CHAPTER 6

Teachers as Social Welfare Agents

CHAPTER OUTLINE

This chapter examines how a teacher functions in the school environment as a social welfare agent. This is one of the emergent roles of teachers. It is the product of government's increased involvement in the welfare of children, as seen through more developed children's welfare agencies, and the passage of the *Young Offenders Act* (YOA) in the 1980s, replaced by the *Youth Criminal Justice Act* (YCJA)[1] in 2003. The teacher's role as social welfare agent is a complex mixture of a number of different roles, which draw on various areas of law. We examine each of these roles and provide a brief description of the elements of each role. This chapter focuses on the identification of the roles, rather than on a thorough explanation of each role. In many cases, simply identifying the role is half the battle.

We begin by examining teachers as rehabilitative counsellors for young offenders in the school, and then look more generally at teachers, particularly guidance counsellors, as social workers. We examine teachers as child advocates both within the school and with agencies outside the school. In this external context, we focus on the teacher's role as coordinator of these outside agencies. Finally, we examine some of the family law issues that spill into the school environment and involve teachers as family mediators.

Teachers as YCJA Rehabilitation Counsellors

The unique provisions of the YCJA place an additional burden on the school system to act in the rehabilitation of youthful offenders. The scheme of the YCJA provides for both punishment and rehabilitation. The legislation was enacted in an attempt

to reconcile two competing views of youth crime. There was, and still is, a public perception that youth crime is increasing, and that the YOA, predecessor to the YCJA was "soft" on youth crime. The Youth Crime Severity Index, which measures both the volume and severity of crime involving youth accused (both charged and not charged), has generally been on a downward trend. However, a notable increase was experienced in 2017, which was primarily the result of increases in the rate of youth accused of violent offences.[2]

The YCJA attempts to have young persons who are involved in criminal activity take responsibility for their actions, while providing alternatives to incarceration for less serious offences. As we noted in Chapter 5, the Act allows for extrajudicial measures and sanctions as a means of diverting some young offenders away from youth court and possible incarceration. In line with this objective, 43 percent of youth accused of crime in 2017 were charged by the police.[3] From the beginning, police must evaluate whether it is necessary to bring a youth into the judicial system. If the police choose to move the case into the system, prosecutors and judges can decide to apply extrajudicial measures and sanctions instead of incarceration or other traditional forms of punishment. Extrajudicial measures include apologies to victims, restitution programs that place the focus on accepting responsibility and making amends, and community service programs. Although the legislation does not specifically address the impact of extrajudicial measures on schools, it could affect the school that a youth attends. Often these measures involve specific, prescribed behaviours at school that require monitoring during school hours.

Historically, education has been seen as an important tool in the rehabilitation of youthful offenders. Egerton Ryerson, one of the founders of the education system in Ontario, worked toward crime prevention with juvenile delinquents.[4] One of the principal drafters of the *Juvenile Delinquents Act*, J.J. Kelso, also recognized the importance of education:

> Gradually we are coming to see that youthful offenders against criminal law cannot be reclaimed by force but must be won over to a better life by kindness, sympathy and friendly helpfulness; that we should substitute education for punishment and secure the hearty cooperation of the boy or girl in question in his or her own reclamation.[5]

The problem with using education as a tool for rehabilitation in the past was that there were no developed resources for dealing with high-needs children, and individual educational program accommodations were not a priority of school administrators. It is clear to most people who are involved in prosecuting young offenders that a significant percentage of these children have some type of special need, often emotional or cognitive, or are substance abusers.

Over the past four decades, however, there has been a general shift in the philosophy of educational professionals toward providing better services to children

who are "specially challenged."[6] The ongoing debate over special needs education and inclusion illustrates the time and resources being spent on servicing these children. As these resources become more developed, the school system becomes more attractive to judges as a means of dealing with youthful offenders. Although students should not be sentenced to school, pre-emptive measures at school can prevent future clashes with the law. One benefit of welcoming students with disabilities within the school system is the diversity they bring to the classroom as a whole and the important lessons learned for other children about the importance of generosity and accommodation in modern society. We all have a stake in helping children reach their full potential.[7]

As we have mentioned, the YCJA applies to young people aged 12–18. Children under 12 cannot be charged with a crime because it is assumed that they are too young to form criminal intent. Particularly violent, dangerous, or destructive children are usually dealt with under provincial child protection statutes.[8]

Unfortunately, children under the age of 12, as well as those between 12 and 18, sometimes engage in serious and disturbing acts of violence, both on and off school grounds. Indeed, the management of behaviour problems in schools has become a major source of stress for teachers and school administrators. Curbing violent and antisocial behaviour is an important objective that requires resources and expertise that are not always readily available in schools. Nonetheless, the teacher has come to be an important player in dealing with young children on the verge of criminal activity. This role is multifaceted and complex, and there are few guidelines for teachers.

Increasing attention has been paid to the issue of cyberbullying as a growing concern. In 2011, the government of Nova Scotia established a task force to address increasing incidents of cyberbullying arising from elementary through to the high school setting.[9] All other provinces have now dealt with issues of both bullying and cyberbullying in their education statutes and other legislation, as well as in the form of front-line policies and practices. There is much more work to be done, but significant progress has also been made.

Identification of Young Offenders

One common complaint of school administrators is that the prohibition against the publication of the names of young offenders in section 110 of the YCJA makes it difficult to find out whether there are, in fact, any young offenders in their schools. This is also a major concern for teachers, who feel that they need to know this information to properly manage their classrooms.

In 2000, before the enactment of the YCJA, the Supreme Court of Canada addressed the issue of whether youth courts could distribute their dockets (schedule of individual appearances) to local school boards.[10] An accused young person applied for an order blocking the youth court from its routine distribution of the

youth court docket to St. John's two school boards. (The boards were in the habit of providing the information to school psychologists and others on a need-to-know basis.) The Supreme Court of Canada found that the YOA did not allow for routine distribution of this information. The court objected to the fact that the information was not only delivered to the school of the accused in question, but to all schools across two school boards. It also noted that the information was being used for school purposes, and not for the purpose of administering justice.

The court stated that although disclosure to schools was possible under the Act, information could be disclosed only by certain persons, and disclosure was limited to the school that was directly dealing with the young person in question. The court found that the current practice of distributing the docket was overly inclusive, because the youth court sent the information to two school boards, when the young person was obviously not a student with both boards, and might not have been a student at all; moreover, the docket included the names of students who might not be a safety risk. The current practice was, at the same time, underinclusive because it failed to provide enough information for schools to determine whether the young person was a safety risk and additional action should be taken.[11] The court noted that the youth court judge would be in a good position to know whether any safety concerns needed to be communicated to the school board or school, and it could select an appropriate person (such as a youth worker or peace officer) to transmit this information in appropriate cases.[12]

What we can take from this case is that although schools may have a need for certain information, the method by which they receive this information ought to be individualized and carefully circumscribed to ensure that the identity of a young person is protected as much as possible. Reference to young people by their initials, rather than their names, in court cases also emphasizes the importance of protecting the identity of the young offender.

The YCJA specifically addresses the disclosure of information to schools and school boards. In section 125(6), the Act allows disclosure to schools and boards to (1) ensure compliance with a court order or reintegration program; (2) ensure the safety of staff, students, and others; or (3) facilitate the rehabilitation of the young person. This disclosure, however, is discretionary on the part of a youth worker, attorney general, or peace officer. In other words, the Act does not require these people to release this information.

