Justice Centre
for Constitutional Freedoms

Support All Students

Categorical School Notification Restrictions Violate the Constitutional Rights of Students and Parents

November 2019

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Overview

The vast majority of school boards in Alberta, including public and Catholic, currently have school policies that unconditionally restrict notifying parents about their children's participation in school clubs and activities.

In 2017, the previous Alberta government amended the *School Act* to require all school boards to prohibit school administrators, teachers and staff from informing parents of their children's participation in certain school clubs and activities under any circumstances; the only notification permitted concerning these clubs and activities was of the establishment of the club or the holding of the activity (the "Notification Prohibition"). School boards that did not adopt this Notification Prohibition were threatened with removal of funding and being shut down.

Over two dozen school boards and several parents brought a court case challenging the constitutionality of the government's Notification Prohibition. No court ruled on the constitutionality of the Notification Prohibition however, as the *School Act* was replaced by the *Education Act*, effective September 1, 2019. The *Education Act* now in force does not require schools to have a Notification Prohibition.

Although school boards again have discretion to create their own policies concerning the appropriate notification of parents about their children's involvement in school clubs and activities, the Notification Prohibitions imposed on school boards by the previous government remain in most schools' policies.

Further, it is still commonly asserted that schools cannot disclose information to parents about their child's participation in clubs or activities. While the current political context appears to promote such claims, those claims are not justified in law or fact.

This paper is designed to help school boards, families, school staff and politicians understand the relevant legal and factual context that require school boards to make needed changes to school policies restricting notification concerning clubs and activities. Policy changes that empower staff to exercise appropriate professional discretion are required to meet the differing needs of individual students. Failure to do so breaches the rights of students and their parents protected by the *Alberta Bill of Rights* and the *Canadian Charter of Rights and Freedoms*.

Specific School Policy Provisions of Concern

Section 45.1 of the now-repealed *School Act* required that every school board in Alberta, including public, Catholic, and private, enact the following Notification Prohibition in their school policies:

> (4) A policy established under subsection (2) must contain a distinct portion that addresses the board's responsibilities under section 16.1, and the distinct portion of the policy
> …

(c) must provide that the principal is responsible for ensuring that notification, if any, respecting a voluntary student organization or an activity referred to in section 16.1(1)

(i) **is limited to the fact of the establishment of the organization or the holding of the activity**, and

(ii) is otherwise consistent with the usual practices relating to notifications of other student organizations and activities…. [emphasis added]

Facing threats from the former Minister of Education that non-compliant schools would lose funding or be shut down, the vast majority of school boards – including all public and Catholic schools and many private schools – enacted the Notification Prohibition into their own school policies or administrative procedures.

Despite the fact that the new *Education Act* does not require it, the Notification Prohibition remains in most school policies. This prevents any notification of parents concerning clubs or activities regardless of their children's age, disability or circumstances, other than the mere "establishment of the organization or the holding of the activity". Schools boards that voluntarily choose to keep the Notification Prohibition in their policies fail to respect the diverse needs of students: a 5-year old student is subject to the same restriction of information to parents as a 17-year old student. These provisions leave no room for the appropriate professional discretion of school staff in providing necessary notification to parents.

Many school policies contain inconsistencies. For example, school policies frequently contain the blanket Notification Prohibition, while simultaneously requiring that notification about a student's participation in a school club or activity must be done in accordance with the *Freedom of Information and Protection of Privacy Act* (the "*FOIP Act*"). As will be discussed below, the *FOIP Act* conflicts with the Notification Prohibition's restriction of notification only to "the establishment of the organization or the holding of the activity".

Given the fact that the Notification Prohibition remains in most school boards' current policies and administrative procedures, school staff will feel restricted from exercising their professional discretion to appropriately involve parents in the best interests of individual students. Under the Notification Prohibition, school staff are forbidden from providing parents with any information about a school club or activity beyond the mere "establishment of the organization" or "holding of the activity".

School boards bear the responsibility to ensure their policies give correct guidance to schools to respect the needs and rights of students and the corresponding responsibilities and rights of parents.

