REPORT TO THE LEGISLATIVE ASSEMBLY

Issues and Recommendations Arising from the Decision of the Department of Health and the Department of Education and Early Childhood Development to Lift Certain COVID-19 Restrictions in New Brunswick Schools

Kelly A. Lamrock, Q.C.

Child, Youth and Seniors' Advocate for New Brunswick

Report 22-01HS

April 21, 2022

Overview

Operating under the authority of Section 13(1) of the *Child, Youth and Senior Advocate Act*, the Advocate has initiated an inquiry into the decision of the Government of New Brunswick to remove mask mandates in New Brunswick schools. Under the same section of the *Act*, the Advocate is making certain findings and recommendations to the Government of New Brunswick and exercising his discretion to advise the Legislative Assembly and the public.

Factual Background

On March 14, 2022, the Government of New Brunswick removed most of the restrictions previously in place to limit the spread of COVID-19. This included the removal of mandates for masking in New Brunswick public schools. Further, many of the clear directives for students to stay home from school when displaying symptoms, or even when testing positive for COVID, were removed. Subsequently, the Minister of Education and Early Childhood Development (EECD) advised that he was exercising his discretion in such a fashion that he would accept the recommendations of the Chief Medical Officer of Health (CMOH) and the Public Health unit of the Department of Health without change.

The Office of the Child & Youth Advocate became aware of significant public unease with the decision through correspondence with the Office and through public and media pronouncements. In particular, there was concern that:

(a) The reasons for the removal of the restrictions were unclear, as were the factors considered by Public Health (and by extension EECD) when making its decisive recommendation;
(b) There was a lack of consideration and planning at the school level for students with risk factors for complications from COVID and/or for students with immediate family members with those risk factors;
(c) There was inadequate weight placed upon risks such as so-called "long COVID" and other complications which could affect children;
(d) There was a lack of public clarity regarding who had the authority and accountability for the decision to remove mask mandates;
(e) There was significant concern and confusion around the authority of schools to require a student to stay home when ill, and anecdotal evidence that some students were attending school when sick; and
(f) There was concern that a failure to protect teachers from the spread of illness was compromising staffing levels and the quality of education.

Based upon these concerns and following some initial investigation within the Office of the Child & Youth Advocate, the Advocate wrote to Dr. Jennifer Russell (see Appendix "A"), the Chief Medical Officer, seeking clarity on the following three questions by April 8, 2022.

1. ***What specific information, data, advice or studies from your office, to your knowledge, has led to the most recent decision by DEECD to reduce or remove COVID restrictions such as masking?***

2. ***What, if any, indicators is your office tracking or measuring to determine if the decision has impacted the safe learning environment in unexpected ways?***

3. ***What, if any, data or developments would cause your office to amend its advice to DEECD and advise the return of some or all of previous COVID restrictions (including but not limited to masking requirements).***

Subsequently, the Advocate reviewed the *Education Act* and made certain recommendations regarding the responsibilities of the Government and District Education Councils (DECs) to accommodate students with vulnerabilities and vulnerable family members. This took the form of a legal "Guidance Letter" (Appendix "C") which provided that:

It would be the guidance of our office that, when a child or a member of their immediate family would be at risk of death or serious complications by the contraction of COVID even if fully vaccinated, and if the conditions in the common learning environment create a reasonable risk of that child contracting and communicating COVID, then the District is under a legal and ethical obligation to provide free services in an accommodated setting during the period of risk. We believe that this balances the need for the Department to balance the safety and freedoms of most students while still meeting its obligations to families at elevated risk.

Following a period in which departmental comments could be received, the Advocate prepared this Report to the Legislative Assembly and the public, which is within the authority of the Advocate.

Legal Background

It is our conclusion that either the Chief Medical Officer of Health or the Minister of Education could make an order requiring (or not requiring) the wearing of masks during all or part of the school day or under certain circumstances. The CMOH's authority can be found in Section 6 of the *Public Health Act*:

6(1)Subject to subsection (2), a medical officer of health or a public health inspector by a written order may require a person to take or refrain from taking any action that is specified in the order in respect of a health hazard.

6(2)A medical officer of health or a public health inspector may make an order under this section if he or she believes on reasonable grounds,

(a) that a health hazard exists, and

(b) that the requirements specified in the order are necessary to prevent or decrease the effect of or to eliminate the health hazard.

The authority of the Minister of Education can be found in Section 6 of the *Education Act*, which provides that the Minister:

(b.2) may establish, within the scope of this Act, provincial policies and guidelines related to....

(ii) the health and well-being of pupils and school personnel

It should be made clear that it is a legal and legitimate use of discretion when an officeholder delegates to (or agrees to accept the recommendations of) a third party. While one can always debate the ultimate result, a legal grant of discretion includes the discretion to adopt the view of another decision maker. Because the Minister of Education and Early Childhood Development has been repeatedly clear that he is exercising his discretion in this way by deferring to the recommendation of Public Health, we have inquired as to the basis of that recommendation for this review.

