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Protecting Children, Protecting Families

The legal rights of parents to be fully informed on all matters regarding their children's education

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Background

There has been considerable public debate about whether schools in Alberta have the legal right to withhold information about students from their parents, in particular regarding whether a student joins or participates in a Gay Straight Alliance ("GSA"). Some have gone so far as to claim that schools are obligated to withhold information from parents regarding their child's involvement with a GSA.

The legal sources of parental rights

As a matter of established practice and common sense, teachers and administrators inform parents regarding the curriculum being taught at school, what extracurricular activities students are involved in, and all aspects of the student's physical, emotional and mental health. There are several reasons for this.

First, this is a best practice because educational outcomes are better when schools and parents communicate openly and work in tandem.[1]

Second, as discussed in this memo, parents have the legal right to be informed on all matters respecting the education of their children. The right of parents to direct, and to be fully informed about, all aspects of their children's education is entrenched in international law, Canadian constitutional law and provincial law.

The *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810 (1948) states in Article 26(3):

> Parents have a prior right to choose the kind of education that shall be given to their children.

Article 16(3) of the *Universal Declaration* also states:

> The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

The *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, to which Canada is a signatory, states in Article 18(4):

> The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure **the religious and moral education of their children in conformity with their own convictions**. [Emphasis added]

[1] See the Father Doucet School as one example: http://calgaryherald.com/news/local-news/father-doucet-school-credits-parents-engagement-for-academic-success.

As with the *Universal Declaration*, The *International Covenant* goes on to say in Article 23(1):

> The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

The Supreme Court of Canada in *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 (paragraph 65), affirmed that Article 18(4) of the *International Covenant on Civil and Political Rights* is applicable in Canada. Parents, religious or otherwise, have the constitutional right under s. 2(a) of the *Charter of Rights and Freedoms* to determine all aspects of their children's education, including the moral education of their children. Like all rights, parental rights are subject to reasonable limits. For example, parents do not enjoy a constitutional right to require the public school curriculum to align with the cultural, moral, and religious values they desire to pass down to their children.[2] Rather, the right to determine all aspects of a child's education manifests itself in the right to school choice and the right to be informed.

Alberta legislation not only recognizes the right of parents to direct their children's education, it also requires that parents be informed about all aspects of their children's education.

Section 1 of the *Alberta Bill of Rights*, RSA 2000, c A-14 states:

> It is hereby recognized and declared that in Alberta there exist without discrimination by reason of race, national origin, colour, religion, sexual orientation, sex, gender identity or gender expression, the following human rights and fundamental freedoms, namely:
> …
> (g) **the right of parents to make informed decisions respecting the education of their children.** [emphasis added]

The *Alberta Bill of Rights* is not merely aspirational; all provincial legislation, including the *School Act*, must comply with it. Section 2 of the *Bill of Rights* states:

> Every law of Alberta shall, unless it is expressly declared by an Act of the Legislature that it operates notwithstanding the Alberta Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared.

The Alberta *Family Law Act*, SA 2003, c F-4.5, in regards to the rights of guardians (including natural parents), states the following:

> s. 21(4)(a) …each guardian is **entitled to be informed of and consulted about and to make all significant decisions affecting the child** in the exercise of the powers and responsibilities of guardianship… [emphasis added]
> …
>
> s. 21(6) …each guardian may exercise the following powers:

[2] See *L. (S.) c. Des Chênes (Commission scolaire)*, 2012 SCC 7.

> (a) to make day-to-day decisions affecting the child, including having the day-to-day care and control of the child and **supervising the child's daily activities**
> …
> (c) **to make decisions about the child's education, including the nature, extent and place of education and any participation in extracurricular school activities**
> …
> (e) to decide with whom the child is to live and **with whom the child is to associate**
> …
> (i) to receive and respond to any notice that a parent or guardian is entitled or required by law to receive
> …
> (l) to receive from third parties health, **education or other information that may significantly affect the child** [emphasis added]

In regards to the definition of the word "may" used in s. 21(6) of the *Family Law Act*, s. 28 (2)(c) of the Alberta *Interpretation Act*, RSA 2000, c I-8 states:

> In an enactment, "may" shall be construed as permissive and empowering.

Consistent with the *International Covenant,* the *Universal Declaration* and the *Alberta Bill of Rights*, the *Family Law Act* recognizes that guardians (parents) should be permitted and empowered to make all decisions regarding their children's education, including extracurricular activities and with whom their child associates, and "other information that may significantly affect the child". The exercise of parental decision-making necessarily requires schools to properly inform parents about all aspects of the child's education, including involvement with extra-curricular clubs and activities.

