



**Issues Related To  
CUSTODY AND ACCESS  
for Saskatchewan Educators**

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## **INTRODUCTION**

School personnel must deal with custody and access issues in many ways in the school. They need to gather necessary information; they need to know who can give direction and provide consents for the child; they need to know who can have information about the child and what to do when parents act inappropriately.

The materials first address the role that all parents play in the educational system - their rights and responsibilities. The processes involved in determining custody and access are reviewed. An analysis then follows of how custody and access issues will affect and interact with the rights and responsibilities of the parents.

The information presented in these materials is intended to give an overview of the legal aspects of custody and access as they relate to education. Individual fact situations will vary and legal advice may be necessary when unique circumstances arise.

NOTE: all references to the *Act* are references to *The Education Act, 1995* unless otherwise noted.

## **I. PARENTAL RIGHTS AND OBLIGATIONS**

### **A. PARENTAL OBLIGATIONS**

Parents have a general requirement in law to take care of their children. This obligation is taken very seriously by society and is strongly supported in legislation. Parents who abuse or neglect their children must be reported to social services or the police. Parents who do not provide appropriate care may ultimately be subject to having their children removed from their care and in some cases they may even be prosecuted under the criminal law.

#### **1. The Education Act, 1995**

Some specific obligations of parents with regard to education are set out in *The Education Act, 1995*.

##### ***a. Duty to Ensure Attendance of Student***

Parents are required pursuant to section 156 of *The Education Act, 1995* to ensure that their children who are of compulsory school age (between the ages of 7 and 15) attend school. This requirement also applies “to a person who has received into his or her home, as a resident, another person’s child who is of compulsory school age.”

Parents who do not make sure their children attend school are guilty of an offence and may be required to pay a fine or post a bond.

Attendance counsellors can conduct investigations concerning attendance problems and must make reasonable effort to gain the co-operation of parents. They are able to institute summary conviction proceedings against a parent, guardian or other person having the “charge and control” of a child of compulsory school age,

*While away from school for travel:*

- Section 157(3) provides that While a pupil is accompanying a parent or guardian on an extended period of travel, the parent or guardian is responsible for maintaining reasonable continuity in the progress of the pupil in his or her courses of instruction

##### ***b. Duty to Provide Accurate Information Required by the School***

Section 162(1) of *The Education Act, 1995* provides that parents and guardian cannot:

- refuse to give information required by *The Education Act, 1995* to the school
- give false information;
- by threat, intimidation or otherwise, prevent or attempt to prevent of a pupil at a school;

- in any way, interfere or attempt to interfere with the carrying out of the provisions of the Act pertaining to school attendance; or
- directly or indirectly, attempt to influence improperly any decision of a teacher, principal, local attendance counselor or other official of the board of education or the conseil scolaire or of the department in the enforcement of any provision of this Act pertaining to school attendance.

A person who violates these provisions will be guilty of a summary offence and liable for a fine

## **B. PARENTAL RIGHTS**

Parental rights in relation to education generally fall into two categories:

1. The right to make certain kinds of educational decisions
2. The right to have certain kinds of information about their children

### **1. Educational Decisions**

Parents will have the right to participate in some educational decisions and will be consulted for many decisions. In most cases these rights will arise either under *The Education Act, 1995* or under board of education policy and procedures.

#### ***a) The Education Act, 1995***

The provisions of *The Education Act, 1995* will apply to all parents or guardians of students unless there is a legal agreement or court order that removes the right from the parent or guardian.

##### *i) Attendance at School*

The right to education in Saskatchewan is determined by the place of residence of the parent or guardian. Section 142 of *The Education Act, 1995* provides that every person who has attained the age of six years but has not yet attained the age of 22 years has the right to attend school in the school division where that person or that person's parents or guardians reside.

*The school which the child will attend and the program of studies that the child will follow will be determined by the policies of the school division.*

Parents are able to provide alternative education for student as long as such education is provided in compliance with *The Education Act, 1995* and its *Regulations*. These alternatives may be:

- *home-based education program*  
A "home-based education program" means an education program for a student between 6 and 18 years that is provided under the direction of a parent or guardian. The parent must register the program with the board of education

and the program which must be consistent with the goals of education for Saskatchewan and appropriate for the age and ability of the student.

- *independent schools*  
An independent school is one owned by a corporation in Saskatchewan with a board that act similar to a board of education. It must use facilities that are safe and meet construction standards and must have goals that are consistent with goals of education for Saskatchewan. Independent schools must be registered with the Ministry

*ii) Mediation of conflict involving students*

Section 148 of the *Act* provides that where a difference or conflict arises in the relationship of a pupil to the school, the parent or guardian, on behalf of that pupil, is entitled to immediate access to procedures established by the board of education or the conseil scolaire for the purposes of investigation and mediation of any differences or conflicts.

In developing policy the board can describe the types of matters that are subject to mediation in order to eliminate frivolous use of the process.

*iii) Referral to committee*

Section 153 of the *Act* allows a school division to set up a committee to look into cases where there are problem with a student's:

- attendance;
- studies;
- deportment;
- personal relationships in the school; or
- attitude towards the school.

When such a committee is established parents must be informed and must be given an opportunity for consultation with the committee.

*iv) Suspensions and expulsions*

Pursuant to section 154 when a student is suspended from a school the student and his or her parent or guardian, at every stage of the process must be given:

- notice of every level of investigation during the process; and
- an opportunity to appear and make representations before the principal, the director, the discipline committee or the board of education.

*More detailed information on student suspension can be found in the materials from the Saskatchewan School Boards Association seminar Student Suspension and Expulsion which are available by contacting Legal Services.*

*v) Consultation with Parents of students with Intensive needs*

Pursuant to section 178(7) of the *Act*, if a student has intensive needs, the teacher or principal of the student is required to confer with the parent or guardian of the student with respect to:

- the assessment of the student; and
- the educational services that may be required to meet the learning needs of the student.

Parents can also request that the principal review the assessment of a student or the failure to assess a student. If the principal's review fails to resolve the matter the parent can then ask for a review by the board, and then by a person acceptable to the parents and the school.

*vi ) Language of instruction*

Pursuant to section 180 of the *Act* parents have the right to send a student to a designated French program.

In cases where a language other than English is designated for instruction in a school, the parent can ask for their child to receive English instruction.

*vii) Religious instruction*

Section 182(1) provides that if religious instruction is authorized by the board of education of a school the parent can ask that their child be exempt from the religious instruction classes

*vii) Health of pupils*

Section 190 provides that a board of education or the conseil scolaire may provide for medical and dental examination and treatment of pupils but states that no treatment shall be given without the consent of the parent or guardian of the pupil or child.

***b) Board Policies and Procedures***

In addition to the provisions in *The Education Act, 1995* board of education policy and procedures will provide for involvement of parents in various ways.

*i) General Information and Consents*

Policy generally requires that parents be advised about school rules and policies, protocols for communication and other information designed to encourage relevant participation of parents.

Boards and school determine what information is required from parents and schools are required to let parents know what information will be collected and how the information will be shared.

Policy also usually requires parents to be asked to give consents for release of information about the child for purposes such as internet sites and use in the newspaper.

*ii) Consents for specific school activities*

Board policies or procedures usually provide that particular field trips or club activities or sports events require parental signatures. Those activities that form part of the required elements of a course do not generally require parental permission.

*iii) Consents for day-to-day activities*

Board or school policy may require parents to give consent for items such as bringing lunch, leaving early for appointments, driving another student to school, being picked up by a relative, etc.

*iv) Consents for specific tests*

Though consent is not a legal requirement when tests are necessary to determine the appropriate educational program for a student, board policy may ask staff to obtain consents for specific types of tests. Because obtaining parental consent is not a legal requirement the board can determine how and when the consent is to be obtained and who will be required to give the consent. For example boards may require that only one parent or guardian is required for consent.

Boards in setting policy regarding obtaining consents for testing may take into account many factors such as:

- any guidelines set by professional associations;
- whether alternative methods of obtaining the information are available;
- the degree to which the tests are necessary to provide appropriate programming for the child

Ultimately, however it is crucial that the best interests and the needs of the child prevail.

Even if consent is required by the board, the failure of parents to co-operate when tests are required for the benefit of the student may require the board to consider proceeding without consent. Legal advice should be obtained in such circumstances.