The Decision of the Chief Medical Officer

By letter dated April 8, 2022, (attached as Appendix "B") the Chief Medical Officer of Health provided our office with the reasons for her recommendation. In that letter, the CMOH advised that it continues to be the position of her office that mask use has and does reduce transmission of COVID-19. Against that fact the CMOH has weighed a number of countervailing factors. These could be summarized as such:

Medical factors: The known case count of COVID among youth peaked around February 18, 2022 and was declining at the time the mandate was lifted on March 14th. Subsequent to March 14th, reported cases increased but increased at a greater rate among children aged 5-11, which the

CMOH attributes to their lower vaccination rate (39%). This led to the conclusion that vaccinations were a more critical variable than mask usage. The CMOH also reports that depression and anxiety have increased since March 2022, particularly among older children, and cites this as a relevant factor to lifting the mask mandate.

Pedagogical factors: The CMOH has been tracking language development among younger children and has found some increase in students requiring intervention in the francophone sector. There is also anecdotal evidence of increased anxiety, toxic stress, timidity and emotional responses among early childhood learners. There is expert concern and negative results from EECD tracking of children's capacity to read and interpret facial expressions, which is an important developmental milestone. The CMOH reports mixed and inconclusive findings regarding a correlation between mask wearing and mental health indicators in older children, although this cannot be conclusively ruled out.

Political/policy factors: The CMOH notes that most Canadian jurisdictions have also lifted mask mandates, although the other three Atlantic Provinces are a notable exception.

In regard to future tracking and indicators, the responses were less fulsome. The CMOH has committed to tracking indicators on cognitive effects of mask wearing while acknowledging that there is no evidence of any negative impact. The issues around facial expression reading and emotional regulation will be tracked. The CMOH declined to offer any predictive indicators which would serve as a benchmark by which the recommendation could be judged, and there were no specific commitments to track any one indicator other than noting that Public Health will "monitor illness" and have "regular communications" on unspecified impacts on schools.

Decision-making and Transparency

Decisions are rarely unanimously supported, and to govern is to choose. However, when it comes to decisions around children's health and well-being there are certain hallmarks one wants to see. Ideally, decisions come from someone clearly given the responsibility to decide. That decisionmaker ideally will be able to communicate the factors which went into a decision and the weight given to each. These responsibilities and factors should be broadly understood by the

public so they can make their own decisions about risks. As well, in situations where the science is evolving, a good decision is one which has a hypothesis – a prediction about what is expected to happen and what deviations from the prediction might mean that the issue should be revisited.

Our office became involved because we were hearing significant concern from parents and the public that children were living in a situation which no one appeared to have intentionally determined. There was mutual statutory responsibility, and decisionmakers were each stating that another office was free to revise or change the decision. Further, we could not see any signs that the hallmarks of a transparent decision – explanation, predictive benchmarks, measurement, and accountability – were being provided publicly. Given that part of the stated reason for the lifting of the mask mandate and other restrictions was that individuals would be empowered to make their own decisions and supported in their choices, this public sense of vagueness and confusion was not in the interests of children.

It must be said that the response of the CMOH has added some clarity, and we believe that there is a public service in sharing it through a report so that the public can now clearly see which factors were relevant to the decision to remove the mask mandate in schools. It should be further acknowledged that the CMOH has provided a more thorough response than we often get from departments, and that is appreciated.

Concerns of the Child & Youth Advocate

There are some obvious questions that arise from the internal logic of the recommendation as detailed by the CMOH. These are within our mandate to ask, and they are ones which can be addressed should our recommendations be accepted.

1. **Masking and vaccines are not mutually exclusive.** The response and public statements from Public Health seem to suggest that the masks are effective but are not being mandated because vaccines are more effective. We accept the medical guidance here, but the logic does not follow because a mask mandate does not negatively impact vaccinations. Both can be done, and the CMOH has previously favoured a "layered" approach where people protect themselves by taking several precautions. We still cannot see a clear reason why this has changed. We note that masking has been dropped while the vaccination rate among young people is unacceptably low given the importance the CMOH places upon it. We know that as recently as last summer we were looking for a provincial vaccination rate of 75% before certain public health restrictions could be eased and commercial activities resume. We know that we waited until more than 90% of the vaccine eligible population was vaccinated before mask mandates could be lifted. The use of a 39% threshold here is not explained. The CMOH has not said that the spread of COVID among youth is benign or acceptable, and that office is still on record as opposing vaccine

mandates for children. As such, there is no real explanation offered as to why the effectiveness of vaccinations is a reason against mask mandates.