If the courts are going to use schools as alternative rehabilitation facilities, school administrators must be brought into the rehabilitation team. The school, of necessity, will have to know when a youth is sentenced to three or four months in a custodial institution. Similarly, school administrators should be fully apprised of any and all probation orders affecting students in their schools. We recommend that administrators seek out their local youth court workers and build a team

relationship. Schools and the justice system should be collaborators and not adversaries in dealing with young people in conflict with the law.[13]

The YCJA allows advisory groups or "conferences" to advise decision-makers (police officers, prosecutors, and judges) in determining consequences for a young person. The advisory group may involve parents, a victim, community agencies, and other relevant professionals. This is a forum in which school administrators or counsellors may be able to improve the decisions made about a young person with information gleaned from the school setting. It is also a place in which they can raise concerns about keeping a young offender within a school setting. This is particularly important where a young person has a history of special needs or behavioural problems that could affect their success and that of the rest of the class.

Teachers as Social Workers

In many areas of the school environment, teachers are expected to act as social workers for children under their care. This expectation is most prevalent among high school guidance counsellors: teachers who by their very description fit the social worker role. This role, however, is certainly not limited to guidance counsellors. Teachers often provide guidance to students on an informal basis. In some cases, teachers divide their time between teaching and counselling, thereby providing guidance on a part-time basis only.

It is the goal of many good teachers to gain the trust of their students and to help them develop as individuals, not simply as academics. Some teachers are more skilled at this than others, but most are involved to a certain extent in performing these child welfare functions. Perhaps the first warning for teachers who get involved in this caring aspect of their jobs is to be careful not to take on the problems of every child. Although it is essential that teachers "care about" the children they teach, teachers cannot be expected to "care for" all the needs of these children.

Examples of the difficulty in drawing this line can be seen in any school. Teachers often ask us about their liability for taking actions that involve the trust and confidence of a particular student. For example, what if a student comes to a teacher in possession of illegal drugs, is frightened, and does not know what to do with the drugs? The student may have unwittingly fallen into possession of these illegal drugs and is now caught in a dilemma. The student comes to the teacher in confidence and expects the teacher's help as a caregiver. Many teachers who try to cultivate a trust relationship with their students would be tempted to tell the student to throw the drugs away and never get involved with them again. Secure in their relationship with the student, a teacher may think they are in a safe position. Any teacher who has acted in this way, however, has come dangerously close to aiding and abetting a criminal offence. The proper course of action is to bring the student to the principal's office and work the situation out with the principal's assistance. In many cases, the

student's parents should be informed. Needless to say, however, these actions may destroy the teacher's trust relationship with the student.

Students may come to a teacher they trust and say, "I need to tell you something, but you must promise me not to tell anyone." Many teachers will foolishly agree to this condition only to find themselves in an awkward position of breaching a confidence. If, for example, a student tells a teacher about abuse in the home, the teacher is under a statutory duty to inform the relevant authorities about any information received from the student. In short, a teacher should never make a promise of unconditional confidence to a student. The proper course is for the teacher to tell the student that they are more than willing to discuss any problem that the student has, that they are open to hearing what the student has to say, but that they cannot guarantee that they will not disclose the information to anyone. In most cases, the student will proceed to discuss the issue with the teacher whether or not there is a promise of confidence.

A teacher's indiscretion in handling such a situation most often will not result in any criminal sanction, but it may result in an employment-related sanction. For instance, in *Singh v. Board of Reference and Board of School Trustees of School District No. 29 (Lillooet)*,[14] a secondary school teacher was a chaperone at a dance at which two workers took two female students from the school to a motel. The teacher followed and returned the girls to the school. After extracting a promise from the girls that this would not happen again, the teacher promised not to tell their parents. The teacher informed the vice-principal of the events. The next day, on learning of the incident, the principal gave the girls the option of telling their parents within a certain period of time or having him tell them. When the teacher found out about the principal's actions, there was a confrontation in the waiting area of the school office. The teacher shouted, "Leave her alone: go away, you have done enough damage."[15] The board of reference found that this conduct, in addition to several years of various other incidents of misconduct, constituted just cause for dismissal.

The lesson to be learned here is that teachers must always be aware of potential employment hazards when dealing with students in a confidential setting. The question is: where do teachers' loyalties lie when offering guidance to students? Do they lie with the school board as employer, the parent of the student, or the student themself? The legal and ethical answers may vary depending on the circumstances.

Issues of confidentiality and identifying the client are particularly acute for school guidance counsellors and school psychologists. Their code of ethics may bolster the sense that their main duty is to the student rather than their employer school board. However, in legal terms, both the school board, as their employer, and the parent of the student may be legally entitled to certain kinds of information. This entitlement can arise through statutory language such as child welfare legislation, which mandates the reporting of suspected child abuse. If a student informs a guidance counsellor that she is pregnant and plans to have an abortion, there may be

legal problems if the parents or guardians are not informed. The same could be said with respect to a student who is contemplating suicide.

In a 2005 judgment of the Ontario Superior Court, a judge ruled that a student had the right to expect that confidentiality of conversations with her school guidance counsellor would be respected.[16] The mother of the child brought a motion seeking an order from the court directing the school board to produce the girl's school record, including notes and reports written by the school's guidance counsellor, as part of a child protection case. While the court found the counsellor's notes and reports did not form part of the student record and were thus not statutorily protected by the *Education Act*, the judge found that the student had a common law expectation of privacy. The main concern expressed by the court was that to allow such disclosure would effectively destroy the role of guidance counsellors because students would be aware of the lack of confidentiality. The court noted that the circumstances of this case justified a finding that the communications between the student and the counsellor were confidential, but it did not go so far as to state that confidentiality would exist in every case.

In *R. v. O'Connor*,[17] the Supreme Court of Canada determined the procedure to be followed when seeking records in possession of a third party. The accused, a Roman Catholic bishop, was charged with numerous sexual offences allegedly committed in the 1960s against students at a residential school. He received a pre-trial order for disclosure of the victims' medical, counselling, and school records. When the information was not fully disclosed, he obtained a stay of proceedings based on the argument that the lack of disclosure impeded his right to defend himself. The Crown successfully appealed to the Court of Appeal. The Supreme Court of Canada dismissed the bishop's appeal, and reviewed the two-part procedure for an application for the production of medical and counselling records in the possession of third parties. In order to begin the process, the accused must make an application to a court explaining why the records are relevant to his defence. Third parties in possession of the records and people whose privacy is affected (in this case, the victims) are then to be notified. The court will then subpoena the records, and a judge will examine them to determine whether they ought to be provided to the accused and whether failure to provide them will affect the accused's right to defend himself against the charges. It is the responsibility of the accused to convince the judge that the beneficial effects of releasing the records outweigh the negative consequences of their production.[18]

Teachers should be aware that since the *O'Connor* decision, some provinces have enacted legislation dealing with flow and access to personal health information;[19] however, this legislation does not change the principles in *O'Connor*. If the court subpoenas a teacher's records, they should seek guidance from school administrators before responding.