## **2. Access to Information**

### ***a) The Education Act, 1995***

Section 175(1) provides that subject to the stated policies of the board of education or the conseil scolaire the principal of the school must develop, in co-operation with the staff,

- procedures for preparation of reports to parents or guardians on the progress of pupils and
- establish mutually acceptable and beneficial channels for communication between the school and parents or guardians of pupils;

Section 231(1) provides that a teacher is responsible, in co-operation with staff, colleagues and administrative authorities to report regularly, in accordance with policies of the school approved by the board of education or the conseil scolaire to the parent or guardian of each pupil with respect to

- progress of the student; and
- any circumstances or conditions that may be of mutual interest and concern to the teacher and the parent or guardian;

### ***b) Local Authority Freedom of Information and Protection of Privacy Act.(LAFOIPP)***

LAFOIPP provides that personal information of an individual held by a school division can only be accessed by the individual or by a party who has the consent of the individual.

However, information can be released to parents or guardians of students who are younger than 18 if, in the opinion of the head, it is not an unreasonable invasion of the privacy of the student. (Section 49(d) of *LAFOIPP*).

It will not generally be considered an unreasonable invasion of privacy in cases where parents are involved in the education of the students and require the information to assist the student in obtaining educational services.

There may, however, be some cases where the privacy interests of the students will outweigh the interests of the parents in having access to the information. This may include situations such as:

- parents not involved in the education of the student such as mature students living independently;
- a parent who has been known to use information improperly in the past; or
- when release of information could jeopardize the provision of services to the student (ex: a request for counselling notes).

## **C. RIGHTS OF THE STUDENT**

In some cases a student may be in a position to make decisions about education and to give consent without parents' involvement or even if contrary to parental wishes.

### **1. Educational Decisions**

#### ***a. Students over 18 years***

Students who are adults are able to make all educational decisions and to give any consents that may be required. Parents are no longer in a legal position to act for such students unless the student suffers from a mental disability that rendered the student unable in law to make his or her own decisions.

#### ***b. Students Under 18 years.***

In some cases students may be sufficiently mature in law to make educational decisions and to give consents on their own. This will require a careful analysis of the maturity of the student and the circumstances surrounding the decision to be made. Caution should be taken in each case to carefully analyse the facts to determine whether or not the child is capable of handling the responsibility

Considerations will include, but are not limited, to the following:

- is the student of sufficient maturity ;( generally this kind of maturity starts to develop at ages 12 or 13. By age 14 or 15 most children will be considered able to give consent in a variety of situations and by 16 or 17 the child is almost always considered capable of making such decisions.);
- does the student have access to advice and information from reliable sources other than parents;
- is it reasonably certain that the student is not making the request for clearly frivolous reasons;
- does the student understand the nature of the subject matter being dealt with; and
- does the student understand the implications of the decision being made.

Other factors such as the seriousness of the situation, other help available to the student and the school's knowledge of the student's background and history will also play a part in deciding whether or not the student can make such decisions.

*In an emergency situation safety issues will outweigh privacy concerns. Information should be released if necessary to provide for the safety of the student or safety of other persons.*

## **2. Access to Information**

### ***a. Student Aged 18 year or Older***

In the case of a student or former student who is 18 years or older, it is the student who has the sole right to access. A parent of a student who is 18 would have to have the consent of the student in order to have access to the personal information of the student.

If the student is not mentally able to understand the nature and extent of an application for information then the parent or guardian will have the ability to make the application

### ***b. Students Under 18 Years***

A student who is of sufficient maturity will be able to make decisions concerning the release of the student's personal information. Similar considerations to those involved in determining whether the student can make education decisions will also apply to decisions about information.

## **D. TRANSFER OF PARENTAL RIGHTS TO GUARDIANS**

Parental rights can in some situations be transferred to other persons who will become guardians of the child. Guardianship can take many forms and the rights and responsibilities of a guardian will depend on the circumstances of each fact situation.

For purposes of the exercising the rights of a parent under *The Education Act, 1995* a guardian is defined as a person who is not the natural parent of the child and who has been made responsible for the care of the child.

For boards of education a guardian can be:

- a person who has lawfully and formally received the child to reside in his or her home and to be in his or her care or custody for the time being or until the child reaches the age of majority; and
- a person appointed or recognized in law as a guardian of the child.

For a student who attends a francophone school, a guardian includes only a person who is appointed or recognized in law as a guardian of the child.

### **1. Formal Guardianship**

Formal transfers of guardianship can be through a formal written document such as an agreement or a will or it can be imposed by a court. This transfer can be to a relative or some other adult to a social services agency.

The guardian should be able to provide the school with a copy of the document granting guardianship.

## **2. Informal Guardianship**

Informal guardianship happens when a child resides with a person other than a parent without formal legal documentation.

*Guardianship does not necessarily confer full parental rights. The terms of the guardianship may be limited by the intentions of the parent.*

In the absence of documentation a school can assume that where a student is living with a guardian with the consent of a parent, that the guardian will have the ability to give consents for school purposes. However, the school should ask the guardian to provide something in writing from the parents showing that the parents have agreed that the child reside with the guardian.

While the courts will not generally interfere with legitimate and reasonable transfers of guardianship by parents the courts do retain the right to supervise who has charge of a child. A court may act in the best interests and appoint someone to act for the child, despite the intentions or wishes of the parent.

(NOTE: In the case of a student from another country who resides with a family in Canada the person with whom the student resides can act as guardian for the purposes of giving consents and making educational decisions. This does not, however, entitle the student to a free education. The student will still be required to pay tuition if the student does not meet residency requirements of Canada Immigration.)

## **II. BRIEF OUTLINE OF FAMILY LAW AND COURT PROCESSES**

The law starts with the assumption that both parents have equal rights and responsibilities towards their children. This applies whether or not the parents are married or living common law or living apart. The only way these rights and responsibilities can be changed is through agreements or by court orders.

### **A. INFORMAL SEPARATIONS**

There may be many occasions, especially immediately after a separation when the parties operate through informal agreements. There is often no documentation concerning custody and access arrangements.

In such circumstances the default legal position of the parents is that both continue to have the same rights and obligations of a parent as they had before the separation. They have joint custody and both have a legal right to make educational decisions and to access information about their child.

It may be that the children will reside with one of the parents during this period. One party has “*de facto*” (in fact) custody. The person with *de facto* custody may vary from time to time in accordance with arrangements made by the parents.

As soon as school personnel become aware that parents are not living together the school can ask each parent for information about the custody and access arrangements they have made.

### **B. SEPARATION AGREEMENTS**

Parents who separate will often not have any formal agreement or court order dealing with custody and access for the first period after the separation. In some cases the parties may be able to agree on the terms of custody and access and will set these out in a separation agreement.

Separation agreements can be prepared by the parties but are most often prepared by lawyers. The terms can be anything agreed upon by the parties – there are no specific standards or requirements.

Custody arrangements set out in separation agreements will be enforced by the courts but only to the extent that they are in the best interests of the child. The court always reserves the right to overrule decisions of parents that are not acceptable to the court.

## **C. COURT ORDERS**

Parents who cannot resolve their differences can apply to the court to have an order setting out the custody and access arrangements for the child. This can be done as a separate application or may be part of other proceeding such as divorce or applications for child support.

In some cases other persons such as grandparent or aunts or uncles may also apply for custody or access.

In cases where social services intervenes in a family situation the Minister of Social Services may apply for an order for temporary or permanent custody of a child.

In all cases the parties will have the obligation to provide whatever information they believe is necessary for the judge to make a decision. In family law cases, however, the courts themselves can also appoint workers to gather information for the use of the court. These reports will often include information about the education of the child.

### **1. Custody and Access Orders**

#### ***a. Interim orders***

As with most court processes it can take considerable time to have a full hearing and decision from a judge. In cases where the parents cannot agree on custody arrangements either party can apply for an interim order. Interim orders are generally made based on affidavit evidence and are quite common in family law situations.

An interim order is temporary in nature and will remain in place until a final hearing is held or another interim order is made. In some cases interim orders can remain in place for several years. There can also be several interim orders over a period of time.

#### ***b. Final orders***

Once a hearing is held and a judge has the opportunity to hear fully from both parties a final order will be made. The terms of a final order may or may not be similar to the interim order.

#### ***c. Varying an order***

Even after a final order is made either parent can apply to the court to vary the order. They will have to show that there is some change in circumstances to justify the change.

