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# UCP Grievance and Culture-War Politics Enter Schools

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**Bill Commented On:** Bill 27 *Education Amendment Act, 2024*, 1st Sess, 31st Leg, 2024 (passed second reading Nov 19)

On October 31 the Minister of Education introduced Bill 27 into the Alberta Legislature with the following comments: "The bill will provide clarity, consistency, and transparency to education policies in schools across Alberta. Parents across the province want to be more involved and have a larger say in their child's education, and we are happy to strengthen their involvement through these proposed amendments." This is a very bland introduction for a Bill that, if passed, will amend the *Education Act*, SA 2012, c E-0.3, to accomplish three objectives: (1) restrict the ability of schools to implement public health emergency measures; (2) require Ministerial approval of curriculum materials on gender identity, sexual orientation, and human sexuality; and (3) restrict the liberty of youth to use gender affirming names or pronouns in school. Bill 27 also grants a lot more than just a 'larger say' to parents – the amendments to the *Education Act* in the Bill grant parental control over the application of public health emergency measures, the delivery of educational materials on gender identity, sexual orientation, and human sexuality, and the use of gender affirming names or pronouns in schools. Suffice it to say, this is not what governing in the public interest looks like.

## Public Health Emergencies in K-12 Schools

Remember the fiasco over COVID-19 and Masking in Alberta K-12 Schools? The Chief Medical Officer of Health (CMOH) issued a public health order just days before the start of the 2020/2021 school year, announcing a convoluted and confusing mix of rules and guidance over masking in schools. It was a total mess, which subsequent legal proceedings revealed was the result of significant dysfunction between the CMOH and United Conservative Party (UCP) Cabinet. The UCP government prematurely declared COVID-19 to be over at least twice between 2020 and 2022. Specifically in relation to K-12 schools, in February 2022 then-Premier Jason Kenney announced masking would no longer be required and the Minister of Education went further issuing a written statement that "school boards will not be empowered by provincial health order or recommendations from the CMOH to require ECS – grade 12 students to be masked to attend school in person or to ride a school bus." The CMOH subsequently rescinded the masking requirement in K-12 schools, and in judicial review proceedings challenging the decision, the CMOH stated that the decision to rescind was actually made by the UCP Cabinet. This admission led to a finding in *CM v Alberta*, 2022 ABKB 716 (CanLII) at para 97, that if the Minister wanted to restrict the ability of the CMOH or schools themselves to implement public health measures, they would need to do so by regulation (see Confirmed in Law: The Decision-Maker for COVID-19 Public Health Orders in Alberta is the Chief Medical Officer of Health for more discussion). In

November 2022, the Minister of Education responded to the Court's direction by enacting the *In-Person Learning Regulation,* Alta Reg 226/2022, and section 3 of this Regulation prohibits a school from requiring a student to wear a mask for the purpose of preventing or limited the spread of COVID-19 or other communicable disease.

Sections 4 and 5 of Bill 27 go much further. Section 4 of Bill 27 adds a new section 3.1 to the *Education Act*, which effectively requires a school to offer in-person learning during a public health emergency. This is because section 3.1 states that during a public health emergency, education must be provided in accordance with the regulations, and section 2(1) of the *In-Person Learning Regulation* requires a school to offer in-person learning if it is going to offer at-home or remote learning.

This new section 3.1, together with powers under a new section 11.1, also grants the Minister of Education power to declare emergencies in schools and prescribe health measures that will be applied to "the body of a student". This is very peculiar and specific authority granted to a Minister other than the Minister of Health or public health officials. This power also exists concurrently under section 3.1 with references to powers granted to public health officials under the *Public Health Act*, RSA 2000, c P-37 to address public health emergencies in schools. These new provisions provide the Minister of Education with a legislated basis to assert authority over public health officials in relation to applying public health measures in schools. It is difficult to see these amendments as anything other than revisiting prior grievances between the UCP cabinet and public health officials over measures applied in schools during COVID-19.

Where things get even more bizarre is the proposed new section 3.2, which requires parental consent for the application of measures to address a public health emergency in a school. Parental consent is required in relation to students under the age of 16, or of the student or parent, in the case of students over the age of 16. If consent is not granted in relation to a student, public health measures cannot be applied to that student. It doesn't take too much thought to realize how involved and arduous this opt-in regime will be for the implementation of any public health measure deemed necessary to mitigate an emergency.