Another problem arises when a student admits to committing a crime or to intending to commit a crime. The admission may impose a duty on the teacher to

inform the principal or other relevant authority so that any risks to the school population or the general public can be reduced. Failure to warn in a situation where a student announces a criminal or violent intent could be held to be an act of negligence within the principles discussed in Chapter 2 under the heading "Liability for Accidents at School." In the landmark US case of *Tarasoff v. Regents of the University of California*,[20] the California Supreme Court found that a psychologist with knowledge of a patient's intention to harm a specific individual had a duty to exercise reasonable care and warn the intended victim. Although *Tarasoff* has not been adopted in Canada, its principle of disclosure is generally followed where the harm is "serious and imminent." The ethical and legal lines to be drawn by guidance counsellors and teachers are complex, and we encourage discussion among colleagues.

In addition to questions of professional ethics, there may also be legal concerns about privacy and information flow in the student–counsellor relationship. These privacy issues can arise in respect to the school psychologist and the administration of tests. A. Wayne MacKay and Pam Rubin outline some of these concerns in their Ontario Law Reform Commission study on psychological testing:[21]

> If the examiner is a registered professional psychologist, he or she is professionally bound by that profession's code of ethics. These standards include confidentiality requirements as between a client and a psychologist, as well as the duty not to disclose test results directly to the client when, in exercising their professional judgment, a psychologist decides releasing data is not in the client's best interest. This latter "duty" [may be] in conflict with the access provisions of [freedom of information and protection of privacy legislation.] …[22]
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> The role of guidance counsellors or school psychologists can be even more complicated by the range of people to whom they may owe duties. In terms of the code of ethics the student is the immediate client to whom a duty of confidentiality is owed. However, the counsellor or psychologist is employed by the school board and is accountable to it as an employee. There may also be ethical and/or school obligations to inform the parents on certain sensitive issues such as pregnancy, abortion or suicidal thoughts. Thus, people in these sensitive guidance positions are in particular need of clear legal guidance about the rules in respect to privacy.[23]

Reporting Child Abuse

One of the most obvious ways in which a teacher acts as a social worker can be seen in the reporting of child abuse. It is safe to say that most teachers are aware of their statutory obligations to report abuse; however, not all teachers are aware of the procedures they must follow. Many school boards have established specific protocols for the reporting of abuse, and we certainly advise all boards to have these types of policies in place. It may also be helpful, particularly for elementary teachers, to insist on a professional development session with local police authorities and child protection workers to clearly establish the appropriate lines of communication for reporting abuse. Some board protocols require teachers to bring the matter to the attention

of the school principal and let them handle the reporting. Even if this is the protocol in a particular school, a teacher should still be aware of the actual process. Most reporting laws in Canada identify the individuals or authorities who must make the report, and some academics are of the opinion that the report must be made by the teacher, regardless of internal school procedures.

Clearly, provincial legislation takes precedent over school board policy. Some provinces have amended their legislation to address the question of whether a teacher can delegate their reporting obligation to another person, such as a school principal. The Ontario *Child, Youth and Family Services Act* specifies that a teacher (or other professional) is obliged to report directly to the appropriate authorities, and cannot rely on any other person—including a school principal—to report on their behalf.[24] The Northwest Territories *Child and Family Services Act* also contains a clause prohibiting delegation.[25] It is perhaps advisable, in cases where a teacher feels it necessary to report an abusive situation, to report their suspicion first to the principal and then, in conjunction with the principal, to contact the appropriate authorities.

The first issue to be addressed with regard to abuse is what must be reported. Although the laws in each province differ with respect to this issue, each province's child protection statute contains a description of what constitutes a child "in need of protection."[26] Every teacher should obtain the provincial child protection statute in force in their province and review the definitions of "abuse," "neglect," and (in some cases) "child in need of protection" or "child in need of intervention." Because educators have a positive duty to report suspected child abuse, they should be familiar with how such abuse is legally defined.

Teachers are naturally reticent to involve outside authorities and initiate the trauma of a child abuse investigation. They are also concerned about the reaction of parents who are the object of suspicion. However, it is incumbent on teachers and other professionals to err on the side of caution when deciding to report. As one author states, "[S]topping child abuse can prevent irreparable physical and emotional damage and can often mean the difference between life and death."[27] Teachers should also be aware that most provinces have the ability to prosecute for failure to report suspected child abuse, although they rarely do so.[28] The consequences of conviction for failure to report can involve fines, probation, and even imprisonment; however, these penalties are rarely imposed.

The first component of any definition of "child abuse" is a definition of "child." In Manitoba, a "child" is a person under the age of majority; in New Brunswick, a child is a person actually or apparently under the age of majority; in British Columbia, Nova Scotia, and the Yukon, a child is a person under the age of 19; and in Prince Edward Island, Alberta, Ontario, and Quebec, a child is a person under the age of 18. Newfoundland and Labrador and Saskatchewan define a child as a person who is actually or apparently under the age of 16, and Saskatchewan refines this definition

by stating that the person must be unmarried to qualify. In the Northwest Territories and Nunavut, a child is someone who is, or in absence of evidence to the contrary, appears to be under the age of 16.

The definition of "abuse" is slightly more abstract, and most of the statutes use broad and vague terminology to identify a range of specific behaviours and conditions that may constitute child abuse. There is general agreement that conduct that qualifies as child abuse can be divided into four major categories. W.F. Foster provides the following guidance in a useful article:[29]

1. *Physical abuse.* This includes "any physical force or action which results in or may potentially result in a non-accidental injury to a child and which exceeds that which could be considered reasonable discipline."[30]
2. *Emotional maltreatment.* This includes the acting out by those responsible for the welfare of a child of their negative or ambiguous feelings toward the child (through, for example, constantly chastising, blaming, belittling, ridiculing, humiliating, or rejecting a child or persistently displaying a lack of concern for the child's welfare), which results in some degree of emotional damage to the child.[31]
3. *Sexual abuse.* This includes "any sexual touching or sexual exploitation of a child and may include any sexual behaviour directed toward a child."[32]
4. *Physical or emotional neglect.* This includes "failure on the part of those responsible for the care of the child to provide for the physical, emotional or mental needs of a child to the extent that the child's health, development, or safety is endangered."[33]

A number of provinces have expanded their definition of what constitutes abuse for the purpose of child protection. In Nova Scotia, for example, section 22(2) of the *Children and Family Services Act* lays out an expansive definition of the types of abuse and neglect that may lead to a child being in need of protective services:[34]

> (a) the child has suffered physical harm, inflicted by a parent or guardian of the child or caused by the failure of a parent or guardian to supervise and protect the child adequately;
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> (b) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (a);
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> (c) the child has been sexually abused by a parent or guardian of the child, or by another person where a parent or guardian of the child knows or should know of the possibility of sexual abuse and fails to protect the child;
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> (d) there is a substantial risk that the child will be sexually abused as described in clause (c);
>
> (e) a child requires medical treatment to cure, prevent or alleviate physical harm or suffering, and the child's parent or guardian does not provide, or refuses or is unavailable or is unable to consent to, the treatment;

(f) the child has suffered emotional abuse, inflicted by a parent or guardian of the child or caused by the failure of a parent or guardian to supervise and protect the child adequately;

(g) there is a substantial risk that the child will suffer emotional abuse and the parent or guardian does not provide, refuses or is unable to consent to, or fails to co-operate with the provision of, services or treatment to remedy or alleviate the abuse;

(h) the child suffers from a mental, emotional or developmental condition that, if not remedied, could seriously impair the child's development and the child's parent or guardian does not provide, refuses or is unavailable or unable to consent to, or fails to co-operate with the provision of, services or treatment to remedy or alleviate the condition;