### 3. Social Services Orders -

#### *a. Children taken into Care*

*The Child and Family Services Act* provides that children can be taken into the care of the Ministry of Social Services. This can be done in several ways:

- voluntary agreement with the parent – usually for specified periods of time.
- temporary orders – these orders are in place for specified periods of time – over 80% of children leave care within one year of entering
- permanent orders – these are children who have been permanently removed from the care of their parents - wards under permanent care or long-term care represent about 40% of the total number of children in care

#### *b. Role of Foster Parents*

The majority of children who are in the care of social services are placed in foster homes. Although the children are legally in the custody of the Ministry of Social Services the foster parents will act in role of guardians for the student. They can exercise the rights of the parents with regard to the giving of consents and making educational decisions, subject to the directions of the Ministry.

#### *c. Students Living Independently*

*The Child and Family Services Act* also gives the Ministry of Social Services the authority to provide support and services to 16 and 17 year old youth in certain circumstances where:

- the 16 or 17 year old appears to be in need of care and supervision; and
- there is no parent who is willing or able to take responsibility for the young person; or
- the young person cannot return to live with his or her family for reasons of safety

These students are in a position where their parents will not have any rights to make educational decisions or access information about the students. These students will generally be able to make their own educational decisions

### **D. NO CONTACT ORDERS/ RESTRAINING ORDERS/PEACE BONDS**

In extreme cases one parent may obtain an order that restricts the other parent from having any contact with a child. Such orders may be temporary and just in place until a further hearing is held or they may be more long term.

If a parent indicates that an order of this type exists the school should get a copy of the order rather than rely on the interpretation of the parent.

*Any attempt by a parent without access to obtain information about a child or any attempt to see the child should be reported immediately to the parent with custody.*

A parent who is the subject of an order prohibiting access to a child is not entitled to any information about the child – they cannot even be told whether or not the child is registered as a student in the school division.

### **III. DOCUMENTATION**

#### **A. REQUESTING DOCUMENTATION**

##### **1. No documentation Available**

Parents living separate and apart are not required to seek a court determination of their respective rights in regards to their children. They can come to a verbal or a written agreement or they can develop a continuing a pattern of trust and consultation between them right through until their child becomes an adult

As soon as school personnel become aware that parents have separated or that a separation order or court order exists the school should ask both parents to provide a copy of the latest agreement or order.

If there is no agreement or order then each parent should be asked to describe what the parenting arrangements are. If *de facto* custody of the child changes from time to time the parents should let the school know who has responsibility for the child.

##### **2. Separation Agreement**

A separation agreement may be an informal document created by the parties or it could be a more formal document drafted by lawyers. In either case, the school should ask each party to give a copy to the school.

Each party should be advised to let the school know immediately if the agreement is revised or if it is superseded by a different agreement or by a court order.

##### **3. Court Orders**

Court orders will be issued by a judge either on an interim basis, based on affidavit evidence or as a final order after a hearing. The order will state whether or not it is an interim order and will signed by a court registrar.

A copy of the order or agreement should be kept by the school.

Even if an order is final, however, either party can go back to the court any time circumstances change to ask for a new order.

Therefore it is very important to always ask each party to provide a copy of the latest order. Each party should also be asked to provide any updates that are made to the order. It is also good to ask each party if they have made any arrangements between themselves that are different than, or a variation on, the actual wording of the order.

## **B. ENFORCEMENT OF ORDERS**

Court orders are not directed at the school and the school is not responsible for enforcing the order. Even if the order happens to mention school a court order is not legally binding on a party who has not had the opportunity to speak to the matter. (There are some very specific exceptions in law, such as *ex parte* orders that would not apply here).

School personnel can facilitate the observance of the order as long as it does not unduly interfere with the operations of the school. They cannot, however, assist a parent to breach order.

It is important for the school to remain as neutral as possible in such situations, The first response to any issues about enforcement of terms of an order should be that the parents should deal with the matter themselves. If the parents cannot, then they should go back to the courts.

On many occasions parents will say they cannot afford to return to their lawyers for the courts. It is not, however, the responsibility of the school to step into the matters.

*As an example, if an order states that a parent with access will pick a child up on Friday after school the school can make sure that the child remembers he should not get on the school bus he takes other days. The school would not however need to provide an escort for the child out to the car of the parent who is picking up the students – unless that is something the school is willing to do for every student, not just those who are dealing with custody orders.*

## **C. INTERPRETATION OF DOCUMENTATION**

Separation agreements and court orders may contain terms that have a specific or accepted meaning in law. It is important not to make assumption about any particular term. If school personnel are unclear, they should ask both parties – if the parents agree on what the term means the school can follow that approach. If the parents disagree or if there is any lack of clarity, legal advice should be sought.

### **1. Child and Parent**

A “*child*” means:

- a child who is under the age of majority and under the care of the parent;
- a child over the age of majority who is unable, because of illness, disability or other cause, to withdraw from their care; or
- a child for whom a person stands in the place of parent.

((Note: For purposes of *The Child and Family Services Act* (Saskatchewan))

a “child” means an unmarried person actually or apparently under 16 years of age)

A “*parent*” can include:

- a person declared to be or recognized as a parents
- the father or mother of a child, whether born within or outside marriage;
- the father or mother of a child by adoption;
- a person to whom custody of a child has been granted by a court of competent jurisdiction or by a deed or agreement of custody;
- a person with whom a child resides and who stands *in loco parentis* (in the place of a parent) to the child;
- the Minister of Social Services when a child has been apprehended and has not been returned to a person who has a right to custody of the child;

## 2. Custody

“*Custody*” means having personal guardianship of a child and includes having the care, upbringing of a child and having the authority and responsibility for decisions concerning the child’s physical, moral and emotional health, personal care, control, place of residence, discipline, religion, education, medical treatment, property, and naming of the child.

“*Sole custody*” occurs when custody is given to one parent.

“*Joint custody or shared custody*” happens when two parents exercise custody rights jointly or severally. Both parents may exercise authority with regard to significant decisions affecting that child, with the implied obligation to consult with each other before doing so. For that reason, a court would be reluctant to order joint custody or joint guardianship where the parents cannot get along.

The parents of a child may enter into a *custody agreement* that may:

- vary their status as joint legal custodians of the child;
- specify the rights, powers and duties of each parent with respect to the child;
- provide for access to the child by either parent or any other person;

On the application of a parent or other person having, in the opinion of the court, a sufficient interest, the court may make a *custody order* to:

- grant custody of or access to a child to one or more persons;
- determine any aspect of the incidents of the right to custody or access; and
- make any additional order that the court considers necessary and proper in the circumstances.

“*Care and control*”, “*guardianship*”, “*parenting arrangements*”, “*parenting time*” and “*contact*” are also words that can be used instead of the terms “*custody*” and “*access*”.

### **3. Access**

**“Access”** can be very generally defined as an ability or capacity to be involved in the physical, social, emotional or psychological development of a child. The extent of access might be set out in an agreement or order and will be more limited than custody.

Access is seen by the law as a right of the child to have access to each parent rather than as a right of the parent.. When making an order the court is required to give effect to the principle that a child should have as much contact with each parent as is consistent with the best interests of the child. Where the parents of a child do not live together and one parent is granted custody, the other parent ordinarily will be granted liberal or generous access.

In some circumstances, persons who are not guardians, but who have played a significant role in the child's life, may also be granted access. Such a person may be a grandparent, sibling, aunt or uncle or other relative.

## **IV. EDUCATION DECISIONS**

### **A. WHICH PARENT CAN MAKE EDUCATIONAL DECISIONS**

In most cases the school parents can be left to themselves to come to an agreement on any educational decision that involve input from parents.. The school should not get involved on either side and should try to stay as neutral as possible.

However, there may be some instances when parents, whether separated or still together, disagree on educational decisions. In many cases the school will require a decision one way or the other and must chose one of the options.

#### **1. If both parents live together**

Both parents have legal custody and instructions can be taken from either or both parents. If there is a dispute, have the parents settle it. If they don't, apply the decision that is based on the best interests of the child.

#### **2. If the parents are separated and there is no court order or agreement concerning custody**

Both parents continue to have legal custody of the children. Take instructions from the parent with whom the children are living.

#### **3. If there is a custody order or agreement in place**

##### ***a. If one parent has sole custody***

The custodial parent has the right to make educational decisions.