2. **An effort to distinguish correlation and causation is needed.** We understand why the CMOH would respond to early indicators of concern regarding masks and developmental goals for young children even as conclusive evidence is elusive. This pandemic is an evolving situation and decisionmakers will have to work with emerging data. One can pledge to err on the side of caution, of course, but we understand that sometimes indicators which suggest caution is due arise from factors which each suggest an opposite course of action. As such, we can understand the need to give weight to early signs of pedagogical concerns around mask use. We would be more enthusiastic if there were clear indicators being measured in these areas as the mask mandate is lifted. After all, there is a need to distinguish between correlation and causation given that masking was not the only significant pandemic response in children's lives. Lost instruction time, social distancing, anxiety from global information and limited activities all could play a role. There does not seem to have been a great deal of analysis of whether or not the deviations reported in children's speech and language learning are normal, or whether the timelines correlate with the imposition of any particular restriction. As such, the old saw that lunch often follows breakfast, but breakfast does not cause lunch may apply here and measurements should be in place sooner rather than later.

3. **Other evolving factors have not been addressed.** Pediatricians and other public health officials have cited the unknown but potential risks to children of so-called "long COVID", in which there can be ongoing physical and neurological harm even after mild infections. There is also a need to track variants to see if they deviate from what we now believe around the impact of COVID on young people. These factors were not cited or given weight in the analysis done by Public Health, and their absence from that equation is creating public concern.

4. **There is a paucity of planning for family members in vulnerable situations.** Children have a need to feel safe and to believe their family is secure. Even if one could be certain that children would not have any negative effects, the spread of COVID in schools inevitably increases risks to family members. In particular, we have seen some unacceptable responses from school districts when faced with students who have vulnerable family members at home. In some cases, district officials have been responding without sensitivity or legality to these concerns. In one reported case, however, a parent with documented needs was told to homeschool their child at their own expense and questioned as to whether cancer is a disability at law. (It is.) It should be noted that the *Education Act* is clear that when a child has a need that cannot be accommodated within the common classroom, an alternate site must be provided at the expense of the district, <u>not</u> the parent. Districts who attempt to send children home and

make parents responsible for educational services when other children are receiving services are flouting the law. The Legislature clearly intended to protect children in a broader sense than simply those with diagnosed learning challenges, because the *Education Act* requires accommodation of any *bona fide* need. That a child would not wish to place a parent at risk of death or serious illness strikes us as a need in any humane understanding of the word, especially when children with seriously ill parents are already under significant stress. We have provided the Department of Education and Early Childhood Development with legal guidance on this point (attached hereto as Appendix "C") and we note that the Department has initiated discussions with districts on this guidance. We would like to see Public Health offer them assistance in understanding what situations merit accommodation and when medical advice should be sought before a family is dismissed out of hand.

5. **The decision-making process raises questions.** We remain supportive of the principle that Public Health should be the arbiter of factual findings around health impacts and public health measures. We have credited the government on previous occasions for their admirable discipline in this matter. This most recent decision concerns us because of the passivity of other key actors who also have roles to play in the final decision. After all, expertise rarely vests entirely in one person. A CMOH cannot always specialize in every particular area of medicine, any more than a judge knows every area of law. What a CMOH can do is have the medical training to assemble, understand and scrutinize medical advice from the full gamut of medical advisers. Similarly, EECD would employ the greatest number of subject experts in pedagogical and learning goals and should be the arbiter of factual and scientific findings in that area, even when their factual conclusions are adopted by the CMOH. Finally, it is important to distinguish between findings of fact and science, where we should defer to expertise, and value judgements which are the proper role of elected, accountable governments. The CMOH is best placed to determine the risk and impacts of adopting various public health rules. EECD is best placed to determine the impacts of these restrictions on student learning and development. Once the impacts are known but must be balanced against each other, the decision is as much one of values as science, and that is where elected officials should make the call and answer to the public. Dressing up value judgements as science leads to a loss of accountability and risks making poor decisions.

6. **There appears to be an over-weighting of following other jurisdictions.** We were struck by the fact that Public Health has placed significant weight on decisions from other provinces without citing the data or reasoning of those other jurisdictions. If the Minister of EECD says mandates are lifted because Public Health said so, and Public Health says they did it because other governments said so, there is neither deliberation nor accountability for the decision. Teachers, families and citizens with concerns cannot question the Premier of Ontario. If another's decision is to be given critical weight, that

reasoning should be clearly adopted and clearly explained by the official making the decision in New Brunswick. This is especially true when there is not a consensus on the right steps to take. We note that Nova Scotia has extended its mask mandate in schools, Prince Edward Island and Newfoundland have retained theirs, and some cities with educational oversight have returned theirs because predicted impacts have not been accurate. New Brunswick children should have a decision made – and justified – by New Brunswick officials.