(i) the child has been exposed to, or has been made aware of, violence by or towards

(i) a parent or guardian, or

(ii) another person residing with the child,

and the parent or guardian fails or refuses to obtain services or treatment, or to take other measures, to remedy or alleviate the violence;

(j) the child is experiencing neglect by a parent or guardian of the child;

(k) there is a substantial risk that the child will experience neglect by a parent or guardian of the child, and the parent or guardian does not provide, refuses or is unavailable or unable to consent to, or fails to co-operate with the provision of, services or treatment to remedy or alleviate the harm;

(ka) the child's only parent or guardian has died or is unavailable to exercise custodial rights over the child and has not made adequate provision for the child's care and custody;

(kb) the child is in the care of an agency or another person and the parent or guardian of the child refuses or is unable or unwilling to resume the child's care and custody;

(l) the child is under twelve years of age and has killed or seriously injured another person or caused serious damage to another person's property, and services or treatment are necessary to prevent a recurrence and a parent or guardian of the child does not provide, refuses or is unavailable or unable to consent to, or fails to co-operate with the provision of, the necessary services or treatment;

(m) the child is under twelve years of age and has on more than one occasion injured another person or caused loss or damage to another person's property, with the encouragement of a parent or guardian of the child or because of the parent or guardian's failure or inability to supervise the child adequately.

If one considers the wording of the statute in combination with Foster's guidance as to the four types of abuse, a relatively clear picture emerges as to what a teacher should report. The decision of the Supreme Court of Canada in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*[35] provides further guidance on the line between reasonable correction and child abuse. In this case, the court upheld section 43 of the *Criminal Code*, which provides a defence to

assault charges for parents, teachers, and persons standing in the place of a parent who use reasonable physical force for purposes of correction. The majority judgment contains the following observations:

> [40] Generally, s. 43 exempts from criminal sanction only minor corrective force of a transitory and trifling nature.[36] On the basis of current expert consensus, it does not apply to **corporal punishment** of children under two or teenagers. Degrading, inhuman or harmful conduct is not protected. Discipline by the use of objects or blows or slaps to the head is unreasonable. Teachers may reasonably apply force to remove a child from a classroom or secure compliance with instructions, but not merely as corporal punishment.[37] Coupled with the requirement that the conduct be corrective, which rules out conduct stemming from the caregiver's frustration, loss of temper or abusive personality, a consistent picture emerges of the area covered by s. 43.

In addition to prohibiting the aspects of child abuse considered above, some of the statutes make specific reference to the perpetrator of the abuse as being relevant to the reporting requirement. In the Northwest Territories, Quebec, and Manitoba, the relationship of the abuser to the victim is applicable in only some forms of reportable abuse. In Alberta, Ontario, Prince Edward Island, Saskatchewan, and Nova Scotia, the relationship of the abuser to the victim is essential. Generally, for conduct to constitute abuse under the statute, an abuser must be a parent, guardian, or person who has care or charge of a child. Again, we recommend that teachers check the statutory provisions within their province as well as the school board regulations to determine the requirements that apply to the nature of the abuse and the identity of the abuser.

How much must a teacher know about a situation before they are obliged to report abuse? In British Columbia, Ontario, Prince Edward Island, Quebec, Manitoba, Saskatchewan, Alberta, and the Yukon, the teacher's duty to report arises when the teacher has "reasonable grounds to believe," "reasonable grounds to suspect," or "reasonable and probable grounds to believe" that abuse has occurred or is occurring. These statutes use different language, but the common denominator is the word "reasonable." This word creates an objective standard to test whether a teacher should make a report in a given situation. The question a teacher must ask themself is whether a reasonable person, knowing all of the circumstances in question, would believe or suspect that abuse is taking place. If the answer is yes, then the teacher has a duty to report.

In contrast, the New Brunswick statute provides that the reporting requirement arises only when an educator personally believes or suspects that a child is a victim of abuse. This is a subjective standard: there is no test for whether the suspicion is reasonable; it is simply the judgment call of a particular teacher. In Newfoundland and Labrador, Nova Scotia, the Northwest Territories, and Nunavut, the requirement

is stricter. Where a person has information that a child is or may be in need of protective intervention, the duty to report engages. This means there is no requirement that a teacher reasonably believe or suspect that a child is being abused. Rather, a teacher must report any information that indicates a need for protection of a child. Again, teachers are encouraged to involve their principals or other school administrators when they determine whether to report alleged or suspected abuse.

Note also that once the reporting duty arises, a report should be made as quickly as possible. Most of the statutes make reference to "forthwith" or "without delay," which indicates the need for an immediate reporting of all relevant information.

Most statutes protect the person reporting the abuse from legal action by the person who is the object of the report. This is true even if the suspicions of abuse eventually turn out to be unfounded. In the Nova Scotia statute, for example, a person making a child abuse report attracts legal liability only if they make the report both falsely and maliciously.[38]

This is not to suggest that teachers should report based on vague suspicion alone. In one widely publicized case, a student at Memorial University in Newfoundland and Labrador wrote a paper for a social work course, to which she attached an appendix containing a first-person account of an admitted child abuser.[39] The appendix did not have a proper footnote. The professor to whom the paper was submitted was concerned that the account was autobiographical and took her concerns to her department head. Without any consultation with the student, the department head made a "suspected ill treatment report" against the student to Child Protection Services (CPS). For several years, and without her knowledge, information circulated in the university, the social work community, and the RCMP suggesting that this individual was a child abuser. It would be, however, more than two years after the initial report before CPS made contact with her directly and laid out the accusation. The student was able to provide a copy of the textbook from which she had taken the accounting of child abuse, thus halting the investigation by CPS.

The student sued her professors and the university for negligence, and was awarded more than $800,000 in damages at trial. The award was overturned by the Court of Appeal, which found that her action was barred by the *Child Welfare Act* (as it was then), which provided that an action could not be properly brought "unless the making of the report is done maliciously or without reasonable cause." The Supreme Court of Canada accepted the case on appeal, and restored the decision of the trial judge. The court noted the importance of prudent decision making, stating:[40]

> [2] It is important that suspected child abuse be promptly reported. But, as this case illustrates, it is also important that persons in positions of authority (such as university professors in relation to their students) act responsibly and avoid unfounded and damaging reports of suspicion. Section 38(6) of the *Child Welfare Act*, R.S.N. 1990, c. C-12, requires there to be "reasonable cause" to make the report, thus

> striking an appropriate balance between the protection of children, the protection of third parties against unfounded allegations, and the protection of informants.
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> [34] … While legislative and judicial policy mandates the quick reporting of information of suspected child abuse, it does not do so to the exclusion of consideration of the legitimate interests of the person named in the report, or the interests of informants. This is not at all to say that the respondents were obliged to conduct their own investigation of the suspected abuse. Informants are *not* required to have reasonable cause to believe abuse has in fact occurred before making a report. They are, however, obliged to have *reasonable cause to make a report to CPS*, i.e. to possess information that CPS reasonably ought to be asked to look into, even if it turns out to be misinformation. It is the absence of reasonable cause *even to make a report* that lies at the heart of the appellant's allegation of negligence.