##### ***b. If both parents have joint custody***

Both parents can make decisions so clarify with the parents as early as possible how the arrangement will be working. If consent from a parent is required for an activity, the consent of one parent will be sufficient, unless board policy specifically requires otherwise.

*NOTE: Appendix \_\_\_ is a summary of the law on custody and access that can be shared with teachers or parents.*

## **B. DEALING WITH DIFFERING INSTRUCTIONS**

### **1. Best Interests of the Child**

The role of the school is to provide appropriate educational services for the child. The best interests of the child should be at the foundation of every decision that is made when parents are in dispute.

### **2. Basic Rule of Thumb**

If there is any dispute between the parents as to who has the decision-making ability with regard to the child a good rule of thumb is to take instruction from the parent with whom the child is physically residing at the point in time at which the decision takes effect. The parent who sends the child to school will be the parent who can write the note about gym class or who will be called if the child forgets to bring lunch.

If the parents disagree with the choice of the school they can be advised that they should either agree come to an agreement on the matter or take it up with the court.

### **3. Specific Issues**

In the following discussion the assumption is that both parents have custody of the child and have the ability to participate in making education decision for the child.

If the child is of a mature enough age to give appropriate consideration to the issue then school can take into account the wishes of the child in making the decisions.

#### ***a. Which school the child will attend***

##### *i) If the parents reside in the same school division*

Attendance areas can be prescribed by the board of education or the board might give parents some choice. Parents who share custody may live in different attendance areas or might disagree on which school the child will attend.

When parents disagree, the school can do its own evaluation of the possible choices and pick the school best suited for the child.

##### *Transportation:*

The board should first look at its transportation policy and at its past practice. It may be that the board is able and willing to provide transport from two different locations. This will be more likely if there is an already existing route or one that does not disrupt other students.

The board does not, however, have a legal obligation to provide transportation from several points – the primary residence of the child would be the point from which the

board would have to provide services. The board must be reasonable in making this determination.

- the location where the child resides most often would be the most likely choice.
- if the child resides equal amounts of time at both locations then the choice that requires the least amount of travel would likely be in the best interests of the child.

There may be other factors that will influence the transportation decision in particular cases, but the analysis should always center on what the school deems to be the best interests of the child.

The other parent will then be responsible for making his or her own arrangements to ensure that the child is transported to school.

*ii) If the parents reside in different school divisions*

The child cannot be registered in two school divisions. If the parents cannot agree on which school the child will attend then the two school divisions should make that decision.

*Transportation*

The parent who resides in the school division where the child will attend school will have the right to access transportation services in accordance with board policy.

The parent who resides outside the school division will have to make and pay for his or her arrangements to get the child to school. The school division in which the second parent resides does not have any obligations to provide transportation services to the school in the other school division.

*iii) If one parent wants to provide home-schooling.*

The preferred mode of schooling for most children will be to attend school. Therefore in situations where parents cannot agree on homeschooling the position of the board would be that unless both parents agree the child should continue to attend at the school.

***b. Which Parent can give Required Consents***

*i) For Testing*

*The Education Act, 1995* does not require parental consent for educational testing. However, many board have established policies or procedures that require consent of one or both parents.

The tests are done to determine the best programming for the child. The child has a right to education and the wishes of the parents should not prevent the child from having access to appropriate programming.

In some cases the professional who administer the test may indicate that, unless there is cooperation of both parents, the validity of the test might be compromised. This can be taken into consideration by boards of education when establishing policies but should not be used to prevent a child from getting the services he or she requires.

When consent is required and there is only one parent with custody then only the consent of that parent will be needed. Parents who have only access are not entitled to be involved in educational decision relating to the child.

*In cases where students are mature enough to understand the nature of the tests, and wish to have the tests, then parental consent will not be needed.*

If parents with joint custody disagree on whether or not a test should be given, the best interests of the child will generally indicate that the tests should take place - they are being performed to benefit the child

(NOTE: If parental consent cannot be obtained and if the test is crucial in order to provide services for the child the board may be able to go ahead with the testing based on the best interests of the child. If, however, employees are reluctant to administer the tests because of professional concerns legal advice should be sought.)

#### *ii) For Trips, Extra-curricular and Discretionary Activities*

If parents cannot agree, then the parent who has the care of the child on the day of the activity would be in a position to give the consent.

If the activity is ongoing then, unless there is something in the medical history of the child, participation in such activities will likely be in the best interests of the child. Therefore the appropriate solution will most often be to allow the child to participate in the activity with the consent of just one parent.

#### *iii) For Programming*

Appropriate programming is a right of the child, not of the parents. The courts, including the Supreme Court of Canada, have said that while parental input is an important factor for board to consider the ultimate decision on programming rest with the school and it must be based on the best interests of the child.

Therefore, if parents cannot agree on programming the school will be able to take direction from the parent whom the school believes is acting in the best interests of the child.

In the case of intensive needs student parents can have recourse to the process set out in *The Education Act, 1995* for the review of certain decisions.

Parents might also be able to use the provisions of the *Act* relating to mediation to address any concerns they have.

*iv) For Counselling*

There is no requirement in *The Education Act, 1995* to obtain parental permission or even to consult with parents before providing counselling services to students. Therefore, from the legal perspective, the board has the ability to provide counselling services even if the parents object.

This is, however, subject to any commitment the Board may have made in policy to require parental consent. *If parental consent is required by board policy then that policy must be followed.* Boards are encouraged to review policy to ensure that students are not denied necessary educational services in situations where parental consent may be an issue.

Because counselling services would generally be viewed as something of benefit to students if one parent consents and the other does not then the best interests of the child will usually indicate that the services should be provided.

In the case of mature students parental consent will not be necessary and parents do not need to be informed that the student is accessing such services. This will likely be the case if the student:

- is of sufficient maturity;
- understands the nature of the subject matter being dealt with in counselling; and
- understands the implications of not telling his or her parents.

Other factors such as the seriousness of the situation, other help available to the child and the school's knowledge of the student's background and history will also play a part in deciding whether or not inform parents.

*v) For Administration of Medication*

If one parent provides a prescription from a doctor then the school can administer the medication in accordance with the doctor's instructions even if the other parent disagrees with the child taking the medication. In such cases the school will rely on the professionalism of the doctor who prescribed the medication.

If the medication is non-prescription then the better option would probably be not to administer the medication unless both parents agree. The parent who believes that the medication is necessary can be asked to provide something from a doctor indicating that the medication is medically recommended for the child.

***c. Physical Access to the Student at School***

*i. Custodial Parent*

Parents who have joint custody of a child have the same rights as any other parents to access their child at school. As with all parents, those rights are subject to school rules. No parent has a right to attend at a school without permission of the principal.

*ii. Parent With Access*

A parent who has been granted access to a child does **not** have an unfettered right to show up at the school at any time and spend time with the child. If the non-custodial parent has access to the children, the access is to be arranged by the parents.

Non-custodial parents even if they have access, should not be allowed to visit with the child at school or take part in school trips without authorization from the custodial parent. This is something the school must leave to the parents to work out.

*School administrators have the right to refuse entry to school property to any person who might disturb the educational environment. This includes parents who have access to the children and parents who have custody.*

In the case where a parent has access to a child the parent cannot be allowed to use the school to circumvent the arrangements put in place by the agreement or court order.. If the access is outside the terms of the agreement or order the custodial parent will need to agree before the access can be allowed by the school.

If there is any doubt about the ability of a parent with access to be at the school that should be clarified with the custodial parent

Parents with access cannot volunteer for school events as a way to circumvent an access order. The custodial parent should be consulted and unless the custodial parent agrees to the access the other parent should not be allowed to participate as a volunteer

Unless there is some other reason (such as the person causing a disturbance) a non-custodial parent would be free to attend public events at the school.

*Appendix \_\_ sets out a draft letter that can be used when parents attempt to contact students at school outside the times set for access.*

## **V. ACCESS TO INFORMATION**

*See Appendix for general a brief summary of Guidelines for Release of Information for use by teachers and in-school administrators.*

### **A. CUSTODIAL PARENTS**

The custodial parent has the same access to information about the child as any parent.

Requests can be dealt with informally or an applicant can be asked to complete an information access request pursuant to *The Local Authority Freedom of Information and Protection Of Privacy Act (LAFOIPP)*. A formal request should be required whenever there is any question about the right of the applicant to have access to the requested information.