Alberta Law Regarding Notifying of Parents about School Clubs and Activities

In 2015, the Alberta Legislature passed *Bill 10: An Act to Amend the Alberta Bill of Rights to Protect Our Children*,[1] which required schools to host requested clubs and activities, including

[1] https://education.alberta.ca/media/158726/act_to_amend_the_alberta_bill_of_rights_to_protect_our_children.pdf

gay straight alliances ("GSAs"). As referred to by its title, *Bill 10* simultaneously enshrined into the *Alberta Bill of Rights* the "right of parents to make informed decisions respecting the education of their children."[2]

It is important to note that the parental rights guaranteed in the *Alberta Bill of Rights* supersede any other legislative provision in Alberta, including the *FOIP Act,* the previous *School Act,* and the current *Education Act*.[3] Thus, the *FOIP Act* cannot be validly construed to infringe the rights of Alberta parents to make informed choices about the education of their children protected by the *Alberta Bill of Rights*.

Additionally, *Bill 10* explicitly protected the right of parents to be notified where "instructional materials, or instruction or exercises, include subject-matter that deals primarily and explicitly with religion or human sexuality." This protection is incorporated into sections 58.1 and 58.2 of the *Education Act*.

Considering these provisions added by *Bill 10* to the *Alberta Bill of Rights* and the *Education Act*, parents have a right to appropriate notification concerning school clubs and activities their children may participate in, especially when such clubs or activities focus on sexuality. That right trumps any provisions to the contrary, including those in schools' current policies as well as suggested interpretations of the *FOIP Act*.

What Does the *FOIP Act* Require?

The commonly asserted justification for withholding information from parents is students' privacy interests within privacy legislation. The *FOIP Act* applies to public schools and it is asserted that the *Personal Information Protection Act* applies to private schools. To claim the *FOIP Act* as justification for categorically withholding information from parents is to fail to understand the legal nuance and application of Alberta's privacy legislation. Further, such a claim ignores the requirement that any interpretation of privacy legislation must comply with the paramount provisions of the *Alberta Bill of Rights* and the *Canadian Charter of Rights and Freedoms* which protect parents' involvement with their own children.

The relevant provisions of the *FOIP Act* use general language that prohibits disclosure that would be an "unreasonable invasion" of a person's privacy.[4] Further, the *FOIP Act* expressly recognizes parents (guardians) as the protectors of their children's privacy rights, unless doing so "would not constitute an unreasonable invasion of the personal privacy of the minor."[5] This determination is necessarily a highly contextual inquiry which must take into account the child's age, vulnerabilities and circumstances.

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[2] RSA 2000 c A-14, section 1(g), available at http://www.qp.alberta.ca/documents/Acts/A14.pdf.
[3] *Alberta Bill of Rights*, section 2: "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, 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."
[4] *FOIP Act*, section 40(1)(b).
[5] *FOIP Act*, section 84(1)(e): "Any right or power conferred on an individual by this Act may be exercised... (e) if the individual is a minor, by a guardian of the minor in circumstances where, in the opinion of the head of the public body concerned, the exercise of the right or power by the guardian would not constitute an unreasonable invasion of the personal privacy of the minor".

The *FOIP Act*'s application relies on the exercise of discretion and common sense by those within public bodies. What would be "unreasonable" disclosure of personal information about a mature 17-year old student, may be entirely reasonable and appropriate information to disclose to a parent about an immature 9-year old child or a developmentally delayed 13-year old child.

The Office of the Information and Privacy Commissioner of Alberta has released an advisory on this issue.[6] While the advisory is legally deficient in its failure to reference the *Alberta Bill of Rights* or the *Charter*, it nonetheless does acknowledge that the *FOIP Act* itself requires situation specific determinations of reasonable and unreasonable disclosure. This fact alone shows that the *FOIP Act* is incompatible with the Notification Prohibition, which imposes a blanket restriction on all notification concerning children's participation in school clubs and activities.

Information from the Government of Alberta

The information from the Government of Alberta on this matter is rather contradictory, possibly on account of the heated political rhetoric on the issue. In a document entitled "The Education Act: GSAs and Inclusion Groups" (the "GSA Fact Sheet"),[7] the government makes the following paradoxical statements:

- Schools cannot disclose a student's membership in any inclusion group, as there are student privacy considerations that trump other legislation.
- All school authorities are required to follow the law: public schools must follow the Freedom of Information and Protection of Privacy Act, and private schools must adhere to the Personal Information Protection Act.
- Legislation needs to balance protecting children and their privacy with the rights of parents, so children are getting the supports they need.
- Under Alberta's privacy legislation, disclosure of GSA membership would only be justified if a student is at risk of harm.
- Educators will need to navigate these difficult situations to do what is in the best interest of kids.