The Supreme Court found that the professors acted on the basis of conjecture and speculation, falling short of the legal expectation of reasonable cause to make the report to CPS. The court noted that the professors did not seek an explanation from the student and, further, that there was no evidence that a child was currently in danger or in need of protection.

Clearly there is a balance to be struck in order to reach a reasonable cause to report and ensuring the safety of children, which is paramount.

School Attendance

Another aspect of the social work role of teachers is the effort made by school personnel to combat truancy. Although truancy was historically seen as simply a matter of rounding up delinquent children, in the modern educational environment, it is recognized as a much more complex issue.[41] A number of varying interpretations of truancy attribute its causes to a wide variety of factors, including the home environment, the socioeconomic position of the student, a student's unhappiness and inability to socialize, as well as the school environment itself.[42]

We do not propose in this book to delve into the complexities of truancy and the arguments over its causes and effects. Bob Keel explores these issues in his book *Student Rights and Responsibilities: Attendance and Discipline*.[43] It is safe to say that non-attendance is a prevalent problem, and that students clearly cannot succeed academically if they do not go to school. Teachers, although not the primary agents for enforcing school attendance, can serve a useful purpose in their social welfare role by identifying the causes of truancy in particular students and attempting to avert this behaviour before it starts. It is usually the classroom teacher who has the deepest understanding of students and the closest experience of them, particularly at the elementary level. These teachers are therefore in a good position to assess the

signs of truant behaviour. The classroom teacher (or teacher assistants) may also have more access to parents than a principal or truancy officer. Particular attention should also be paid to more marginalized student populations, such as Indigenous students, where schools may not be adequately accommodating particular cultural needs.

In the event that a teacher's intervention does not increase a student's attendance, teachers should be aware that most school boards have truant officers, sometimes called "attendance counsellors." These counsellors provide support and counselling to high-risk students who might otherwise have attendance difficulties. Many schools also provide student counsellors, who attempt to contribute to the social and emotional growth of at-risk students. This is a positive trend toward seeking a proactive solution to truancy.

Some Ontario schools have implemented a program called supervised alternative learning (SAL). This program provides students ages 14 to 17 who have significant difficulties with regular attendance at school with an alternative learning experience and individualized plan. The program includes a range of activities to help the student achieve their goals, an identified contact person for the youth who will be in touch with the student at least monthly, and a transition plan to help the student return to school. The purpose of the program is to help those most at risk of disengaging from school to stay connected to learning and re-engage at a later date.[44]

The legislative trend across Canada has been to put truancy into the arena of the family court, which also deals with cases arising from children's services legislation. In many provinces, a child who is consistently truant may be deemed to be a child in need of protection, and taken into the custody of a child protection agency. This is rare, however, since child protection advocates are reluctant to impose this sanction on a child and family, unless there is other evidence of the need for protection, such as neglect or abuse.

In Alberta, the courts have refused to interpret the section that requires every child between the ages of 6 and 16 to attend school as creating a legal duty that can result in punishment when it is not carried out.[45] The court reviewed legislation from other provinces and concluded that only Ontario and New Brunswick have created an offence for a truant child, and even then not in clear language. The court was persuaded by the legislative movement toward empowering family court to make orders for attendance, rather than punishment.

In some provinces, it is an offence for parents to allow their child not to attend school. These provisions have been challenged under the Charter as potentially violating the parents' freedom of religion, but the Supreme Court of Canada in 1986 ultimately upheld the requirement that children avail themselves of some form of provincially approved schooling.[46]

Teachers as Child Advocates

Having looked at the teacher as a rehabilitation counsellor and social worker, we now examine the teacher's social welfare role as an informal lawyer, or advocate, for students. Every individual in the caregiving professions who comes into contact with children feels a natural tendency to take on an advocacy role, particularly in relation to vulnerable children. It may be that a teacher simply acts as an advocate within the school system to achieve better services for a child, though the teacher may also extend that role into seeking external resources, such as Children's Aid, the United Way, or Big Brothers/Sisters, to name but a few. In the same way that educational systems have expanded and diversified, so too have the external government agencies that affect children. In earlier, simpler times, child advocacy was an easier task, given that the only resources that could be drawn on were those of the community in which the child lived. In today's more complex world, full of institutions established to help children, the child advocacy role becomes more complex. The range of services available on the Internet goes well beyond those in the local community.

Given the day-to-day contact of classroom teachers with their students, they are natural advocates for children with special needs. Often children of single-parent or low-income families need the help of an articulate advocate to obtain necessary services. Anyone who has dealt with the bureaucratic tangles that can be created by some child welfare agencies is well aware of this need. As any bureaucracy gets larger, the individuals within the system may focus too much on the delivery of service on a "macro" level and not enough on the "micro" needs of particular children and families. This is especially true in the age of government cutbacks, when every social welfare agency is struggling to justify its existence in obtaining government funding.

It is important to realize that advocacy is not necessarily adversarial. It is not always necessary for teachers to feel they must "take on the system," whether that is the education or the social welfare system. Often, the most effective form of advocacy is the simple co-opting and coordinating of support services. From an employment standpoint, it is also wiser to take a more subtle approach than to risk alienating individuals in the government hierarchy. This is especially true of internal advocacy within the school system. It may also be helpful in this regard for teachers as a group to encourage their school system to view child advocacy as a positive employment objective, and one that fits within the role of the teacher, rather than labelling teacher advocates as "disturbers."

One recent opportunity for teachers as advocates focuses on the role teachers can play in supporting student equality movements, such as gay–straight alliances.[47] In June 2012, Bill 13 received royal assent in Ontario, becoming the *Accepting Schools Act, 2012*.[48] This Act amended the *Education Act*, including placing an obligation on

school boards to promote a climate of acceptance and inclusion, including but not limited to the support of students who want to create school-centred organizations to promote equality. It is obvious that teachers could play a significant part in such groups. The preamble to the Act specifically acknowledges the importance of a whole-school approach in the creation of a positive and welcoming school climate.

In 2012, the integral role of teachers as advisors for groups to support marginalized students was noted by the Nova Scotia Task Force on Bullying and Cyberbullying.[49] A few years later, in 2015, Bill 10 received royal assent in Alberta: *An Act to Amend the Alberta Bill of Rights to Protect our Children*. This bill amended Alberta's *School Act* by adding to its preamble that "students are entitled to welcoming, caring, respectful and safe learning environments that respect diversity and nurture a sense of belonging and a positive sense of self." Other amendments include defining the term "bullying" and imposing an obligation on principals employed by school boards in the province to support student-led activities and organizations that promote welcoming learning environments that respect diversity.[50]

Another good example of teachers acting as advocates for children in the school system is a breakfast program created by teachers in the Peel Board of Education. For some time, classroom teachers had noted that particular children were having difficulty concentrating in class and were consistently being disciplined for acting out. Finally, when the principal asked one of the children whether he had breakfast at home, the child stated that he was not usually able to have breakfast in the morning.

Over a number of months, the school implemented a program where each classroom teacher was instructed to keep a close eye on children who might not have been properly fed in the morning. Without singling the children out, teachers discretely sent them to the main office (often on the pretext of bringing the attendance record to the office). Once there, they were asked whether they had had breakfast and those that had not eaten were fed. The discipline problems in the school declined substantially as a result of this breakfast club, and numerous other schools have since adopted the program. This is an excellent example of classroom teachers and administrators identifying and solving a specific child welfare need. Clearly, the parents were not in a position to help, and it was not the kind of problem that could necessarily be solved through any traditional social welfare agencies. Although schools certainly cannot replace these agencies, this model of identifying problems and advocating solutions is an important and positive role for teachers in the school system.