Even in the case where an information request is dealt with informally a note should be made on the file of the request.

A parent can be asked to provide proof that he or she has either custody or access of the child in cases where there is any question about whether or not the applicant should have access to requested information.

*The right of the parent with access or custody is still subject to section 49(d) of LAFOIPP and the school can refuse to release information if it would be an unreasonable invasion of the privacy of the student.*

### **B. NON-CUSTODIAL PARENTS**

Non-custodial parents do not have the same rights of access to student records as do custodial parents.

However, subsections 9(2) and (3) of *The Children's Law Act* provide that non-custodial parents with access rights have the same rights to certain information about their child as would custodial parents. Section 9 states:

9 (2) Unless otherwise ordered by the court, a parent who is granted access to a child has the same right as the custodial parent to make inquiries and be given information concerning the health, education and welfare of the child.

(3) The right of a parent who is granted access described in subsection (2) is not, unless the court orders otherwise, a right to be consulted about or to participate in the making of decisions by the custodial parent.

The information to be provided is not restricted to "records" as is information under *LAFOIPP*. The non-custodial parent is also entitled to oral reports concerning the educational progress of the child.

The school should provide the non-custodial parent who has access with information concerning the educational progress of the child, such as copies of report cards, copies of test scores or any other information that would be released in the ordinary course to all parents.

***If the non-custodial parent does not have access:***

A non-custodial parent who does not have access is not entitled to receive any information about the child.

## **C. INFORMATION REQUESTS FROM THIRD PARTIES**

### **1. Transfer of Records to New School**

Parental or student consent for the transfer is not required. The records are necessary for the education of the child and the transfer is consistent with the purpose for which they were created.

### **2. Requests from Court Workers**

Judges have the ability in family cases to ask court workers to prepare reports for the use of the court in making decision concerning custody and access. In most cases the court worker will want to include information about the educational background of the student.

The school can share any information requested by the court worker as long as doing so does not interfere with the privacy rights of the child. In most case attendance records, report cards, educational testing results and reports form consultants can be shared without problem.

*Because of the particular private nature of counselling records and the need to ensure the continued confidence of the child in the counsellor, counselling records should not be shared with any third parties.*

### **3. Requests from Lawyers**

Information can be shared with a lawyer for a parent as long as the parent would have the right to access the information – i.e. the parent has either custody of or access to the child.

The information should be provided to the lawyer only if the lawyer provides a written signed permission from the parent to do so.

### **4. Requests from Social Workers**

If a child has been taken into care by social service then information can be shared with the social worker or with the solicitor acting on behalf of social services.

If there is any doubt about the matter, the school can ask the worker or lawyer to provide documentation showing that the child is in the care of the Ministry of Social Services.

## **D. TYPES OF INFORMATION**

### **1. Reports, Opinions or Verbal information**

The school does not have to create new reports for parents or provide written answers to questions asked by parents just because they may be involved in a possible court action.

The school will need to provide parents in custody situations with the same type of information as it would normally provide to all parents. This will mainly be factual reporting but can also include professional opinions. Care should be taken to make sure that the person giving an opinion does not venture outside their own areas of expertise.

### **2. Copies of documents**

The right of access applies to any record kept on the student. It applies to all files kept on the student, whether by the teacher, the school or central office. Access includes files and testing performed by consultants such as psychologists or speech therapists.

A person who has the right to access information has the right to request actual copies of the records.

If copies of documents are requested a reasonable copying fee can be charged.

### **3. Counselling Records**

Counselling report should NOT be shared with anyone unless it is clear that the privacy interests of the child will not be adversely affected. Courts have been reluctant to require counselling notes to be released, even to parents, and even if a subpoena is served.

The nature of the trust relationship between counsellor and student is recognized as one that is very important and that should be protected. The interests of the party wanting disclosure must be shown to outweigh the privacy interests of the student before the notes will be released.

## **VI. COURT PROCESSES**

### **A. ROLE OF LAWYERS**

A lawyer who acts for either parent does not have any more right than any other party to access documents or to speak to teachers. The lawyer should first provide the school with a written documentation from the parent giving permission for the school to share information with the lawyer.

The information that can be shared with the lawyer is only the same information that can be shared with the parent. If, for example, the lawyer is acting for a parent who does not have custody or access then neither the parent nor the lawyer is entitled to any personal information about the student.

If the lawyer requires documents the lawyer can subpoena the information or obtain it through the discovery process available in court actions.

A lawyer should not be given access to information if it would interfere with the privacy rights of the child. This will apply for example, to counselling records and other sensitive information.

*As soon as a board or an employee is contacted by a lawyer it is advisable to seek legal counsel.*

Any information shared with one side of a dispute should also be shared with the other side. This should be made clear to the lawyers when requests for information are made.

### **B. AFFIDAVITS**

Caution should be exercised when teachers or other staff are requested to provide affidavits. In most cases it is not desirable for employees to provide evidence of this nature to one side or other in a dispute.

There may be some exceptional circumstances where an affidavit will be appropriate. This is more likely to be the case if both parties agree that an affidavit is an appropriate way to get undisputed factual information, such as attendance records or reports cards, in front of the court.

Even if a staff member signs an affidavit it does not necessarily eliminate the possibility of being subpoenaed to give evidence in court. The other party to the dispute always has the right to call the person who swore the affidavit to be cross-examined on the affidavit.

It is advisable to contact legal counsel to review any request for an affidavit.

## C. SUBPOENAS

### 1. Types of Subpoenas

There are two types of subpoenas:

- a *subpoena ad testificandum* requires someone to appear and give verbal testimony.
- a *subpoena duces tecum* is a command for a witness to appear and bring to court all documents the witness has in his or her possession that might relate to the case.

If the subpoena calls for documents it must be determined whether or not the subpoenaed employee has appropriate access to the record for court purposes. For example, school records are not “in the possession” of teachers. They belong to, and are in possession of the Board. Board policy or the Director will determine who is the appropriate person to represent the Board if the records are required.

### 2. Suggested Process when Served with a Subpoena

Immediately upon receiving a subpoena involving a student matter a teacher should notify the principal. The principal should in turn notify central office staff.

If there has been no prior contact, it is advisable to call the lawyer who issued the subpoena. The employee should ask the lawyer about the kind of questions that he or she is likely to be asked. The lawyer can also give specific details about attending at court. It should be noted, however, that the subpoenaed employee is not obligated to talk to the lawyer before court.

The witness can speak with the lawyers for each side and should not in any way treat one differently than the other. Any education information shared with one lawyer can be shared with the other.

### 3. Formalities

When subpoenas are served the witness will also be given what is called “conduct money”. This is a fee set by the court rules that is intended to cover the travel expenses of the witness plus a minimal fees for appearing in court,

The lawyer who issued the subpoena should be able to provide more specific information about the date and time when the witness will be required to attend.

*When served with a subpoena an individual **must** attend at the time specified unless excused either by the person serving the subpoena or by the court.*

Note: Article 2.9 of the Provincial Collective Agreement for Teachers provides that teacher will be paid for days when they are absent to respond to a subpoena. They are also required to pay to the board any remuneration received. This would not include

actual reimbursements for travel expenses. Similar provisions are often found in collective agreements for non-teachers or in board policies.

*Appendix \_\_ What to do if You are Served with a Subpoena is a handout that can be shared with staff members who have been served with subpoenas.*

#### **D. COURT PROCESS**

Once a witness appears in court the process is completely within the control of the judge. Courts recognize that educators often have useful knowledge that will help the courts determine what is in the best interests of the child. Judges will generally take great care that witnesses will be treated with respect by all parties.

The witness should keep in mind that even though the witness is called by one of the parties the job of the witness is not to take sides. The witness is there to share information as accurately as possible. It is the role of the judge to assess all information and make a decision that is best for the child.

*Generally speaking the information shared by the witness will be:*

- *observations made by the witness*
- *factual matters – such as attendance, marks, etc.*
- *professional opinions – those within the training and competence of the witness.*

*Appendix \_\_ Information for Witnesses is a handout that can be shared with staff members who have been called as witnesses.*

## **VI. PARENTS BEHAVING BADLY**

Parents who are involved in custody disputes will often bring the dispute to the school. In some cases this results in behaviour that disrupts the school environment.