It almost seems like these amendments in Bill 27 will make it impossible to apply public health measures in a school, which is a scary thought. Take, for example, a measles outbreak in a middle school, where all students are 15 years or younger. Measles is a 'communicable disease' under the *Public Health Act* with no known treatment other than vaccination. It is a highly infectious disease with serious health consequences, possibly even fatal, that can be passed from one person to the next simply by breathing the same air as an infected individual. A measles outbreak in a school is an obvious example of a public health emergency which requires timely and effective measures to address the health risk. An obvious public health measure to contain the spread of measles in a school would be to close the school until the outbreak is gone. So here are some worrisome outcomes of the Bill 27 amendments in this scenario: (1) the school with the measles outbreak would need to obtain the consent of parents of all students to implement the public health measure schoolwide; (2) assuming that consent is not granted by all parents, those students without consent must still be able to attend the school in person without any public health measures applied; (3) even if all consents were obtained, the school would still need to remain open for in-person learning because the *Education Act* and its regulations now provide for a right to in-person learning

during a public health emergency, even in a single school; and (4) students, teachers and other school staff will be forced to be in an unsafe environment, contrary to section 31 of the *Education Act* and requirements in the *Occupational Health and Safety Act*, SA 2020, c O-2.2, and its regulations. One wonders how thoroughly these amendments in Bill 27 were considered before they were tabled for first reading in the Legislature.

**Unprecedented Ministerial Control Over Sex Education**

While section 18 of the current *Education Act* provides the Minister of Education with general powers over curriculum content, the proposed amendments in Bill 27 mark a significant shift. The amendments to the *Education Act* will (1) require Ministerial approval of education curricula related to gender identity, sexual orientation, or human sexuality, and (2) implement an opt-in requirement whereby parents must give their consent to a student receiving educational instruction on these topics in school.

Section 7 of Bill 27 adds a new section 18.1 to the *Education Act* which requires Ministerial approval of learning and teaching resources on gender identity, sexual orientation or human sexuality, as well as requiring Ministerial approval for the use of an 'external party' in delivering these learning materials. These so-called external parties will include specialists with advanced expertise in modern and inclusive approaches. These experts bring critical, research-based insights that cannot be offered by the schools themselves. We suggest their role is vital in formulating curricula that are not only informative, but also foster a safe and respectful understanding of complex subjects. An example of a program that will now be subject to Ministerial approval, is the consent project delivered by the Pro Bono Students Canada chapter operating in the Faculty of Law. By imposing restrictions on expert involvement at the Minister's discretion, there is a concern that the depth and effectiveness of sex education and education on gender identity and sexuality could be compromised, limiting students' exposure to diverse perspectives and essential knowledge needed to navigate personal and social challenges safely.

Section 12 of Bill 7 also implements an opt-in model for teaching and learning on gender identity, sexual orientation or human sexuality, by adding a new section 58.11 to the *Education Act*, which requires a school to obtain parental consent before a student can receive this education. This replaces what was an opt-out model in the *Education Act* for education on human sexuality. In a brief survey of other provinces, we found that Alberta is one of the few provinces that legislates on human sexuality education. Those that do legislate on this topic, such as Saskatchewan (see *The Education Act, 1995*, SS 1995, c E-0.2, which was amended in 2023 to add section 197.2(m)(ii)), use an opt-out model where a parent can withdraw the student from receiving this education at school. Currently, section 58(1) of the Alberta *Education Act* uses the opt-out model for teaching on 'human sexuality' and 'religion'. The amendments in Bill 27 will remove reference to 'human sexuality' in section 58(1), and by concurrently adding section 58.11 make Alberta the only jurisdiction in Canada to require opt-in consent from parents before a student can receive education on human sexuality in school, as well as adding unique requirements for parental consent to education on sexual orientation and gender identity.

Concerns over these changes to educational coverage were raised immediately after the Premier announced her intention to implement these policies back in February 2024. An open letter to the Premier from faculty members, legal researchers, and staff at the University of Alberta and University of Calgary Faculties of Law (published on ABlawg here) raising *Charter* concerns with the changes, stated the following:

> We also have deep concerns about the government's planned changes to require parental notification and opting in for formal instruction on matters involving gender identity, sexual orientation, and human sexuality. The current notification and opt-out approach in the *Education Act* is already flawed since it emphasizes parental rights rather than the best interests of the child, resulting in a risk that children most in need of this type of instruction will be deprived of it. The creation of an opt-in framework will likely lead to fewer children having access to important educational resources that can assist them with understanding their gender identity and sexual orientation, their rights not to be discriminated against on those grounds, and protections they are owed in relation to sexual activity. The proposed restrictions will cause harm to all youth, especially to those who are vulnerable to sexual violence, including girls and 2SLGBTQ+ youth. In addition to the *Charter* provisions mentioned above, the proposed scheme impacts youth's right to access to information, which is an important aspect of freedom of expression.