In many instances, the advocacy role will involve the coordination of existing agencies rather than the creation of new programs within the school. Often, parents simply need to be directed to an appropriate agency and assisted by an advocate in negotiating with that agency in order to improve the welfare of their child. For instance, children whose parents are illiterate are certainly impeded by a lack of models at home to encourage and assist them in their studies. In this situation, a

teacher can often be helpful by directing a parent to a community literacy program that would benefit both the parent and the child. Any such suggestion must, of course, be made with tact and sensitivity.

One particular problem with respect to teenage students mentioned earlier is the danger of a teacher acting as an advocate in young offender situations. Section 146(9) of the YCJA states that an adult consulted pursuant to section 146(2)(c) shall be deemed not to be a person in authority for the purposes of the admissibility of a statement under section 146. As we discussed in Chapter 5, under the heading "Questioning Students and the Admissibility of Statements," section 146(2)(c) allows a young person to consult a parent or, in the absence of a parent, any other appropriate adult chosen by the young person, before giving a statement. Often, the individual of choice for a student is a teacher whom the student trusts. A teacher who takes on an advocacy role may be tempted to act in this advisory capacity when requested to do so by a student, particularly when the police are present and the student shows signs of fear. However, the danger in assuming this role is that, because the teacher is not required to give the student any warning that any statements the student makes are admissible as evidence in court, the student may be vulnerable to legal consequences as a result of any admissions they make to the teacher.

Therefore, if the teacher consults with the student before formal questioning and the student confesses to having committed an offence, the Crown prosecutor may subpoena the teacher. The teacher will then be required, on the witness stand, to relate the statement made by the student. As advocates, teachers are not protected by the solicitor–client privilege that is enjoyed by lawyers. Therefore, if a teacher truly wishes to assist an accused young person in the absence of the student's parents, we recommend that the teacher direct the student to a local legal-aid service for advice. Teachers need to be aware that playing the role of legal adviser may create problems for the student further down the road.

Teachers as Family Mediators

The family as an institution in Canada (and elsewhere) is in a state of evolution, and the so-called traditional family is no longer the norm. Single-parent families, blended families, and same-sex-parented families are just a few examples of the evolving nature of the family.

The legal issues that can arise in respect to same-sex parent relationships have been explored in high-profile cases, including before the Supreme Court of Canada in *Mossop*,[51] a human rights case about equality for same-sex couples, and *Chamberlain v. Surrey District School Board No. 36*,[52] which addressed Charter issues. The Surrey School Board case dealt with classroom use of books that addressed same-sex parenting.[53]

Given the large number of family breakups in today's society, teachers are often faced with difficult family law issues. Often a teacher may be trying to assist a child

in dealing with the separation or divorce of the child's parents, while at the same time dealing with both parents. Provided that neither parent has been denied access to the child, both parents typically have general rights to participate in the child's education and to obtain their child's student records. These rights extend to the parent without physical custody as well as to the parent with whom the child lives. Perhaps more troublesome for teachers than parental participation in their child's education are the day-to-day custodial problems that arise when non-custodial parents arrive at the school to pick up their child. As well, the courts have awarded joint custody in divorce cases with increasing frequency, and thus there are sometimes two custodial parents. The *Criminal Code*[54] contains provisions that penalize anyone who wrongfully takes a child from someone with lawful care or charge of the child. In this regard, consider section 280:

> 280(1) Every one who, without lawful authority, takes or causes to be taken an unmarried person under the age of sixteen years out of the possession of and against the will of the parent or guardian of that person or of any other person who has the lawful care or charge of that person is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.
>
> (2) In this section and sections 281 to 283, "guardian" includes any person who has in law or in fact the custody or control of another person.

Section 282(1), which addresses child abduction in contravention of a custody order, reads as follows:

> 282(1) Every one who, not being the parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, takes, entices away, conceals, detains, receives or harbours that person, in contravention of the custody provisions of a custody order in relation to that person made by a court anywhere in Canada, with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that person, of the possession of that person is guilty of
>
> (a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or
>
> (b) an offence punishable on summary conviction.

Defences to the crime of abduction are set out in sections 284 and 286 of the *Criminal Code*. These defences provide that no one is to be found guilty of the offence of abduction if they can satisfy the court that they took the young person with consent of the legal guardian or if they can establish that the taking was necessary to protect the young person from danger or imminent harm. Section 286 states that the consent of the young person to the conduct of the accused person does not afford a defence. The defence of parental consent contained in section 284 raises interpretation problems. Who can consent to the taking of a child? Is it the parent who has temporary lawful custody, such as a father, exercising his right of access, or the

parent who has permanent custody, such as the mother? The Supreme Court of Canada clarified this section in *R. v. Dawson*, where Justice L'Heureux-Dubé stated:

> I cannot accept the notion that a person who takes a child with intent to deprive the child's parent, or another person having lawful care or charge of the child, of possession of the child could escape liability by giving his or her own consent to the taking. Under the appellant's interpretation of s. 284, a babysitter or a teacher could take a child with intent to deprive the child's parents of possession of the child, and escape criminal liability … simply by giving his or her own consent as a person having lawful possession of the child. Such an absurd result could not have been within the contemplation of Parliament in enacting s. 284.[55]

Many schools wisely require that a child's parent provide them with a copy of the current custody order at the beginning of each school year. This can provide school authorities with the information necessary for addressing complex and sensitive custodial issues. It is the responsibility of the parent who seeks changes to the custody order to provide the school with any changes to the order.

Physical Access to the Child at School

If a non-custodial parent wishes to pick a child up from school, the principal should contact the custodial parent (or parents) before allowing the child to leave. If a dispute seems likely, it may also be wise to notify the police, whose function is to ensure that court orders are obeyed. Ideally, the teacher or principal should obtain legal advice in situations where both parents claim the right to take the child, although this advice is not always quickly available. Having the custody order in hand may limit these types of disputes. Although teachers may be required to act as mediators in parental disputes over a child regarding education, educators should never attempt to adjudicate parental disputes over rights of custody or access.[56]

Decisions About a Child's Education

A parent who has been awarded exclusive or sole custody of a child has the right to make decisions that relate to the child's upbringing, including how and where the child will be educated.[57] However, under the *Divorce Act*, a parent with access to the child also has some rights to participate in the child's education.[58] A custody order usually grants the parent the right to give consent (medical or otherwise) on behalf of the child. A parent who does not have custody is not permitted to "interfere" in the child's upbringing even though they may have access to the child and the right to some degree of "participation" in decisions that affect the child. In today's custodial orders, joint custody has become more frequent. This means that both parents share custody of the child, although, typically, one parent is awarded day-to-day control. If there is any question about which parent is able to give permission for the child to participate in an activity or enroll in a course, the custody order should be reviewed to determine which parent can make that decision.