7. **The child rights impacted require standards of care that do not appear to have been met.** If children's rights mean anything, they means that decisions affecting children must be taken with their best interests foremost in mind and that the standard of care required of decision-makers will be a high one, higher often than in other matters of public policy making. After all, the law compels children to be present in schools. Government has a high duty of care when placing people in a mandatory setting. The "child's best interests" principle must be explicitly considered. The child's right to the highest attainable standard of health in Article 24 of the U.N. *Convention on the Rights of the Child,* the *Convention*'s insistence in Article 6 of a right to life and survival oriented to the child's maximum development, and the Article 20 responsibility to secure the child's family environment are all engaged here. Lest anyone suggest that the *Convention* will always militate towards the most restrictive health measures, there are other factors to be weighed against unnecessary restrictions. Articles 12 through 16 all require respect for the child's liberty rights, and freedom to make decisions appropriate to their age. Article 23 and 28 on the rights to a full educational experience and Article 23's requirement to ensure accommodations can cut both ways. The issue is not that the *Convention* has pre-determined the outcome in any particular situation. The issue is that the *Convention* sets out factors that any government should weigh when determining matters that affect children as a moral and legal obligation. That is what children deserve. These factors do not appear to have been explicitly weighed.

Recommendations of the Child & Youth Advocate

Our interest, as the office charged with advocating for children who are impacted by government decisions but who lack formal voting and political rights, is that the decision is made fully considering the best interests of the child above all other factors such as the comfort of adults and the political moods of the day.

It is not our intention to make a permanent determination regarding mask mandates. We do not believe that, in an expedited three-week review, the Advocate could or should take on the role of being the final arbiter of public health records. What we can say is that children deserve

a decision which explicitly considers their rights and needs, reports on each of those with clear and relevant factual findings by the right experts, and is communicated with clarity and accountability by someone who is answerable for the results. We are not yet satisfied that New Brunswick children have been given such a decision. As such, we are recommending that the government revert to the status quo that existed when the flawed decision to lift the mandates was made, and then work expeditiously to make a final decision that is properly researched, balanced, communicated and implemented. We note that New Brunswick could align its policy with Nova Scotia, which is to continue with the mandates until May 21, 2022 and then review the decision. This would allow for a Public Health process that addresses the concerns we have raised here.

It may seem odd that we have cited concerns with a process without simply calling for the conclusion to be permanently reversed. Yet sometimes, the correct answer is for the decision maker to fix the process but retain the capacity to make a decision. For example, if a judge hears hours of evidence at a criminal trial and then flips a coin to determine the guilt or innocence of the accused, it is possible that by happy accident they reached the correct decision. Yet no appellate court, nor any reasonable citizen, would sanction that process. The solution would not be for someone who did not hear all the evidence to simply demand that the opposite conclusion be reached. That would also be a flawed process. The correct response is to set out what the decision maker should have done and considered in the decision, and then to ask them to revisit their decision with the correct process.

So, it is here. Both the CMOH and EECD have faced difficult challenges over the two years of this pandemic and have gained much expertise in doing so. They have often faced these challenges with competence and compassion. We believe this process fell short of that standard, but we retain confidence that they can collaborate and get the process right. There are legitimate interests restricted by mask mandates – free expression, socialization, effective instruction, learning outcomes, and children's choice and autonomy. These should not be arbitrarily limited. Nor should they be excuses for requiring students to spend five days a week in a building where there is undue risk. The line between arbitrary restrictions and undue risk should be driven by evidence, pro and con, and clearly explained. That can, and should, happen now.

As well, we are not opening an investigation under Section 19 of the *Child, Youth and Senior Advocate Act* to fully review the lifting of the mandate. In making that decision, we have considered the current staffing of the office and the impact it would have on other investigations, the likelihood that we could make a recommendation before the end of the school year given that we are not staffed with significant public health and epidemiology expertise, the existence of long-term oversight and accountability through the Office of the Auditor General, and (most importantly) our belief that our concerns with the process and completeness of the decision can be addressed with supplemental recommendations. We are,

however, using the Advocate's discretion under Section 13 of that *Act* to place the matter under ongoing review and monitor these recommendations. We retain the jurisdiction to upgrade the matter to a systemic investigation if facts change or recommendations we see as essential are ignored.

The Child & Youth Advocate does make the following recommendations pursuant to Section 13(1)(f) of the *Act*.

1. The lifting of mask mandates and other restrictions around testing, reporting and attendance in schools should be revisited *de novo* by Public Health, with a goal of issuing a proper decision by May 21, 2022. This process should co-ordinate with EECD and should explicitly consider all relevant factors and children's rights, linking its conclusions to evidence.

2. The Departments of Health and Education and Early Childhood Development should co-ordinate and issue a protocol for making and communicating regulations in schools and early learning facilities with regards to COVID, which co-ordinates their input and ensures both departments are accountable for decisions.