The rights of children *vis-à-vis* their own parents

Children do not have legal rights that are independent of the obligations and rights of parents to raise and care for their children.

For example, the Newfoundland Unified Family Court (NUFC) has interpreted a child's s. 7 *Charter* rights to include the right to have the protection of parents, and the right to have parents make decisions for the well-being of the child: *L. Re*, 70 Nfld. & P.E.I.R. 287, 1988 CarswellNfld 77 [*L. Re*], at paragraphs 77-78. Further, the NUFC found that the child's s. 7 *Charter* rights are violated when the state does not properly inform and notify parents, thereby preventing parents from discharging their obligation to make decisions for, and care for, the child: *L. Re*, at paragraphs 77 and 87.

The Supreme Court of Canada has acknowledged the fact that children develop and mature gradually, and therefore gradually acquire the same rights as independent adults. As children sufficiently develop such that they have the understanding required to make intelligent decisions, parents gradually lose the legal authority to make decisions for the child in accordance with the child's stage of development: *Manitoba (Director of Child & Family Services) v. C. (A.)*, 2009 SCC 30, at paragraphs 50-51. However, the Supreme Court found that research has shown that children and even adolescents typically lack the psychological development required to make truly good decisions, and are easily influenced: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927, at paragraph 72; *Manitoba (Director of Child & Family Services) v. C. (A.)*, at paragraphs 70-79.

A child has no right to make significant decisions effecting their life until the child has sufficient decision-making capacity: *Manitoba (Director of Child & Family Services) v. C. (A.)*, at paragraph 46. In the context of health care decisions, the SCC has found that children under the age of 16 years do not have the right to unilaterally make a decision that will, in the opinion of the court, cause harm. Further, parents retain at least some legal authority to make decisions for their children until the age of 18 years: *Manitoba (Director of Child & Family Services) v. C. (A.)*, at paragraph 51.

New challenges created by section 16.1 of the *School Act*

Regarding the relative rights of parents and children, until 2015 the Alberta *School Act*, RSA 2000, c S-3, was in complete conformity with the approach taken by Canadian courts, the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *Alberta Bill of Rights*, and the Alberta *Family Law Act*. In fact, the Preamble to the *School Act* still states:

> WHEREAS parents have a right and a responsibility to make decisions respecting the education of their children;

Further, prior to the enactment of s. 16.1, the *School Act* did not grant any exclusive rights to children. Rather, all rights and responsibilities governed by the *School Act* were either granted exclusively to parents, or held jointly as between children and parents. In a break from international law, Supreme Court of Canada jurisprudence and provincial legislation, s. 16.1 of the *School Act* allows children to make some decisions unilaterally, without the consent of their parents:

> (1) If one or more students attending a school operated by a board request a staff member employed by the board for support to establish a voluntary student organization, or to lead an activity intended to promote a welcoming, caring, respectful and safe learning environment that respects diversity and fosters a sense of belonging, the principal of the school shall
>
> > (a) permit the establishment of the student organization or the holding of the activity at the school, and

(b) designate a staff member to serve as the staff liaison to facilitate the establishment, and the ongoing operation, of the student organization or to assist in organizing the activity.

(2) For the purposes of subsection (1), an organization or activity includes an organization or activity that promotes equality and non-discrimination with respect to, without limitation, race, religious belief, colour, gender, gender identity, gender expression, physical disability, mental disability, family status or sexual orientation, including but not limited to organizations such as gay-straight alliances, diversity clubs, anti-racism clubs and anti-bullying clubs.

(3) The students may select a respectful and inclusive name for the organization, including the name "gay-straight alliance" or "queer-straight alliance", after consulting with the principal.

Section 16.1 of the *School Act* violates the right of parents to make decisions respecting all aspects of the education of their children, which, as per s. 21(6)(c) of the *Family Law Act* and Article 18(4) of the *International Covenant on Civil and Political Rights*, includes extracurricular activities and moral education. GSAs are extracurricular activities which involve discussions of morality, namely, sexual morality. Further, GSA websites indicate that GSAs are not merely informal support groups, but are ideological clubs which espouse beliefs about human sexuality and sexual morality that are hostile to, or at least incompatible with, the beliefs and values of many parents, teachers, administrators and schools in Alberta.[3]

Further, Section 16.1 of the *School Act* is incongruous with Section 50.1(1) of the *School Act*, which requires that parents be notified when any instruction or exercises include subject matter that deals primarily and explicitly with religion or human sexuality. While section 50.1(1) does not expressly mention extra-curricular activities, the underlying principle is that parents have a legal right to insist that their children not be exposed to matters of a sexual nature.

