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Legal Opinion: School Psychologists - Parental Consent to Psychological Assessment of Students and Disclosure of Student Records

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Introduction

The Saskatchewan College of Psychologists (SCP) has engaged in discussions with the Saskatchewan School Boards Association (SSBA) in an effort to address apparent conflicts in direction provided to psychologists working with school boards in relation to two key issues: parental consent to psychological assessment of students and disclosure of records containing person health information relating to students, which information has been collected by a psychologist.

The SCP understands that the SSBA bases its position on the argument that because students have a right to education recognized by the *United Nations Convention on the Rights of the Child* and guaranteed by *The Saskatchewan Human Rights Code*, which their parents cannot take away from them, and because school boards have the authority under *The Education Act, 1995* to provide psychological assessments in order to determine the appropriate educational placement for a child, parental consent is not required to the psychological assessment of a student. From the SCP's perspective, obtaining informed consent from the parents of a child is a fundamental ethical requirement, and a failure to do so could lead to discipline proceedings for professional misconduct under *The Psychologists Act, 1997*.

Similarly, SSBA argues that because *The Health Information Protection Act* (HIPA) does not apply to school boards, and because the records and reports that psychologists employed by school boards compile and make are the property of their employer, school boards can disclose these documents to third parties without parental consent, subject only to the requirements of *The Local Authority Freedom of Information and Protection of Privacy Act* (LAFOIPPA), which does apply to school boards. SCP understands that its members are "trustees" under HIPA, regardless of the position of school boards, and are required to comply with that Act, irrespective of the wishes of the school boards who are their employers.

Parental Consent to Student Assessment

SCP acknowledges that children have a right to education and that school boards must provide them with an education appropriate to their needs and abilities, as mandated by *The Saskatchewan Human Rights Code* and *The Education Act, 1995* and its related regulations.

In certain circumstances, psychological testing can be useful to enable school boards to determine what is appropriate for a particular child. However, the SCP does not agree that parental consent to psychological assessment is irrelevant, or that school officials necessarily make these decisions irrespective of the consent of the parents. In addition, school boards do not decide what is ethical behavior on the part of those professionals employed by school boards who are members of the SCP.

The Education Act, 1995 does not override the provisions of *The Psychologists Act, 1997*. Moreover, and more importantly, there actually is no conflict between them that requires one to override the other. The provisions of both Acts can be complied with through adopting a process for psychologists employed by

school boards to follow in securing parental consent and identifying when and how they can proceed in the absence of parental consent by focusing on the best interests of the child.

The Education Act, 1995

Subsection 190(1) of *The Education Act, 1995* authorizes school boards to “provide” medical and dental examination and treatment. This is an enabling provision; it allows school boards to provide these things, not just for students, but also for children under the age of seven in the school division. Subsection 190(3) requires parental consent to medical and dental “treatment” but does not refer to “examination”. It is argued that these provisions in combination mean that the school board does not need parental consent for psychological examination of a student. Section 191 of that Act permits school boards to employ specialized personnel to provide psychological and other services, and this, it is said, supports the argument that school boards can psychologically assess students without bothering to obtain parental consent.

However, subsection 190(1) also allows school boards to provide medical examination and treatment to children in the school division under the age of seven who are not students. The fact that subsection 190(3) refers only to consent to “treatment” cannot mean that such children can be examined medically without their parents’ consent. This brings into question the validity of this interpretation of this provision in relation to students also.

Moreover, subsection 190(2) specifically authorizes the board to employ personnel for the purposes of subsection 190(1). Thus, the personnel needed to carry out the examinations and treatments that are being referred to in subsection 190(1) are different personnel than those hired to provide psychological and related services under subsection 191. Section 191 thus supports the interpretation that subsection 190(1) is not referring to psychological services at all.

From the SCP’s perspective, sections 190 and 191 have very little to do with the issue of parental consent to psychological assessment of children in school. The provisions that are relevant are section 178 of *The Education Act, 1995* and section 50 of the regulations. The process to obtain an assessment set out in this legislation does not refer to parental consent to psychological assessment; however, neither does it establish that the school board determines how that assessment will take place. The legislation requires the director to direct that an assessment to be conducted, but the legislation does not authorize the director to dispense with the parental consent that is ethically required to be obtained by the professional who conducts the assessment.

The Psychologist’s Ethical Obligation is to obtain consent

Obtaining informed consent is a fundamental ethical consideration for a psychologist providing professional services – as it is for other health care professionals as well. When individuals do not have legal capacity to provide consent themselves, that consent must be obtained from a parent or guardian. While consent may not be immediately obtained in the case of a disaster or other crisis, it must be obtained as soon as possible thereafter.