3. The Departments of Health and Education and Early Childhood Development should co-ordinate and issue clear protocols for school leaders regarding when a student must test, report and/or absent themselves from school due to exposure, symptoms or a positive test.

4. The Departments of Health and Education and Early Childhood Development should co-ordinate and issue a plan to make appropriate rapid tests available to schools.

5. Public Health, in consultation with EECD, should hone and clarify the health and pedagogical indicators it will be tracking to judge the impact of the removal of the mask mandate and elaborate clearly on what benchmarks would lead to a review of the decision.

6. Public Health should include long-term impacts of COVID upon youth to the areas which it is monitoring and weighing in making recommendations.

7. Public Health and EECD should develop a strategy, backed up with regulation if necessary, to raise the low vaccination rate of children age 5-11. Public Health, having opposed enforcement of vaccine rules through registration, should be clear as to what alternate steps it would recommend.

8. EECD should require that school districts meet their obligations at law to accommodate students with a need to protect vulnerable family members. The need for protection, as per our guidance, will be dependent upon medical advice and the monitored spread and risk of COVID within the school, as per the legal guidance at Appendix "C". Public Health can assist EECD with guidelines in this regard.

Addendum: Departmental Response

We provided an opportunity for the Departments of Health and Education & Early Childhood Development to respond to a draft of this report by April 20, 2022 and to provide us with any studies or facts which might cause us to revisit the recommendations herein. The response we received is appended as Appendix "D". The Departments did not provide any studies or objections but did pledge to review these concerns as part of the process review following the expected report from the Auditor General. That report will look at pandemic issues beyond our inquiry here, which is limited to schools today.

We look forward to continuing the discussion on process. We should note that EECD has responded very quickly to a related inquiry made by the Advocate into post-pandemic remediation for school children whose learning has fallen behind during the pandemic, and this makes us optimistic that we will have a productive dialogue.

That said, we do want to emphasize that our concerns are not merely procedural. When decisions affecting children's health are made, it is a substantive concern when factors are omitted from the equation, when benchmarks and measurements are not established, and when responsibility for a decision is passed between actors and ultimately attributed to other provinces. These are not procedural omissions. They speak to the confidence we can have in the quality of the decision.

We undertook this inquiry because there was significant confusion as to the reasons for the change, and an apparent mismatch between the government's assertion (that masks could be forgone because vaccines work) and the reported facts (the vaccination rate is still very low). We hoped that we could secure a full explanation that might have been lost in sound bites or social media, and reassure the public that there was a clearly-reasoned, measurable decision with accountability for the results. We regret that we cannot give that assurance today. We now pass our findings over to the elected officials for their reflection.

It is entirely legitimate for government to envision an end to measures like mask mandates. Government has managed the pandemic well with decisions where evidence is shared, decisions are clear, and data is welcomed and made public. We know government can do this

well. We would simply emphasize that these same principles should guide how we manage the lifting of restrictions every bit as much as they guided the imposition of those restrictions.

SUBMITTED to the Legislative Assembly this 21st day of April, 2022

Kelly A. Lamrock, Q.C.
Child, Youth and Seniors' Advocate
Province of New Brunswick

New Brunswick Child & Youth Advocate

Défenseur des enfants et des jeunes du Nouveau-Brunswick

March 30, 2022

Dr. Jennifer Russell
Chief Medical Officer of Health
HSBC Place
Floor: 5
P.O. Box 5100
Fredericton, NB E3B 5G8

Dear Dr. Russell:

I am writing you today with a request for further information pursuant to Section 13(1) and Section 21(1) of the *Child, Youth and Senior Advocate Act.*

This office has become aware of significant concerns from parents and the general public around the decision of the Department of Education and Early Childhood Development (and its subordinate statutory bodies) to drop a number of restrictions aimed at reducing the spread of COVID-19 in schools, most notably any requirements for masks. It has been communicated publicly that this is in conformity with guidance from your office.

This office is empowered, under Section 19 of the *Act*, to undertake an investigation of that decision as it pertains to the safety and maintenance of the learning environment for children. Before deciding whether or not to undertake such an investigation, it would be very helpful to have information from you with regards to the advice that has led to this decision. It may well be that better public awareness of this public health guidance would assuage the concerns of parents, students, and educators.

As such, I would greatly appreciate your response to the following questions:

1. What specific information, data, advice or studies from your office, to your knowledge, has led to the most recent decision by DEECD to reduce or remove COVID restrictions such as masking?
2. What, if any, indicators is your office tracking or measuring to determine if the decision has impacted the safe learning environment in unexpected ways?
3. What, if any, data or developments would cause your office to amend its advice to DEECD and advise the return some or all of previous COVID restrictions (including but not limited to masking requirements).