Access to Information About the Child's Education

There are always questions about if and how non-custodial parents may obtain information about their children. For several decades, courts have addressed the issue on an ad hoc basis. Often they have included a condition in a custody order requiring the custodial parent to ensure that the non-custodial parent is provided with information about the child, including medical records and school report cards. In 2002, the government introduced a bill to amend the *Divorce Act*. Suggested amendments to the Act included replacing the terms "custody" and "access" with the term "shared parenting," and the term "custody order" with "parenting order." As well, the bill included the following amendment: "[U]nless a court orders otherwise, any person with parental responsibilities is entitled to make inquiries, and to be given information, as to the child's health care, education, and religious upbringing."[59] These changes were based on the theory that shared parenting was a more child-centred approach than sole custody, and that having both parents involved in the child's life in a meaningful way was essential, unless that involvement was not in the child's best interests, which is the paramount concern of custodial orders. Amid significant debate from a number of public interest groups, Bill C-22 died on the floor in 2003. Thus, the proposed changes were never enacted, and the *Divorce Act* continues to reference "custody" and "access."

If the House of Commons had passed this bill, it would likely have resulted in significant changes to custody orders, with more information being available to parents who were characterized as "non-custodial." The effect would have been that more parents would have access to information from schools because the presumption would have been that both parents are entitled to information about their child, unless it would be contrary to the child's best interests. Because the bill did not pass, it continues to be important that schools possess copies of custody orders so that they are aware of any restrictions or obligations with respect to access to information about students. Requests for custody orders should be general in nature so as not to single out divorced families. If there is no mention of access to information in the custody order, the legal presumption is that both parents have access. In most cases, it is in the best interests of a child for a teacher to make efforts to involve both parents to some extent in the education of their children.

Teachers as Paramedics

Although teachers are not typically trained to provide medical services, they are often called on to do so. In Chapter 2 under the heading "Liability for Accidents at Schools," we discussed the role of the teacher in providing first aid when a student is injured in an accident. In our discussion about integrating students with special needs in Chapter 4, we identified the administration of medication as a service necessary to make schools truly accessible. In the past, this service has focused on special education classrooms. However, with the advent of inclusion, not to mention medications

for attention deficit disorders (ADDs), allergies, and other health issues, it has become a matter of more general concern. Most school boards have policies that prevent teachers or school administrators, for example, from providing any non-prescription medications, such as headache relievers or antacids, to students.

Are teachers obliged to administer prescription medications? William Foster posits that a teacher's duty (or lack thereof) to provide medical services, including the delivery of medication, can be found in the collective agreements that govern teachers' working conditions, school board policy manuals, and government policies that relieve teachers of the obligation of providing certain types of medication.[60] Foster draws a distinction between long-term and emergency medication. An example of long-term medication is Ritalin, which a child may be scheduled to receive every day at lunch to manage symptoms of hyperactivity. This can be contrasted to an emergency medication, such as epinephrine, which a child may carry in an EpiPen in anticipation of an allergic reaction to peanuts or bee stings, for example. Many teachers' associations had, in previous years, maintained a position that their members should not be obligated to provide medication to students on an ongoing basis. This stance appears to have softened in recent years in most jurisdictions. A number of teacher associations now caution members that, although they may be obliged to administer medication to students, they should not do so without clear, written parameters in place to protect both the teacher and student.[61] School boards should ensure that there are clear policies or protocols on these important medication issues.

Foster notes that provincial education legislation contains little in the way of an express obligation to provide medical care, though most legislation notes that teachers may be called on by their school boards to perform duties in excess of those listed. Is there an implied obligation on the part of teachers to administer medication? The test created to determine whether an implied obligation exists was laid out in *Winnipeg Teachers' Association v. Winnipeg School Division No. 1*.[62] The case did not deal with teachers giving medication, but instead with teachers refusing to supervise lunch-hour activities. The Supreme Court of Canada held that, even though the duty was not contained in the collective agreement, teachers were under an implied duty to supervise the noon-hour activities of students. Chief Justice Laskin wrote the minority opinion (in which the majority concurred on this point). He pointed out that the fact that a collective agreement does not expressly impose a specific duty on teachers does not mean that the duty does not exist, because employers have the right to require employees to perform duties that are fair and reasonably related to the duties that they are required to perform in the ordinary course.

As well, Chief Justice Laskin noted that the mere fact that a teacher might be inconvenienced by the assigned duty did not necessarily make that duty unreasonable. On the basis of this decision, Foster argues that there are three steps to be considered in determining whether teachers are under an implied duty to administer medication to students. In short, he suggests that for an implied duty to exist:

1. there must be a clause in the legislation or collective agreement that contemplates the assignment of additional duties,
2. the administration of medication must further the role to which teachers are committed, and
3. the assignment to teachers of the job of administering medication must be fair and reasonable in the circumstances.[63]

Foster suggests that when one considers the issue of administration of medication by teachers in this light, it is

> not possible to reach the general conclusion that teachers' "job descriptions" can never include the administration of regular medication to pupils. Rather, the law on the issue, such as it is, suggests that a more appropriate conclusion is that teachers may legally be assigned the duty of administering such medication when it is fair and reasonable to so do.[64]

Foster provides a number of examples of factors that may come into play when deciding if it is fair and reasonable to require a teacher to administer medication, including the need for special training, the degree to which administering the medication interferes with the teacher's other mandated duties, and the number of students requiring medication in the class.[65] In today's world of ADD medication and inclusion, it is certainly possible that the amount of medication that various children require might make the job of administering it too onerous to be fair and reasonable for a teacher. Although the administration of medication might be left to teaching assistants, this solution does not solve the problems of safety or liability because these people may not have the necessary qualifications either. A school nurse may be an answer, but the funding for this position is often not available in a school's budget. The expertise required to administer medication is relevant to both the safety of students and the liability of the school.

Foster holds that a teacher's duty to administer emergency medication is not open to debate. He notes that every province has legislation requiring a person to render assistance to a person in peril when a "special relationship" exists, such as that between a teacher and student. He posits that it is clear that the general duty of teachers to exercise reasonable care and skill in attending to the health, safety, and comfort of their students includes the expectation that teachers will administer emergency medication as necessary.[66] In the terrifying new world of school shootings, this kind of emergency medical attention can extend well beyond just medication to life-saving medical attention.

A. Wayne MacKay and Tonya Flood suggest that, although ideally the administration of medication should be left to the school nurse, it is a fact of life that many schools no longer have full-time nursing staff. As a result, teachers are often called on to deliver everything from hyperactivity to headache medications.[67] MacKay and

Flood suggest that teachers who are required to deliver medication to students should ensure that their school boards have insurance coverage for dispensing drugs. If no such insurance exists, the safest route for teachers who want to avoid liability is to refuse to administer the medication. Overall, Flood and MacKay argue, the best solution is government and school board action in the form of the development of policies on drug administration and teacher training programs.[68]

In general, teachers who decide to administer medication to students should seek specific doctor's instructions from the parents. As well, teachers should seek training in dealing with students who are epileptic, diabetic, or subject to other physical disabilities. Schools and school boards need to develop clear rules and policies in this important area and provide the necessary medical supports for teachers. The present lack of clear guidance about a teacher's paramedical role causes anxiety for teachers and raises the possibility of liability for negligent conduct.