The government vacillates from stating that "[s]chools cannot disclose" a student's participation in a group, to stating that disclosure is "justified if a student is at risk of harm", to stating that educators must "do what is in the best interest of kids." All of these statements express a different, and rather contradictory, standard for school staff to apply.

The GSA Fact Sheet correctly notes that "school authorities are required to follow the law". Unfortunately, the GSA Fact Sheet does not contain an accurate summary of the law. Complying with the categorical Notification Prohibition still remaining in many school policies is not following the law; rather, failing to appropriately notify parents risks breaking the law by violating the paramount constitutional rights of students and parents.

[6] https://www.oipc.ab.ca/media/1014145/advisory_school_clubs_sep2019.pdf
[7] https://www.alberta.ca/assets/documents/education-GSA-fact-sheet.pdf

The applicable law, including the *Canadian Charter of Rights and Freedoms*, the *Alberta Bill of Rights*, the *FOIP Act*, and the *Education Act*, requires consideration of the constitutional rights of parents and the rights and needs of individual children.

Despite giving contradictory information in its GSA Fact Sheet, the government acknowledges that, in fact, a case by case determination of appropriate notification in accordance with the law needs to be made:

> School authorities are bound by privacy laws to protect personal information and may only disclose personal information if authorized under these laws….While a student can and has the right to ask their school authority not to disclose such information, the school authority has an obligation to consider each student's unique circumstances and the law.[8]

It is important for school boards to recognize the obligation they have to follow the law, including respecting the legal rights of students and parents. The statements of the Alberta government in the GSA Fact Sheet are not law. They are also not legal advice and do not provide protection for a school board that violates the constitutional rights of students and parents by categorically restricting appropriate notification of parents. Rather, such a school board would be liable for harm caused to vulnerable students by failing to respect students' and parents' rights to appropriate parental notification.

Schools' Failure to Respect Students' Needs and Vulnerabilities

Schools' failure to notify and involve parents concerning their vulnerable children's involvement in school clubs and activities has resulted in documented suffering and harm to students, including depression, self-harm and suicide attempts. Sworn testimony from affected students and parents indicates the need for school policies and actions to respect individual students' needs and vulnerabilities, including developmental disabilities, bullying and naiveté.

In one situation, a young autistic girl became involved in a GSA and subsequently experienced severe gender dysphoria leading to a suicide attempt.[9] Her school did not effectively inform her parents or involve them in helping her until she was constantly being tormented with severe depression and suicidal thoughts.

In a rural Alberta school, a bullied student had a similar experience when her school refused to provide information to her parents concerning her involvement in a GSA club, her gender dysphoria and gender transition at school.[10] This girl also attempted suicide, and only improved after her parents eventually learned about what their daughter was experiencing at school.

In another circumstance, a boy with learning disabilities and a history of being bullied experienced gender dysphoria shortly after attending a GSA. This caused him significant mental turmoil and

[8] https://www.alberta.ca/assets/documents/education-GSA-fact-sheet.pdf [emphasis added].
[9] https://www.jccf.ca/wp-content/uploads/2019/05/Filed-Affidavit-of-Autistic-Student-re-GSA-and-Transitioning.pdf
[10] https://www.jccf.ca/wp-content/uploads/2018/12/Filed-Affidavit-of-JP_Redacted.pdf

led him to urgently seek to have hormone therapy.[11] His parents were not notified by his school, even though the school had already changed his name and gender on his school records.

Some school activities, including presentations and events, can likewise cause vulnerable students harm, particularly in the absence of parental notification.

A child diagnosed with Autism and Obsessive Compulsive Disorder has described how an in-class "fYrefly" presentation caused her long-lasting anxiety and stress.[12] Her parent has also attested to the failure of the school to give advance notification of the presentation which focused on sexuality and gender.[13]

The deficiencies in policies restricting notification of parents concerning school clubs and activities are highlighted by the fact that some "activities" – such as conferences or club events – occur off school grounds. One student has attested to his attendance at a GSA conference off school property where he was provided with dozens of condoms, lube and a graphic flip book depicting anal sex. His teacher assured him that his mother would not be notified.[14] His mother has likewise described the failure of the school to provide her with any notice of the conference.[15]

The Notification Prohibitions contained in most school boards' policies remove the professional discretion of school staff and disregard the differing needs of students based on their age, disabilities or other vulnerabilities. Consequently, school boards risk repeating the documented harm that vulnerable students have experienced as a result of schools' failure to notify parents concerning school clubs and activities.