Notwithstanding the silence of s. 16.1 of the *School Act* on parental notification regarding GSAs, an argument has been advanced that schools should <u>not</u> inform parents when their children join a GSA or engage in GSA-related activities. This argument has no basis in law. A further, related argument is that schools have a legal <u>obligation</u> not to inform parents. This also has no basis in law.

[3] "Clubs often work on advocacy, human rights and awareness projects": https://www.calgarysexualhealth.ca/programs-workshops/gsanetwork/; "GSAs… work to end homophobia and transphobia": https://gsanetwork.org/resources/building-your-gsa/what-gsa;

Children have no privacy rights vis-à-vis their own parents

One justification advanced for the practice of withholding information from parents is rooted in the mistaken assumption that children have privacy rights as against their parents, and that these privacy rights legally entitle children to require other adults, such as teachers and school administrators, to purposely withhold important information from their parents. The law recognizes no privacy rights of children vis-à-vis their own parents.

Children only have privacy rights as against the government and third parties, not vis-à-vis their own parents. In fact, as detailed above, the law requires schools to inform and notify parents in regards to the moral education of their children and the extracurricular activities their children participate in. By virtue of both the parental right to decide all matters respecting a child's education, as well as the child's lack of decision-making capacity, children under the age of 16 have no legal right to demand that the school not inform their parents about their participation in a GSA or involvement with GSA-related activities. Even at or above the age of 16, it is far from clear that children have a right to require schools to withhold information from their parents in regards to their involvement with a GSA.

Section 17 of the *Freedom of Information and Protection of Privacy Act, RSA 2000, c F-25* [*FOIPPA*] states:

> s. 17(3) The disclosure of personal information under subsection (2)(j) is an unreasonable invasion of personal privacy if the third party whom the information is about has requested that the information not be disclosed.
>
> s. 17(2)(j) subject to subsection (3), the disclosure is not contrary to the public interest and reveals only the following personal information about a third party:
>
> (iii) attendance at or participation in a public event or activity related to a public body, including a graduation ceremony, sporting event, cultural program or club, or field trip…

A parent is not a "third party" vis-à-vis her or his own children. This is made clear by the *Alberta Bill of Rights* and *Family Law Act*, which impose legal obligations on teachers, principals and schools to inform parents about all aspects of their children's education. Further, Section 40(1) of *FOIPPA* specifically provides that personal information must be disclosed in order to comply with international law, federal laws, and provincial laws which mandate disclosure to parents:

> A public body may disclose personal information only:
>
> (e) for the purpose of complying with an enactment of Alberta or Canada or with a treaty, arrangement or agreement made under an enactment of Alberta or Canada,
>
> (f) for any purpose in accordance with an enactment of Alberta or Canada that authorizes or requires the disclosure.

Protecting children from abuse

Some have argued that informing parents of a child's participation in a GSA will somehow negatively impact the child's safety. This argument falsely pre-supposes that all parents are a threat to their own children's safety and well-being. This argument ignores the fact that in rare cases where a child's safety is actually threatened, teachers and administrators are already legally obligated to inform child protection authorities, and to do so without telling parents that child protection authorities have been notified. In other words, the law currently provides protection for children who need protection, and does so while also respecting the rights of parents to be fully informed about GSAs, their children, and all other aspects of what is happening in their children's schools.

The "child safety" argument also ignores the fact that the small minority of parents who may be abusive will make use of a wide range of pretexts, including poor grades, bad behaviour, the child's choice of friends, the teenager's choice of a boyfriend or girlfriend, the type of clothing worn by the child, etc. If a small number of parents abuse their children upon learning of their child's poor grades, this would not serve as justification for withholding report cards from all parents. The law recognizes that, except in the rarest of circumstances, no persons are more invested in the well-being of a child than that child's parents. The law therefore supports the right of parents to be fully informed, and provides avenues to protect children who are genuinely facing abusive situations at home.

Conclusion

Schools have no legal right to withhold information from parents.

Instead, teachers and principals have a positive duty to inform parents, including notifying parents of a child's involvement with a GSA or GSA-related activities.

The legal obligation to inform parents is modified only in cases where doing so would, objectively, put the child at risk. Such circumstances are exceedingly rare, and Alberta's current laws provide for them. The vast majority of parents do not engage in abusive behaviour that would justify the withholding of information regarding the education of their child.

Parents have the right to choose the kind of education their child receives, including extracurricular activities, and the right to be informed regarding what their child is learning inside of and outside of the classroom, and what extracurricular activities their child is involved with.

The foregoing is made clear by the *Alberta Bill of Rights*, the Alberta *Family Law Act*, the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, and the rulings of the Supreme Court of Canada and other Canadian courts.