and Tribunals Ontario and the *Child and Youth Family Services Board* has repeatedly commented that a s. 119 or s. 123 YCJA order is required to identify a young person's youth criminal justice

²³ YCJA, *supra* note 6, ss 138(1).

²⁴ Ministry of Education, *Policy/Program Memorandum No. 145: Progressive discipline and promoting positive student behaviour*, October 17, 2018, at Appendix 2, see "Safe Schools Incident Reporting Form – Part I".

²⁵ Reports are prepared by Principals to recommend an expulsion consistent with s. 311(7) of the *Education Act* and for suspension appeals under s. 309(1) of the *Education Act*.

involvement in a non-criminal proceeding.²⁶ It is noteworthy that principals are not to disclose more information than is necessary for the purpose of communicating the results of their disciplinary investigations.²⁷

We see these same concerns when school boards report serious student incidents to the Ministry of Education by way of Safe School Incident Reports.²⁸ In our review of Safe School Incident Report Forms created by various school boards across the province, there are often inputs requesting the confirmation of whether police were involved, the number of officers, their names and badge numbers and whether the young person was charged. This is patently contrary to privacy provisions of the YCJA.

The YCJA provides strong privacy protections to avoid the “self-fulfilling prophecy” of stigmatizing young people and jeopardizing their rehabilitation.²⁹ The disciplinary proceedings ought to stand on their own separate and apart from a young person’s youth criminal justice involvement. Any attempt in a disciplinary proceeding to rely on YCJA involvement, without getting a court order permitting such disclosure, is unlawful, unfairly prejudicial, and contrary to the spirit and intention of the YCJA.

Suggested Commentary:

Administrators cannot address a student’s YCJA involvement in any reports created in disciplinary proceedings or in Safe School Forms without a YCJA court order. A student’s YCJA involvement can never be referenced in a student’s Ontario Student Record.

3. The Model Protocol must account for child’s rights in the sections that address Notification to Parents, Police Interviews/Arrests of Students and Occurrences of Children Under 12

²⁶ See for example: *Appellant v. Toronto District School Board* (EA s.311.7), 2008 CFSRB 96 and *Appellant v Respondent School Board (Education Act s 311.7)*, 2016 CFSRB 34.

²⁷ Ministry of Education, *Policy/Program Memorandum 145: Progressive discipline and promoting positive student behavior*, October 17, 2018.

²⁸ *Supra* note 22.

²⁹ *FN(Re)*, *supra* note 8.

We welcome the opportunity to have ongoing discussions with the Safe and Healthy Schools Branch of the Ministry of Education about how to ensure the Protocol offers robust children's rights protections. In the below section we have highlighted three important areas in the Model Protocol that are of concern.

Section 13: Police Interviews of Students (Including Arrests)

We are concerned about police interviews occurring on school property. There is a significant and overwhelming power imbalance when students are being asked to speak to police on school property. The existing power imbalance between police and young people is exacerbated when an interaction takes place at school. This power imbalance may lead a young person to feel as though their communication with a police officer may not in fact be voluntary. Students are legally required to attend school and as such, police interviews on school property may alter a young person's perspective on the voluntariness of their interaction with police. There must be a clear and unequivocal obligation on the police and school administrators to ensure that a young person understands whether they are being detained and the consequences of making any statement to the police.

Additionally, while not explicitly addressed in the Model Protocol, Justice for Children and Youth is concerned about arrests happening on school property and how this stigmatizes and unnecessarily identifies the young person as having been dealt with under the YCJA to a broad segment of the school staff and students.

Recommended Commentary:

1. Police should not be interview or arrest students on school property unless absolutely necessary. Factors relevant to this decision include the importance of privacy protections fundamental to the YCJA, the dignity of the student, and the significance of a student's relationship to their school.
2. There is a clear and unequivocal obligation on both the police and school administrators to ensure that a student understands whether they are being detained and the consequences of making any statement to the police.

Section 13 (a): Notification of Parents

Because of the *parens patriae* obligation, a principal is acting in the place of the parent until a parent or guardian arrives. As such, an administrator has an enhanced obligation to play a protective role for all students in their interactions with the police until another trusted adult steps into that role.

Recommended Commentary:

An administrator has an enhanced obligation to play a protective role for all students in their interactions with the police until another trusted adult steps into that role. An administrator must ensure that a student understands their ability to obtain legal advice (from either duty counsel or by directing them to Justice for Children and Youth's website) or the advice of a trusted adult.

Section 16. Occurrences Involving Students Under Age 12

Justice for Children and Youth is particularly concerned about the involvement of police for incidents involving children under the age of 12. A particularly appalling example is the example of a six year old being handcuffed in the Peel Region that resulted in a finding of discrimination at the *Human Rights Tribunal of Ontario*.³⁰ The UN Committee on the Rights of the Child is clear that children below the age of criminal responsibility ought not to require police intervention but a child friendly and multidisciplinary response that reflects the psychosocial causes of such behaviour but also the protective factors.³¹

Recommended Commentary:

The appropriate response to incidents of concern for children below the age of 12 is a child friendly and community oriented response that reflects the psychosocial causes of such behaviour but also the protective factors. The involvement of police for children under the age of 12 is strictly reserved as a measure of absolute last resort and/or where the child is a victim resulting in the need for a joint police and child protection investigation.

³⁰ *JKB v Regional Municipality of Peel Police Services Board*, 2020 HRTO 1040.

³¹ UN Committee, *supra* note 13 at para 11.

We welcome the opportunity to discuss these submissions and any other areas of concern, and / or to answer any questions you might have.

Thank you for your consideration.

A handwritten signature in blue ink, appearing to read "Mary Birdsell".

Mary Birdsell, Executive Director

A handwritten signature in blue ink, appearing to read "Samira Ahmed".

Samira Ahmed, Staff Lawyer

A handwritten signature in black ink, appearing to read "Kaffie Abdirashid".

Kaffie Abdirashid, Staff Lawyer

JUSTICE FOR CHILDREN AND YOUTH