Principals have an obligation to protect the educational environment. Boards of education also have a legal obligation to create a workplace that is free from harassment and violence.

### **A. DUTY OF BOARDS OF EDUCATION**

Schools act *in loco parentis* to students and have a duty to keep them safe. Schools have a duty to control access to the school for safety purposes. If schools did not do this they would be liable for any injuries suffered by students.

Schools also have a duty to provide an appropriate educational environment suitable for learning. If this educational environment is disturbed the school must take action.

Schools are not considered public places. They are owned and operated by boards of education and the conseil scolaire pursuant to the duties set out in section 85 and 86 under *The Education Act, 1995*.

Just like any other member of the public, parents are only able to attend at a school when they have an invitation from the school to do so. If a parent is in a school or on school property without permission, the parent is a trespasser under the law.

The Education Act, 1995 *does not* give parent the right to enter the school - even if their children attend the school.

### **B. POWER OF BOARD OF EDUCATION TO EXCLUDE PEOPLE FROM SCHOOL PROPERTY**

In carrying out its duty to provide a safe and appropriate educational environment there are several legal principles and statutory provisions that a board of education can apply to exclude unwelcome persons from school property. Individuals who act inappropriately on school property may also be in violation of criminal law provisions.

The legal options available to the board also apply to parents- parents will be treated the same as any other persons.

## 1. Common Law of Trespass

The common law allows an owner, such as the Board of Education to prevent people from coming on to their property. The owner can invite and give permission for people, including parents to be on school property. This can be a general invitation to the public or can be a specific invitation to individuals. However the property owner can also impose conditions on the invitation.

If the invited person does not follow the conditions or if the owner does not wish the person to be on the property the owner can at any time tell the person to leave. If the person does not, the owner is entitled to take steps to have the person evicted. This will include calling the police who will be able to remove the person.

These rights have developed in the commons law and are some of the oldest and most protected rights in the common law.

## 2. The Trespass to Property Act

Section 3 of *The Trespass to Property Act* provides that a person who has been requested to leave a property must do so and must not re-enter the premises without permission. Failure to do so may result in a summary conviction offence and a fine of up to \$2000.

If a person is on school property and does not leave when requested to do so the staff of the school can call the police who will remove the person from the property and charge them if appropriate.

*If school staff determine that someone is interrupting or disquieting the orderly operation of the school they can ask the person to leave. If the person does not leave the police can be called.*

## 3. Section 367 of *The Education Act, 1995*

The school can also rely upon section 367 of *The Education Act, 1995*. It provides that anyone who

“wilfully interrupts or disquiets any school by rude or indecent behaviour or by loitering, whether within the school or on school premises or so near as to disturb the orderly operation of the school”

commits an offence.

## 4. Criminal law

The behaviour of persons who attend on school premises after being told to leave might in some cases also include criminal behaviour. Such behaviour should be reported to the police.

### ***a. Criminal Harassment***

It is a criminal offence for anyone to make someone reasonably fear for his or her safety or the safety of someone they know by:

- repeatedly following that person or someone he or she knows
- repeatedly visiting, calling, writing or contacting that person or someone he or she knows
- watching a person's home or workplace
- threatening a person or someone in his or her family

No actual injury need occur. The offender does not need to have intended to harm the person. If the behaviour would cause a reasonable person to fear for their safety, it is criminal harassment. Serious cases could result in an offender being sent to jail for up to ten years. In some cases an offender may be prohibited from possessing firearms, ammunition or explosives.

### ***b. Intimidation***

It is a criminal offence for anyone to try to force a person to do something or prevent a person from doing something by:

- using violence
- threatening violence or damage to property
- following someone
- watching a person's home or place of work

Offenders can be jailed for up to five years. In some cases an offender may be prohibited from possessing firearms, ammunition or explosives.

### ***c. Uttering Threats to Property***

It is a criminal offence for anyone to threaten to "damage, destroy or burn property".

The maximum penalty for uttering threats to damage property is two years.

### ***d. Indecent or Harassing phone calls***

It is a criminal offence to make an indecent telephone call, or to repeatedly call someone to harass them. This offence carries a penalty of up to six months in jail and/or a fine of up to \$5000.

It is also a criminal offence to tell someone false information with the intent to injure or alarm them, for example, that someone close to a person has been injured or killed. The maximum punishment for this offence is two years in jail.

## D. HANDLING PARENTS WHO ACT INAPPROPRIATELY

While the stresses and strains of going through a custody dispute can affect people adversely, school personnel do not have to tolerate parents who act inappropriately towards staff or on school property. Staff should be encouraged to report as soon as possible any untoward behaviour.

Dealing with parents who are acting inappropriately will follow steps that are very similar to those required for discipline of students or employees who act inappropriately. Actions taken should progress from verbal discussion to written warnings and finally to imposition of penalties.

If parents continue to cause problems, steps similar to progressive discipline can be used – escalating from verbal warnings to written expectations. Ultimately parents can, and should, be banned from the school if inappropriate conduct continues. Protecting the educational environment is a crucial responsibility of boards of education.

*If there is ever any threat of violence – verbal or physical - principals should take immediate steps to ban parents from the school.*

*Appendix \_\_\_\_ sets out some steps for dealing with difficult parents.*

*Appendix \_\_\_\_ is a draft letter that can be adapted to the facts of an individual situation to ban a parent from the school if necessary.*

## APPENDIX A

### CUSTODY AND ACCESS

#### **In custody and access situations which parent can make educational decisions for a student?**

**a) If both parents live together:** Both parents have legal custody and instructions can be taken from either or both parents. If there is a dispute, have the parents settle it. If they don't, apply the decision that is based on the best interests of the child.

**b) If the parents are separated and there is no court order or agreement concerning custody:** Both parents continue to have legal custody of the children. Take instructions from the parent with whom the children are living.

#### **c) If there is a custody order or agreement in place:**

*If one parent has sole custody:* the custodial parent has the right to make educational decisions.

*If both parents have joint custody:* Both parents can make decisions so clarify with the parents as early as possible how the arrangement will be working. If consent from a parent is required for an activity, the consent of one parent will be sufficient, unless board policy specifically requires otherwise.

If there is any dispute between the parents as to who has the decision-making ability with regard to the child a good rule of thumb is to take instruction from the parent with whom the children are physically residing at the point in time at which the decision takes effect. The parent who sends the child to school will be the parent who can write the note about gym class or who will be called if the child forgets to bring lunch.

#### **Who has access to information about the student?**

**a) If the parent has sole or joint custody:** The custodial parent has the same access to information about the child as any parent.

**b) If the non-custodial parent has access:** Subsections 9(2) and (3) of The Children's Law Act provide:  
9(2) Unless otherwise ordered by the court, a parent who is granted access to a child has the same right as the custodial parent to make inquiries and be given information concerning the health, education and welfare of the child.

(3) The right of a parent who is granted access described in subsection (2) is not, unless the court orders otherwise, a right to be consulted about or to participate in the making of decisions by the custodial parent.

The school should provide the non-custodial parent who has access with information concerning the educational progress of the child, such as copies of report cards, copies of test scores or any other information that would be released in the ordinary course to all parents.

#### **c) If the non-custodial parent does not have access:**

A non-custodial parent who does not have access is not entitled to receive any information about the child.

#### **Does a parent with access have the right to exercise access at the school?**

A parent who has been granted access to a child does **not** have an unfettered right to show up at the school at any time and spend time with the child. If the non-custodial parent has access to the children, the access is to be arranged by the parents.

Non-custodial parents even if they have access, should not be allowed to visit with the child at school or take part in school trips without authorization from the custodial parent. This is something the school must leave to the parents to work out.

Unless there is some other reason (such as the person causing a disturbance) a non-custodial parent would be free to attend public events at the school.

*Remember: School administrators have the right to refuse entry to school property to any person who might disturb the educational environment. This includes parents who have access to the children.*

#### **How can the school tell who has custody and access?**

Assume that both parents have joint custody until the school is provided with a copy of either a court order or a written agreement between the parties that sets out who has custody and access.

A copy of the order or agreement should be kept by the school and parents should be advised to let the school know as soon as possible if the order or agreement is amended.

**What if the student doesn't want us to share the information with one or both parents?**

The personal information of a child under 18 years can be released to parents as long as it does not interfere with the privacy rights of the child. Privacy rights are most likely to be affected in cases where highly confidential information such as counselling notes is requested.