Relevant Rights and Freedoms in the *Charter*

The *Canadian Charter of Rights and Freedoms* is part of Canada's Constitution, the supreme law in Canada. Legislation which conflicts with the *Charter* is of no force or effect.[16] That means that provisions of the *FOIP Act* and the *Education Act* must be interpreted and applied consistent with the *Charter* rights of students and parents.

Section 7 of the *Charter* protects children by guarding parents' "right to nurture a child, to care for its development, and to make decisions for it in fundamental matters" including its "moral upbringing".[17] According to the Supreme Court of Canada, there is a "presumption that parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such

[11] https://www.jccf.ca/wp-content/uploads/2019/07/Filed-Affidavit-of-parent-re-harm-of-GSA-to-autistic-child.pdf
[12] https://www.jccf.ca/wp-content/uploads/2019/07/Filed-Affidavit-of-autistic-student-re-fYrefly-school-presentation.pdf
[13] https://www.jccf.ca/wp-content/uploads/2019/07/Filed-Affidavit-of-parent-re-harm-of-fYrefly-presentation-to-autistic-child.pdf
[14] https://www.jccf.ca/wp-content/uploads/2019/05/Filed-Affidavit-of-Student-re-GSA-Conference.pdf; https://www.jccf.ca/wp-content/uploads/2019/08/Filed-Student-Transcript-re-GSA-Conference.pdf
[15] https://www.jccf.ca/wp-content/uploads/2019/08/File-Affidavit-of-parent-re-GSA-Conference.pdf
[16] *Constitution Act, 1982*, section 52(1).
[17] *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, 1995 CanLII 115 [*B.R.*] at p 370.

decisions itself."[18] Interference with this parental responsibility and right to make important decisions affecting their children is justified "only when necessity was demonstrated".[19]

Parents have the primary responsibility for protecting their children from harm. The rights of their children do not conflict with this responsibility. Rather, in the majority of cases, the section 7 rights of children – to life, liberty and security of the person – are safeguarded through the informed decisions of their parents. Failure to appropriately notify parents when the life, liberty or security a child is affected violate that child's section 7 rights.[20] The experiences of Alberta school children outlined above demonstrate how the rights, safety and security of children can be jeopardized by schools' failure to appropriately inform parents.

The Supreme Court has also affirmed that the right of parents to guide the moral and religious upbringing of their children is protected by the *Charter*'s guarantee of freedom of conscience and religion under section 2(a).[21] This right would be particularly engaged where a school club, activity or event is promoting a view of sexuality that contradicts a family's religious or moral beliefs. Keeping such activities secret from parents could interfere with their ability to guide their children's moral upbringing.

Fundamentally, school boards must recognize that the only authority they exercise in regard to students is a delegated authority from parents.[22]

Policy Changes are Needed

In light of the above information, Alberta's public, Catholic and private school boards need to ensure that their policies respect the needs and rights of all students and the responsibilities and rights of their parents.

The blanket prohibition on giving notification concerning student clubs and activities, beyond the mere "establishment" of the club or "holding" of the activity, violates school boards' obligations. Rather, such Notification Prohibitions constitute an infringement of the rights of Alberta students and parents.

Thus, at a minimum, in order to comply with the *Charter*, the *Alberta Bill of Rights* and the *FOIP Act*, Alberta school boards should remove the Notification Prohibition provisions from their policies.

Further, Alberta school boards should consider enacting appropriate policies and administrative procedures that:

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[18] *B.R.* at p 372.
[19] *B.R.* at p 371.
[20] *C.P.L., Re*, 1988 CanLII 5490 (NL SC), at paras 76-80, 87-88 and 97.
[21] *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at paras 64-67.
[22] See *E.T. v. Hamilton-Wentworth District School Board*, 2017 ONCA 893 at para 67 ("The law is clear that the authority of the state to educate children is a delegated authority").

- recognize the paramount right of parents to make informed decisions respecting the education of their children, protected in the *Charter*, the *Alberta Bill of Rights* and the preamble to the *Education Act*;
- define parameters regarding materials and speakers for school clubs and activities, referencing the ages of children permitted to participate in such clubs and activities when the content deals with mature themes;
- establish rules for where school clubs meet and parental notification requirements for off-school events and activities;
- require that notification can only be justifiably withheld from parents if the notification would constitute an "unreasonable invasion" of the student's privacy or safety; and,
- empower school staff to exercise professional judgment regarding the unique needs, vulnerabilities and circumstances of individual students in assessing appropriate parental notification.