We re-iterate these concerns. As well, the requirement for Ministerial approval amounts to unprecedented political control over education that will have significant harmful impacts on youth. Bill 27 will restrict the scope and effectiveness of education on gender identity, sexual orientation, and human sexuality in Alberta, adversely impacting students' ability to safely and respectfully navigate complex personal and social landscapes. These changes risk undermining the foundational goals of educational inclusivity, thoroughness and reliability.

**Use of Gender-Affirming Names and Pronouns in Schools**

Section 9 of Bill 27 adds a new section 33.2 to the *Education Act*. Under section 33.2, if a student asks a teacher or other school staff to use a gender-affirming name or pronoun, parents must be notified and, if the student is under 16 years of age, the school must obtain consent from the parents. The new section 33.2 also requires mandatory parental notification for students aged 16 or 17 years, effectively forcing these students to be outed to their parents, a measure that undermines their safety, autonomy, and equality rights.

Teachers and other school staff are prohibited from using gender-affirming names or pronouns when referring to a student until the prescribed notification and consent requirements are met. Section 33.2 also provides that where parental notification or consent may reasonably be expected to cause emotional or psychological harm to the student, the school shall provide the student with counselling or other assistance before notifying the student's parent.

Similar legislation has been enacted in Saskatchewan. Section 197.4 of the *Education Act, 1995*, requires parental consent to use a gender-affirming name or pronoun in schools for students under 16 years of age. One significant difference between Bill 27 and Saskatchewan's *Education Act,*

*1995*, is that Saskatchewan does not require parental notification for students 16 years of age or older.

Another noteworthy distinction between the two provinces is that, unlike the Saskatchewan legislation, Bill 27 does not employ the section 33 *Charter* notwithstanding clause to protect section 33.2 from a constitutional challenge. See Seismic Shift: The Notwithstanding Clause and Litigation on the Rights of Trans and Gender Diverse Youth for a discussion of Saskatchewan's use of the notwithstanding clause and the decision in *UR Pride Centre for Sexuality and Gender Diversity v Government of Saskatchewan*, 2024 SKKB 23 (CanLII), to proceed with judicial review of section 197.4 of the Saskatchewan *Education Act, 1995*, notwithstanding the use of the 'notwithstanding clause'. Presumably, Alberta is waiting to see how the Saskatchewan Court of Appeal rules in this case on the issue of whether judicial review can proceed against legislation which invokes the notwithstanding clause (arguments were made at the Saskatchewan Court of Appeal in September, and Alberta is an intervener in that case: see here).

Research has shown that requiring parental consent for the use of gender-affirming names or pronouns may result in family violence or other forms of discriminatory harm against youth (see Gender-Affirming Names and Pronouns, Parental Control, and Family Violence). Being outed to their parents or being forced to remain silent can lead to higher rates of violence, discrimination, and bullying at schools. The open letter to the Premier referenced above also raised significant *Charter* concerns with this proposed change when it was initially announced in February 2024, stating as follows:

> The proposed restrictions will require parental notification and/or approval of youth's change of name and pronouns at school. This policy deprives Two-Spirit, trans, and gender diverse youth of their freedom of gender expression, contrary to section 2(b) of the *Charter*, and will cause significant harm to youth who are forced to choose between misgendering themselves at school or outing themselves to non-supportive and potentially abusive parents. This cruel choice violates their section 7 right to make fundamental personal decisions and be free from state-imposed psychological distress, and violates the prohibition against cruel and unusual treatment under section 12. By singling out a historically disadvantaged and vulnerable group for adverse impact, the restrictions also violate the right to equality guaranteed by section 15 of the *Charter* and the *Alberta Human Rights Act*. A court has already found that a similar Saskatchewan policy would likely cause irreparable harm to Two-Spirit, trans, and gender diverse youth: *UR Pride Centre for Sexuality and Gender Diversity v Saskatchewan (Education)*, 2023 SKKB 204 (CanLII).

Perhaps the most obvious admission by the UCP government that these restrictions on the use of gender-affirming names and pronouns will result in harm to youth is the fact that the government felt compelled to include an immunity from liability provision in the proposed new section 33.2. Subsection (5) purports to protect the Crown, Ministers, school boards, teachers, and others, from liability for anything done or omitted to be done in good faith under section 33.2. There are existing immunity sections in the *Education Act* (see sections 251 and 252) that protect teachers and other staff from liability, but notably these existing provisions do not purport to protect the Crown, Ministers, or school boards (i.e. the 'deep pockets') from liability. Whether this new immunity

provision in section 33.2(5) will actually protect the Crown from liability arising from harm to youth is uncertain. In *Canada (Attorney General) v Power*, 2024 SCC 26 (CanLII), the Supreme Court of Canada recently confirmed there is no absolute immunity from liability for damages when the Crown enacts unconstitutional legislation that infringes *Charter* rights.

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