This fundamental ethical requirement is contained in the SCP Code of Ethics and adherence to the Code is required by the SCP’s Regulatory Bylaws. Under *The Psychologists Act, 1997*, a breach of the bylaws is

defined as “professional misconduct” and a member of the College who is guilty of professional misconduct is liable to a long list of possible consequences.

The SCP’s practice guidelines do acknowledge the possibility that consent may not be required by operation of law. However, it is our submission that *The Education Act, 1995* does not require or authorize the performance of a psychological assessment of a student without parental consent. If consent is to be dispensed with in the case of a psychological assessment of a student, it is not because *The Education Act, 1995* says so. The authorization to proceed without consent is embedded in the *parens patriae* jurisdiction of the Courts.

The Supreme Court of Canada’s decision in *Eaton*

The decision of the Supreme Court of Canada in *Eaton*¹ is not a decision about the right of the school to complete a psychological assessment of a child without the parents’ consent or to require the psychologists it employs for this purpose to contravene the ethical requirements of their profession in conducting an assessment. It is a decision about the best interests of the child.

In *Eaton*, the parents of a child with cerebral palsy were upset with the school’s decision to place their child in a special education class, rather than in a regular class. They argued that the school’s decision was discriminatory under s. 15 of the *Charter*. The Court held that this decision was not discriminatory and, in so doing, rejected the argument that there is a presumption in favour of placing a child in an integrated classroom that can be displaced by parental consent. The Court said that what is in the best interests of the child is determined on the basis of the individual facts and circumstances of each case; there are no presumptions. So, just as the best interests of the child are not necessarily determined by parental consent, nor are the best interests of the child determined by what the school board may think is appropriate. There is no presumption either way. All of the facts and circumstances of each case must be taken into account in order to decide what is in the best interests of this child.

Guidelines for School Psychologists in obtaining parental consent

Utilizing the approach mandated by the Supreme Court of Canada and focusing on the best interests of the child in the context of the issue of obtaining parental consent to psychological assessment would, require psychologists asked to conduct an assessment of a child take the following steps:

1. Where an assessment is directed by the director of the school division in accordance with s. 178 of *The Education Act, 1995*, the psychologist should make all reasonable efforts to obtain full and informed consent from the custodial parent(s) as required by the SCP Code of Ethics and practice guidelines. While recognizing that parental consent is not determinative, where both the director and the parent(s) consent to the assessment, this is an indication that there is no dispute about whether or not the assessment is in the best interests of the child.
2. Where there is no court order or agreement relating to custody, *The Children’s Law Act* establishes joint custody as the default and the consent of both parents is required.

¹ [1997] 1 SCR 241, 1997 CanLII 366.

3. If there is a court order or agreement relating to custody in place, a copy of the court order or agreement should be obtained, and:

a) if custody is joint, the consent of both parents is required, whether or not they are separated and regardless of the length of time the child spends in the actual physical care and control of either one of them; or

b) if one parent has custody, only the consent of that parent is required.

4. If a parent whose consent is required does not agree to the assessment, the psychologist may proceed without consent in the case of emergency or, where, having taken into account all of the following factors, the psychologist concludes that it is in the best interests of the child to proceed with the assessment:

a) is the non-consenting parent actually present?

b) what are the reasons why the non-consenting parent has withheld consent?

c) will the assessment actually contribute useful information to the decision that must be made regarding the child's placement?

d) is the information necessary to make the decision regarding the child's placement available through other means?

e) will the information that is available provide a sufficient basis to substantiate the validity of the testing?

f) what are the views of colleagues in the profession?

g) what are the views of educational colleagues?

5. In rare situations, the student may consent to psychological assessment without parental consent where the psychologist determines that the student has sufficient intelligence and maturity to fully appreciate the nature and consequences of the procedure to be performed for his or her benefit.² Consent by the student should only be a consideration where the student has requested that the parents not be notified or the parents cannot or will not consent. In such situations, the psychologist must consider the following factors in concluding that a minor is capable of providing consent:

a) the age and maturity of the student;

b) the nature and risks of proceeding with the proposed assessment versus not proceeding; and

² See Law Reform Commission Report, *Proposals for a Consent of Minors to Health Care Act*, 1980; *Director of Child and Family Services v. A.C.*, 2007 MBCA 9 (CanLII)

c) any readily available information relating to the student's intelligence, reasoning ability, state of mind, or other similar factors.