If a student who is mature enough to understand the situation and its implications does not want the information released the student's wishes can be respected unless it is clear it will not be in his or her best interests.

**Do we have to create reports or provide opinions or verbal information to parents involved in custody disputes?**

The school does not have to create new reports for parents or provide written answers to questions asked by parents just because they may be involved in a possible court action. The school will need to provide parents in custody situations with the same type of information as it would normally provide to all parents. This will mainly be factual reporting but can also include professional opinions. Care should be taken to make sure that the person giving an opinion does not venture outside their own areas of expertise.

**What do we do if a lawyer for one parent asks for copies of documents?**

Ask the lawyer to provide the request in writing with written permission from the parent. As long as the parent has custody or access they can have access to the information provided it doesn't interfere with the privacy rights of the child.

**What if the lawyer wants an employee to sign an affidavit?**

Caution should be exercised. In most cases it is not desirable for employees to provide evidence of this nature to one side or other in a dispute, however, there may be exceptions. It is advisable to contact legal counsel to review the request.

**What if an employee is served with a subpoena?**

There are two types of subpoenas:

- a *subpoena ad testificandum* requires someone to appear and give verbal testimony.
- a *subpoena duces tecum* is a command for a witness to appear and bring to court all documents the witness has in his or her possession that might relate to the case.

When served with a subpoena an individual must attend at the time specified unless excused

either by the person serving the subpoena or by the court.

If the subpoena calls for documents it must be determined whether or not the subpoenaed employee has appropriate access to the record for court purposes. For example, school records are not "in the possession" of teachers. They belong to, and are in possession of the Board. Board policy or the Director will determine who is the appropriate person to represent the Board if the records are required.

If there has been no prior contact, it is advisable to call the lawyer who issued the subpoena. The employee should ask the lawyer about the kind of questions that he or she is likely to be asked. The lawyer can also give specific details about attending at court. It should be noted, however, that the subpoenaed employee is not obligated to talk to the lawyer before court.

It is advisable to contact legal counsel who can review the subpoena and provide information about the specifics of the court process.

**NOTE: The information provided in this document should not be regarded as legal advice. If you have questions about a specific fact situation please contact your legal counsel.**

## APPENDIX B

### GUIDELINES FOR RELEASE OF INFORMATION IN SCHOOLS

*1. Requests that can be filled without further permission from a principal:*

- copies of newsletters or other public documents
- information available on a website

*2. Requests that would usually require consultation with the principal:*

- report cards
- attendance records
- classroom work
- copies of consultants' reports

These records can be released informally as long as:

- school staff are sure the applicant has a parental role - there is joint custody or the school has a copy of an agreement or court order stating that the requesting person has custody or access; and
- the release of the information will not interfere with the privacy rights of the student ( usually not an issue for this type of information but may be so with older students)

*3. Requests that will usually require consultation with central office staff:*

Any requests where there is any concern about the individual's right to access the file which may include:

- the application includes a request for an opinion, about a student;
- there is uncertainty about the right of the applicant to have the information;
- there is uncertainty about whether or not the release of the information is in the best interests of the student;
- request for an affidavit,
- request for something that would be presented in court,
- request from a lawyer, or
- any other request that seems a bit odd or unusual.

At minimum require a written request for the information.

Can require applicant to use the formal application process under (LAFOIPP).

*NOTE: Counselling notes and information relating to content of counselling sessions should not be released even in cases where subpoenas are served. Legal advice should be sought first.*

## APPENDIX C

### WHAT TO DO IF YOU ARE SERVED WITH A SUBPOENA

#### ***What do I do if a lawyer calls and wants to find out information concerning a student?***

If a teacher or other employee of the Board is contacted directly by a lawyer the request should immediately be passed on to the principal. The principal, in consultation with central office if necessary, can assess whether or not the school can comply with the request and can obtain any consents that might be required.

#### ***What if the lawyer wants me to be a witness in a court action?***

If a lawyer believes someone has information that might be relevant in a case the lawyer should be asked to issue a subpoena.

#### ***What is a subpoena?***

A subpoena is a document issued by the Court at the request of one of the parties involved in a lawsuit or court action. The subpoena is a command of the court requiring the person named to attend in court and give testimony.

There are commonly two kinds of subpoenas:

- a *subpoena ad testificandum* is the ordinary subpoena requiring someone to appear and give verbal testimony.
- a *subpoena duces tecum* is a command for a witness to appear and bring to court all

documents the witness has in his or her possession that might relate to the case.

The subpoena document will clearly state if the witness is required to bring documents. It might not specify the exact documents to be included.

#### ***Who Can Be Served with a Subpoena?***

Anyone who has information that might be relevant to a case can be subpoenaed to appear at trial as a witness. In the case of school personnel, subpoenas usually involve child custody or young offender matters. The most common documents that are required to be brought to court are student records.

#### ***What is the first thing to do if I am served with a subpoena?***

You should advise your principal as soon as possible. Board policy may also require the principal to notify the Director of Education.

#### ***What if the subpoena requires documents to be produced?***

If the subpoena calls for documents it must be determined whether or not the witness has appropriate access to the record for court purposes. For example, school records are not “in the possession” of teachers. They belong to, and are in possession of the Board. Board policy will determine who is

the appropriate person to represent the Board if the records are required.

***Should I speak with the lawyer who issued the subpoena?***

Even if there has been no contact with the lawyer it is a good idea to call the lawyer once the subpoena is served. You should ask the lawyer about the kind of information that you will be asked to give evidence about. Lawyers will generally be very willing to do this.

***What if the lawyer for the other side wants to talk to me?***

In law, either side can speak to a witness. The same procedure should be followed as for the request from the first lawyer. Notify the principal who can determine whether information should be shared and what consents will need to be obtained.

***When do I go to Court?***

The subpoena will state the date and time the witness is required to appear in court. However, court cases vary greatly in length. The subpoena will give only the time the case will begin. You may not be required to testify until some later time. It is, therefore, important to try and speak with the lawyer who issued the subpoena. The lawyer might be able to give a more specific time for you to appear.

***What happens at court?***

At the court house, the location of the room where the trial is being held will be posted. When you arrive, you should let the lawyer know you are there. You will then be asked to sit outside the courtroom until you are

called to testify. Once you have testified you will be able to stay in the court room (unless it is a closed court).

***Will I be paid for my expenses?***

At the same time the subpoena is served the person serving the subpoena is required to pay the witness costs. These costs are set by the court and include mileage expenses and a *per diem*. Most Board policies allow time-off for these types of court appearances. The policy may require you to pay the Board the *per diem* you receive if you receive a paid leave from work.

***What happens if I just ignore a subpoena?***

Subpoenas are commands of the court and you could be subject to penalties and arrest if you do not respond.

*The material provided in this pamphlet is for general information purposes only and should not be relied upon as legal advice. If you have questions about a specific fact situation please contact your Director of Education.*

## APPENDIX D

### **INFORMATION FOR WITNESSES**

- The witness must appear at the court house at the time named in the subpoena.
  - Sometimes hearings may take several days and the lawyer who issued the subpoena will usually be able to give the witness a more precise idea of when he or she will be called - in some cases, with the co-operation of the court, they may even be able to take into account the schedule of the witness..
  - If the witness has a significant event scheduled, such as surgery or out of country travel, the witness should alert the party who issued the subpoena as soon as possible – it is only the person who issued the subpoena or the judge who can excuse the witness from attending, no matter what the reason.
  
- The witness will be required to wait outside the courtroom until called in by the lawyer. Once the witness has completed testimony the witness can remain in the courtroom (unless the proceedings are closed to the public – the witness can check this with one of the lawyers)
  
- Once called, the witness will be asked to take an oath to tell the truth. If the witness does not wish to swear on the bible the witness can “affirm” that he or she will tell the truth. The clerk of the court will lead the witness through this process.
  
- In the courtroom the judge is completely in charge of the process. There is generally a great deal of respect for educators and the judge will ensure that all lawyers treat the witness appropriately.
  
- The only job of the witness is to tell the truth. If the witness does not remember something it is quite appropriate to say so.
  
- The witness should only answer the questions asked and should not add any additional information. However, if the witness believes that an answer was misunderstood the witness can ask to clarify the response.
  
- The witness should not worry about whether or not to answer specific questions. That is the job of the lawyers. The witness should answer all questions asked as accurately and factually as possible unless a lawyer objects. At that point the witness will stop and the judge will discuss the

matter with both lawyers. The judge will then tell the witness whether to proceed or not.