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I assure you that it is not the intention of this Office to review or second guess the guidance and advice provided by your office. From the beginning of the pandemic we have regularly encouraged all stakeholders to follow public health advice. Nor should this request for preliminary information be seen as offering any implied criticism of the decision at this stage. What our mandate does require of me is to understand the scientific and medical health basis for the decision, and if possible, to ensure that parents and educators may understand it so as to make informed choices to protect children.

As I understand that this information is already readily available in usable format (as it has been used by DEECD), I would be grateful if we could have a reply by April 8, 2022. I thank you for your assistance.

Yours truly,

Kelly A. Lamrock, Q.C.
Child, Youth and Seniors' Advocate

/jbm

C: Ms. Heidi Liston, Deputy Minister, Department of Health

Appendix "B"

New Nouveau Brunswick CANADA

April 8, 2022

Mr. Kelly Lamrock Q.C.
Child, Youth and Seniors' Advocate
548 York Street,
Fredericton, NB E3B 5H1

Dear Mr. Lamrock:

This is in response to your letter dated March 30, 2022, about policies associated with masking in schools. Thank-you for bringing these issues to our attention. We appreciate the opportunity to openly discuss these concerns with you.

During the pandemic, we learned that masks are an important protective layer for slowing the spread of COVID-19. Public Health continues to work with school districts to create a respectful and supportive environment for all. Schools have been directed to ensure that students and staff continue to feel welcome to wear masks, based on individual risk assessments and comfort levels.

Public Health also recognizes the importance of empowering children to make choices regarding when to wear a mask and accepting and supporting all children whether they wear a mask or not. With this in mind, we have endeavored to answer your three questions.

1. **What specific information, data, advice, or studies from your office, to your knowledge, has led to the most recent decision by DEECD to reduce or remove COVID restrictions such as masking?**

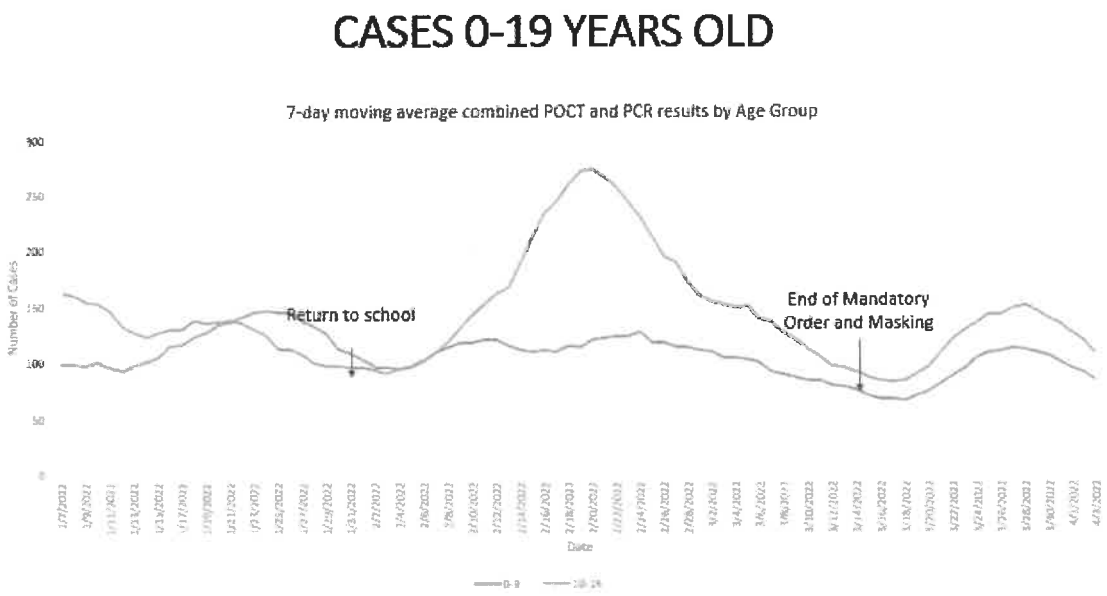
Vaccinating children is the single most important action parents can take to reduce COVID-19 related absenteeism in our schools. Currently, 39% of students aged 5 to 11 are fully vaccinated. Vaccines are safe and effective, and reduce transmission rates, which is very important in a school environment, especially with new more contagious variants.

We have compared absenteeism data provided by the Department of Education and Early Childhood Development. There can be no question that student absences have increase overall. However, when one compares February 2020 to February 2022, the increase in the absenteeism rate of Kindergarten to Grade 8 students is double that of high school students who have higher vaccination rates. The mask mandate was still in place at that time.

Decisions regarding COVID-19 measures are often influenced by considering trends and research taking place outside our province. By March 2022, most jurisdictions across Canada recognized the need to balance the risks versus benefits of measures such as masking and made the decision to discontinue mandatory masking in schools.