Disclosure of Personal Health Information Collected or Compiled by Psychologists

Psychologists are Trustees under HIPA

SCP acknowledges that school boards are not defined as "trustees" under HIPA, but psychologists are. Clause 2(t) of HIPA defines the term trustee to include:

(xii) a person, other than an employee of a trustee, who is:

(A) a health professional licensed or registered pursuant to an Act for which the minister is responsible; or

(B) a member of a class of persons designated as health professionals in the regulations;

Thus, because psychologists employed by school boards are licensed or registered pursuant to *The Psychologists Act, 1997*, which is an Act for which the Minister of Health is responsible, they are therefore trustees under HIPA because their employer is not.

HIPA also states that it prevails in the case of conflict with another Act:

Act prevails

4(1) Subject to subsections (3) to (6)³, where there is a conflict or inconsistency between this Act and any other Act or regulation with respect to personal health information, this Act prevails.

(2) Subsection (1) applies notwithstanding any provision in the other Act or regulation that states that the provision is to apply notwithstanding any other Act or law.

(3) Except where otherwise provided, *The Freedom of Information and Protection of Privacy Act* and *The Local Authority Freedom of Information and Protection of Privacy Act* do not apply to personal health information in the custody or control of a trustee.

This means that psychologists must comply with the requirements of HIPA, apart from whatever school boards do, because HIPA applies to them and their handling of personal health information, and not LAFOIPPA, according to the explicit statement contained in subsection 4(3) of HIPA (above).

Decisions of Privacy Commissioners

³ Subsections (4) to (6) are not relevant to this particular situation.

The *Neilson* decision is a B.C. case and is based on B.C. legislation. The SCP has not examined that legislation to determine its applicability in Saskatchewan, as it appears to have been made on the basis of freedom of information requirements and not in relation to a statute such as HIPA.

The decision of the Saskatchewan Office of the Information and Privacy Commissioner in *The Board of Education of Horizon School Division* addressed the question of parental consent to a transfer of a student's cumulative record. The case did not involve personal health information. Thus, while generally a school board can disclose information to other school boards when the information is to be used by that other local authority for a purpose for which the information was collected, this will not be the case with personal health information, because HIPA prohibits disclosure without consent except to another trustee.

Where a psychologist is disclosing information to a person who is not a trustee, such as another school board, HIPA requires a psychologist to verify that the information is going to a school board and that the recipient of the information is aware of the restrictions on its use.

Duty where disclosing to persons other than trustees

21 Where a trustee discloses personal health information to a person who is not a trustee, the trustee must:

- (a) take reasonable steps to verify the identity of the person to whom the information is disclosed; and
- (b) where the disclosure is made without the consent of the subject individual, take reasonable steps to ensure that the person to whom the information is disclosed is aware that the information must not be used or disclosed for any purpose other than the purpose for which it was disclosed unless otherwise authorized pursuant to this Act.

HIPA only allows a trustee to disclose personal health information with the consent of the individual to whom it relates or if the disclosure falls into any of the categories of exceptions listed in sections 27 to 29 of that Act.

Although HIPA authorizes disclosure of personal health information when it is to be used for the purpose for which it was collected, similar to LAFOIPPA, it explicitly requires members of regulated professions to comply with the ethical requirements of their profession in doing so. Clause 27(3)(a) says:

(3) A trustee shall not disclose personal health information on the basis of a consent pursuant to subsection (2) [situations of deemed consent under the Act] unless:

- (a) in the case of a trustee other than a health professional, the trustee has established policies and procedures to restrict the disclosure of personal health information to those persons who require the information to carry out a purpose for which the information was collected or to carry out a purpose authorized pursuant to this Act; or

(b) in the case of a trustee who is a health professional, the trustee makes the disclosure in accordance with the ethical practices of the trustee's profession.

Thus, there is no deemed consent to disclosure if the profession has an ethical requirement mandating the professional to obtain actual consent, as is the case with the profession of psychology.

There are very few situations applicable to students in school where disclosure can be made without consent. These include:

- a situation where on reasonable grounds the psychologist believes that disclosure will avoid or minimize danger to the health or safety of any person
- a situation where the disclosure is being made for the provision of health or social services to the individual whose consent would otherwise be required where the psychologist believes that disclosure will clearly benefit the person's health or well-being, but even then, only where it is not reasonably practicable to obtain consent.

HIPA imposes many additional requirements on the collection and use of personal health information, even where it is not being disclosed to another school board.

The Specific Personal Health Information in Question

The ethical requirements of the psychology profession suggest that, generally, information gathered by a psychologist through the process of psychological assessment may only be shared with another psychologist. This includes not only raw test data, test scores and scoring sheets, but could also include diagnostic conclusions drawn from the test and interview information, and all other information gathered in relation to the assessment.

Psychologists employed by school boards should not therefore routinely place this information in a cumulative file. It should only be provided directly to another psychologist, and, as required under HIPA and the ethics of the psychology profession, only with informed consent.

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