- If the witness does not understand a particular question the witness can ask for the question to be repeated or can state that he or she does not understand the question.
- If the witness has notes or a written document that might help to answer a question the witness can say so. The lawyers will then discuss with the judge whether or not the document can be referenced.

## APPENDIX E

### STEPS FOR DEALING WITH A PARENT WHO IS ACTING INAPPROPRIATELY

1. Investigate and obtain information from teachers and other staff. Gain a clear understanding of the status of the children and their behaviour. Find out what attempts have already been made to deal with the actions of the parents.
2. Ask staff to keep notes, documents of all contact with the parent. Continue this throughout the process.
3. Meet with parent to address the concerns. Another person should also be present (and any other professionals that may be involved with the family). Look into the possibility of outside pressures and/or the possibility of referral to other agencies for assistance. If possible come up with a plan on how the parent will interact with the school. Put the arrangement into writing and send it to the parent as soon as possible.
4. If the parent does not co-operate and if the situation is severe then skip to step 7. If the situation is not as serious, send a written notice setting out the expectations you have for the parent.
5. Follow up on the meeting – with the teachers and with the parents.
6. If problems persist, and if they are not very serious, send a polite letter, re-stating the arrangements previously agreed to and asking the parents to abide by them. Set a dead line and state if matters have not improved by then you will have to consider other measures. (The length of the deadline will depend on the severity of the behaviour). If there are serious problems you may wish to skip right to step 7.
7. If there is no improvement and there are still significant problems, in cooperation with the superintendent, send a warning letter. The letter should clearly set out the expectations for the parent and warn the parent that he or she is not to attend at the school unless the conditions are followed. Emphasize that no matter what happens the school will continue to make an effort to keep the parent informed about the educational progress of the children. ***We strongly advise at this point, if you have not already done so, that the superintendent contact your solicitor. It would be advisable to have your solicitor review the letter you send to the parent.***
8. If problems check with your local law enforcement agency with regard to any assistance they may be able to give you.

## APPENDIX F

*NOTE: This letter is a sample of some language that might be used. The contents of each letter will depend on the specific facts of each case.*

### SAMPLE LETTER TO PARENT ATTEMPTING TO HAVE ACCESS TO CHILD AT SCHOOL

Date \_\_\_\_\_

Dear \_\_\_\_\_

We would like to clarify the situation with regard to your child \_\_\_\_\_ enrolled in \_\_\_\_\_ School.

It is our understanding that you have been making attempts to contact \_\_\_\_\_ at school. We understand that \_\_\_\_\_'s primary residence has been ordered by the court to be with his father/mother. Mr/s \_\_\_\_\_ has advised the school that you are not to have contact with \_\_\_\_\_ at school. As primary caregiver for \_\_\_\_\_ the school will be honouring Mr/s \_\_\_\_\_'s request.

It is my understanding that you have made several phone calls to the school and have on occasion attended at school at inappropriate times.

I would like to draw your attention to section 367 of *The Education Act, 1995* which provides in part that anyone who does the following is guilty of an offence:

- (d) wilfully interrupts or disquiets any school by rude or indecent behaviour or by loitering, whether within the school or on school premises or so near as to disturb the orderly operation of the school.

In addition, the common law allows an owner, such as the Board of Education to prevent people from coming on to their property. Section 3 of *The Trespass to Property Act* provides that a person who has been requested to leave a property must do so and must not re-enter the premises without permission. Failure to do so may result in a summary conviction offence and a fine of up to \$2000.

**It is our opinion that the behaviour you have exhibited may disturb the orderly operation of the school. We will, if necessary, completely ban your attendance at the school or on school property. If, however, you are able to comply with the arrangements set out below we will not have to do so:**

- You may pick \_\_\_\_\_ up at the school on the designated times set out in the court order. If you are not able to do this you must make arrangements with Mr/s\_\_\_\_\_. If you are not at the school at the regular time when students are picked up which

is between \_\_\_ PM and \_\_\_PM. the school will follow a back-up plan to be arranged with Mr/s\_\_\_\_\_.

- You must NOT attempt to call or communicate in any other way with \_\_\_\_\_ at school during the school day.
- You are not to attend at the school during the school day except to pick up \_\_\_\_\_ as set out in the court order. If you attend at school during the school day you will be asked to leave the premises. If you do not leave the police will be called.
- You will not phone any teachers or staff members at school during the day. Any emergency communications can be made to \_\_\_\_\_ or \_\_\_\_\_.
- You may phone the principal at the school on each Friday to discuss any matters of concern.
- You will be provided by mail with copies of all report cards, memos, newsletters, etc.
- You may make written requests for copies of specific materials and we will do our best to provide such materials provided the requests are reasonable.
- You may attend at the school for interviews with a specific teacher if these interviews are arranged in advance. All such interviews will be conducted in the presence of the principal and will be immediately terminated if you display abusive behaviour

We trust this serves to advise you of the position of the school with regard to this matter. We hope that we can work with you in the best interests of J.

Yours truly,

Director of Education/ or designate

## APPENDIX G

***NOTE: This letter is a sample of some language that might be used. The contents of each letter will depend on the specific facts of each case.***

### **SAMPLE LETTER TO PARENT ATTENDING AT SCHOOL INAPPROPRIATELY AND CAUSING DISTURBANCE**

Dear \_\_\_\_\_

It has come to my attention that you have attended at \_\_\_\_\_ School where your child \_\_\_\_\_ attends and have \_\_\_\_\_ (*insert brief description of inappropriate behaviour- ex: made inappropriate comments, behaved in a threatening manner and uttered specific threats against an employee of the board*) \_\_\_\_\_. This conduct is not acceptable.

I would like to draw your attention to section 367 of *The Education Act, 1995* which provides in part that anyone who does the following is guilty of an offence:

- (e) wilfully interrupts or disquiets any school by rude or indecent behaviour or by loitering, whether within the school or on school premises or so near as to disturb the orderly operation of the school.

In addition, the common law allows an owner, such as the Board of Education to prevent people from coming on to their property. Section 3 of *The Trespass to Property Act* also provides that a person who has been requested to leave a property must do so and must not re-enter the premises without permission. Failure to do so may result in a summary conviction offence and a fine of up to \$2000.

***It is our opinion that the behaviour you have exhibited disturbs the orderly operation of the school. For this reason you are no longer welcome at the school or on school property. This includes attendance during the school day and attendance at evening, weekend or public events.***

We must therefore advise you that effective immediately you are not to attend at the \_\_\_\_\_ School. If you attend at school premises, I have advised the staff to immediately call the police.

We remain willing to work with you to come to some arrangement by which you can monitor the progress of your child. We will agree as follows:

- that you may phone the principal at the school on each Friday to discuss any matters of concern. All other communications must be in writing.
- you will be provided by mail with copies of all report cards, memos, newsletters, etc.

- you may make written requests for copies of specific materials and we will do our best to provide such materials provided the requests are reasonable.
- you may attend at the school for interviews with a specific teacher if these interviews are arranged in advance. All such interviews will be conducted in the presence of the principal and will be immediately terminated if you display abusive behaviour

**(ALTERNATIVE:**

*If you require any information from staff at the School we must insist that you put your request in writing. The request will be directed to the appropriate person and will be dealt with in the normal course of business. We do not wish to discourage you in any way from seeking information to which you may be entitled. We just need to insure that it is done in a courteous and appropriate manner.*

*(Note if you do not want parent to phone then add: "Phone calls from you will not be accepted by School office staff". OR: "If you wish to phone the office please ask that your call be directed to me (or put in name of appropriate person").)*

*(The following can be added if there have been defamatory statements made by the parent:*

*It has also been brought to our attention that you have made statements about \_\_\_\_\_ that could be misleading, inaccurate or misinformed. While we expect and encourage frank dialogue and constrictive criticism, we cannot condone the circulation of false statements and would have to consider legal action if it occurred. We trust you will ensure that all communications you make are factually accurate.)*

We regret the necessity to impose these measures. We hope that the arrangements we have suggested will lead to a more appropriate relationship with the school and that eventually we can dispense with these conditions. In the meantime the focus must remain on maintaining a good learning environment for your child and all the children in the school.

Yours truly,  
Director of Education *(or designate)*