New Brunswick surveillance data indicates that COVID-19 illness among children and youth under 20 years of age peaked in late March 2022 and is trending downward. (See Figure 1)

Figure 1:



It is recognized that the pandemic and associated measures appear to have had a significant impact on the mental health of children and youth. However, it is very difficult to correlate specific psychological impacts of mask-wearing, as research results have been mixed. It is also very hard to differentiate the impacts of mask wearing from all the other COVID-19 societal measures that were also in place, including physical distancing and limiting of social contacts. Depression and anxiety at all age levels, particularly those in middle school and older are noteworthy trends that have increased over the past two years.

The following additional trends were observed by the Department of Education and Early Childhood Development (EECD). These are not the result of one factor, but of many, including the use of masks over the past two years:

- Language development :
    - In the francophone sector, EECD observed a rise in the proportion of children aged approximately four years who were identified at risk (33.9% of children are identified at risk – North Western part of the province saw a rise of 5.4% in children at risk)
    - In the francophone sector, the ASQ assessments (ages and stages questionnaire) completed with willing parents of 18-24 month olds demonstrated a higher than historical level of risk. 10% require early childhood intervention, 17% requiring support from 'Talk with Me' (speech language pathology program)
    - Waitlists for speech language pathologists are growing and extending to almost two years in some regions
    - Psychologist Manon Porelle contributed in an article on early childhood: the impact of mask wearing will require an explicit teaching our children, over the next few years, in reading facial expressions in others
    - Partnerships in Autism group also observed additional challenges with children with an autism diagnosis in their language development

- Observations made by early childhood intervention specialists:
    - Children are more timid, more reserved
    - Children are demonstrating anxiety (toxic stress)
    - Children are more difficult to approach, sometimes demonstrate fear
    - Children have more difficulty managing their emotions

2. What, if any, indicators is your office tracking or measuring to determine if the decision has impacted the safe learning environment in unexpected ways?

The Epidemiology and Surveillance Branch is tracking the current research on the impact of wearing masks on children. At present, there is no evidence of significant negative cognitive impacts of mask wearing on children. Studies on the impacts of mask-wearing on children's communication skills, skin conditions and mental health showed mixed results. Further study is required, but there are convincing data demonstrating impacts on children's ability to interpret facial expressions and emotion. My office would be happy to share the applicable studies with you.

In New Brunswick, EECD is seeing trends regarding the effects of COVID-19 on children. These include changes in language development, reading facial expression of others, and mental health, including anxiety and depression. There are many factors that have influenced these changes in addition to mask wearing including decreased participation in activities, less interaction with others outside their household, and physical distancing.

EECD and Public Health are in regular communication about how COVID-19 cases are impacting schools. These conversations take place between schools and regional Public Health offices, but also between the two departments.

3. **What, if any, data or developments would cause your office to amend its advice to DEECD and advise the return of some or all of previous COVID restrictions (including but not limited to masking requirements).**

Public Health continues to monitor illness across the province, with ongoing testing for Omicron BA.2 and XE variants. If additional advice is required to inform New Brunswickers, Public Health will do so based on predictive models and current epidemiology. Until such time Public Health stands behind its recommendations to Government to remove the Mandatory Order and measures with the exception of vulnerable settings. Mandating individuals to mask in public places and spaces, at this time, would require enforcement under a new Mandatory Order or new legislation.

We will continue to work with EECD to create a supportive environment for those who choose to wear a mask based on personal risk assessment. We continue to encourage all eligible individuals to get their COVID-19 immunization and booster, to stay home when sick, practice respiratory etiquette, sanitizing and handwashing.

Please be aware, the situation is fluid and measures taken will consider the most recent information. Thank you for sharing your questions with me.

Sincerely,

Dr. Jennifer Russell, BA, BSc, MD, CCFP
Chief Medical Officer of Health

Appendix "C"

New Brunswick Child & Youth Advocate

Défenseur des enfants et des jeunes du Nouveau-Brunswick

April 6, 2022

The Honourable Dominic Cardy
Minister, Education & Early Childhood Development
Province of New Brunswick

Dear Minister:

Our office has had reports that some school districts have advised parents to consider homeschooling their child if the child or one of their parents has a disability or fragile medical condition which places them at risk of severe complications from COVID-19. I am writing today to provide you, on the record, with the legal position of the Office of the Child and Youth Advocate.

While I have no doubt in your familiarity with the *Education Act*, I note the following sections of the statute to better ground our position:

8(1)Subject to subsection (2), the Minister shall provide free school privileges under this Act for every person who is of school age and who
(a) has not graduated from high school, and
(b) is a resident of the Province.

12(4)The superintendent concerned may deliver programs and services for pupils requiring a personalized learning plan to a pupil at the pupil's home or other setting if the pupil is not able to receive the program or service in a school due to
(a) the pupil's fragile health, hospitalization or convalescence, or
(b) a condition or **need** that requires a level of care that cannot reasonably be provided effectively in a school setting. *(emphasis added)*

I further note that children of parents with disabilities are, by our reading of case law and statute, protected under both the Canadian *Charter of Rights and Freedoms*, Section 15 and the New Brunswick *Human Rights Act*, Section 2.1 (g), (h) & (k). Further, the Supreme Court of Canada has found that a presumption can be made, when interpreting statutes, that compliance with international obligations can be presumed. A purposive interpretation of the statute along these lines is also consistent Canada's obligations under

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the UN Convention on the Rights of the Child (UNCRC) and the Convention on the Rights of Persons with Disabilities (CRPD). The recent joint statement by both the UNCRC and CRPD treaty bodies on the rights of children with disabilities, launched earlier this month, reaffirms the central principle of the CRPD that disability policy must be founded upon a human rights model and that "impairments must not be taken as a legitimate ground for the denial or restriction of human rights".

Reading Sections 8 and 12 of the *Education Act* together, with the presumption that the Legislature intends to follow both the *Charter* and the *Human Rights Act*, it seems clear that a student has a right to receive free educational services at times when their peers are also receiving them. These cannot be offloaded to a family when the child cannot be accommodated due to a disability, health condition or analogous need. It is the school district which must bear the costs of accommodation in an alternate setting if the child cannot be accommodated in the common learning environment.

I should acknowledge here that the Department's legal obligation is to the child, and not the parent. However, the needs of child and parent are not completely severable. The definition of "need" in Section 12(4) is sufficient, in our view, to encompass the emotional need for a child to both have a parent available to love and care for them, and to have the security of knowing that they will not cause their parent serious harm. That appears consistent with the science and the legislative intent, as well as consistent findings from courts that statutes creating access to vital services are to be given the large and liberal interpretation that supports universal and discrimination-free access.

I recognize that you have been committed to receiving and following public health guidance in setting the conditions for managing COVID in the common learning environment, and our office has urged exactly that when consulted. The issue here is when, having followed that guidance, there are a few children whose family situations may make the common learning environment inappropriate for their needs, based upon their family situation and a parental disability or fragility.

So that our position is not read in an overly broad way, I would note that mere disagreement or concern on the part of a parent is not sufficient to trigger the legal duty to accommodate. In this, as in many other aspects of managing COVID, the medical evidence is essential to evaluating each case on its own merits.

It would be the guidance of our office that, when a child or a member of their immediate family would be at risk of death or serious complications by the contraction of COVID even if fully vaccinated, and if the conditions in the common learning environment create a reasonable risk of that child contracting and

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communicating COVID, then the District is under a legal and ethical obligation to provide free services in an accommodated setting during the period of risk. We believe that this balances the need for the Department to balance the safety and freedoms of most students while still meeting its obligations to families at elevated risk.

I note that I have not, at this time, exercised this office's statutory authority under Section 19 of the *Child, Youth and Seniors Advocate Act* to open a formal investigation into this issue. It is my hope that, by providing our guidance in advance, that the dialogue and decisions needed to manage the situation will occur proactively, rather than reactively. I am sharing this guidance with the districts, and I am sure you will advise them of your direction on the matter.

I thank you for your consideration of this issue.

Yours truly,

Kelly A. Lamrock, Q.C.
Child, Youth & Seniors Advocate

/jbm

C: Mr. George Daley, Deputy Minister
M. Marcel Lavoie, Deputy Minister
District Education Councils

Appendix "D"

New Nouveau Brunswick CANADA

April 19, 2022

Mr. Kelly A. Lamrock, Q.C.
Kelly.A.Lamrock@gnb.ca

Dear Mr. Lamrock:

This is in response to your email dated April 13, 2022, in which you provided a draft of your report to the Legislative Assembly titled *Issues and Recommendations Arising from the Decision of the Department of Health and the Department of Education and Early Childhood Development to Lift Certain COVID-19 Restrictions in New Brunswick Schools.*

The Department of Health and the Department of Education and Early Childhood Development appreciate your interest in this issue and your concern for the wellbeing of children in New Brunswick's school system, which we share.

We note that your recommendations describe specifically to the opportunity for process and communication improvements. To that end, the Auditor General, is completing its own review of the Province's response to the pandemic which will be fundamental to a comprehensive evaluation. Our departments will continue to work together to further the health of New Brunswick's children, taking into consideration the recommendations we receive from both offices.

The Department of Education and Early Childhood Development will be responding to your point on vulnerable individuals in a separate letter.

Sincerely,

Heidi L. Liston
Deputy Minister
Health

Marcel Lavoie
Deputy Minister
Education and Early Childhood Development

George Daley
Deputy Minister
Education and Early Childhood Development