Who performs the necessary medical procedures for students with special physical needs, such as changing colostomy bags, removing fluid for children with cystic fibrosis, and feeding children by means of tubes? In many cases, educational assistants deal with these procedures. As with medication delivery, it is of the utmost importance that these individuals are properly trained to perform these procedures because significant injury to a student could occur as a result of improper performance. The New Brunswick Department of Education specifies in its guidelines that teaching assistants may perform specific medical procedures, such as catheterization and administration of hypodermic needles to students, only after receiving "appropriate training."[69]

Several provinces have begun to acknowledge the issue of life-threatening allergies at governmental and administrative levels. In January 2006, the Ontario legislature brought in "Sabrina's Law," a statute intended to protect students with severe food allergies.[70] The law was named for a high school student who died of anaphylactic shock after eating cafeteria food that had come into contact with dairy products, to which she was severely allergic. Sabrina's Law requires schools to train staff and create procedures to address food allergy concerns and to develop individualized plans for every student in the school with anaphylaxis. In several provinces, individual schools have considered banning the sale of milk and milk products because of the severe allergy to dairy products of several students who attend the school.[71] Although not directly related to teachers' duties, these types of incidents show another area of concern for the teacher as paramedic. It is important for teachers to know which students in their class may have severe allergies so that they can do what is necessary to protect them from exposure to an allergen. School authorities may have an obligation, in both educational and legal terms, to make reasonable inquiries about the special health needs of the students attending the school.[72] Maintaining a safe school environment for all students is the responsibility of schools and their staff.[73]

Summary

This chapter discusses the different "social welfare" functions that may be performed by teachers. These include YCJA rehabilitation counselling, social work, family mediation, child advocacy, and paramedic assistance. Teachers perform many varied roles as social welfare agents. These roles are further complicated by the evolving nature of the family and changing societal expectations of teachers. Often, these roles arise simply as a result of teachers' constant and intimate contact with their students. In addition to providing their students with an education, teachers should at least be aware of opportunities to take action on behalf of their students in a social welfare context. They should also become familiar with the legal implications of adopting social welfare roles. This is one of the new and evolving frontiers in education law.

DISCUSSION QUESTIONS

1. A student tells you a secret: she is being sexually assaulted by her baseball coach. Can you keep her confidence? What are your legal obligations? What if, prior to making the statement, she explicitly asked and you promised to keep it confidential? Does that change your position?
2. According to Ontario Bill 135, also known as Ryan's Law (2015), children with asthma need to have ready access to their asthma medications while at school. Ontario's Sabrina's Law (2005) says a teacher may administer an epinephrine auto-injector (EpiPen) in emergency situations without pre-approval from the student or guardians, if they believe the student is having an anaphylactic reaction.
    a. You are an Ontario teacher. A student in your class is in anaphylactic shock. You have no written parameters in place, and no preauthorization from the student or their guardian to administer the auto-injector. Sabrina's Law says you may do it. Do you? Discuss.
    b. You are not an Ontario teacher and do not have to follow Sabrina's Law or Ryan's Law. Do you allow your kindergarten/early years student to keep their asthma medication on their person? Discuss.
3. In your opinion, should a teacher be informed if there is a young offender guilty of a violent crime in their classroom? Support your opinion with an argument.
4. The 2012 amended YCJA allows police the right to decide whether or not to charge a youth with a crime. If the officer feels it is not necessary, they may issue an informal warning and let the child go. In your opinion, does this place too much power in the hands of the police or is this a good change that allows for the rehabilitation of youth? Discuss.

Legal Case Study

What Is Age Really?

On April 12, 2006, Candace (a pseudonym) was just shy of 15 years old when she was admitted to a hospital with gastrointestinal bleeding due to Crohn's disease.[74] The attending physician believed the internal bleeding could pose a serious health threat, perhaps even to her life, and recommended a blood transfusion. As a Jehovah's Witness, Candace had previously signed a medical directive that she should not be given blood under any circumstance. She refused the transfusion.

Due to her refusal, the doctor requested a psychiatric assessment to determine if Candace had the capability to understand death. Three psychiatrists reported Candace understood why a blood transfusion was recommended as well as the consequences of not having the transfusion. Her parents supported her decision.

On the morning of April 16, Candace experienced more bleeding. Again, a blood transfusion was recommended and refused. This time the doctor contacted the director of Child and Family Services. Because Candace was under 16 years of age, she was apprehended as a child in need of protection. A court order was made to authorize the blood transfusion *in the best interests of the child* based on the doctor's statement that Candace's low hemoglobin level threatened her vital organs. The treatment order was granted, and three hours later she was given three units of blood. Six days later, the surgeon (without the use of blood transfusions) performed gastrointestinal surgery to correct the bleeding. On May 1, the director terminated the apprehension order, and Candace was discharged from the hospital on May 4, 2006.

Candace and her parents brought the issue to the courts. They argued that although Candace was under 16, she had capacity, so the *best interest* clause should not have been applied. They also argued that parts of the *Child and Family Services Act* were unconstitutional because they infringed on Candace's Charter right of freedom of conscience and religion; her right to life, liberty, and the security of person; and her right to equal protection without discrimination based on religion. In February 2007, Candace and her parents lost the appeal. In response, they took the case to the Supreme Court of Canada (SCC).

The SCC noted that Candace was challenging the constitutionality of denying people less than 16 years of age the opportunity to prove they are sufficiently mature and capable of making their own choices about medical treatment. The court noted that for adults there is a common law right to decide what happens to one's own body and a constitutional right to security of person. Further, the *mature minor* doctrine recognizes that children are allowed a degree of autonomy, reflective of their intelligence, understanding, and level of maturity, when making decisions. Even the United Nations' *Convention on the Rights of the Child* states that while the *best interests of the child* is paramount, the capacity, age, and maturity of the child must be taken into consideration.

In the end, though the SCC dismissed Candace's constitutional challenge, the majority of judges accepted her argument that, in regards to treatment, doctors and the courts need to take into account the wishes of those less than 16 years of age who demonstrate maturity and decision-making capacity.

Questions

1. In the text, it is noted that legal issues from outside education can spill into our role as teachers and educational advocates. How could this case study inform your practice as an educational professional? In what sort of situations might the knowledge from this case study be useful?

2. Could a young person have capacity for one issue but not another? If yes, can you think of an example?
3. A 13-year-old student has a breakdown at school and begins to make threats of harming himself. He is removed from the premises. Suppose he is then admitted to a psychiatric facility for the threats of harm.
   a. Should he be required to give consent? Support your argument.
   b. Would your answer and argument change if the student was six years old? Why?
   c. Would your answer and argument change if the student was 17 years old? Why?

Legal Case Study

A Statutory Duty to Report

Sometime around September 18, 2014, a female student reported to a teacher that she was being abused by her father.[75] The teacher, Mr. Quaglia, met with the student's parents, discussed what he had been told, and warned the father that if the student disclosed another incident of abuse, he would file a report with Children and Family Services (CAS). He advised the student to keep in daily contact. Later that day, he discussed the student's disclosure with her homeroom teacher. He sent a text message to the student informing her he had told the other teacher, who also would keep her confidence.

Approximately a day later, CAS received an anonymous report that a female student had claimed abuse by her father. An investigation occurred, during which time the student confided that she had told Mr. Quaglia at school.

On May 11, Mr. Quaglia pled guilty in the Ontario Court of Justice. He was convicted of failing to report a child in need of protection and ordered to pay a fine of $250.

On June 18, the school board sent Mr. Quaglia a letter of discipline, suspending him for five days without pay and advising him that he would be transferred to another school. This letter went into his personnel file.

On April 20, 2017, Mr. Quaglia was called before the Discipline Committee of the Ontario College of Teachers (OCT). He was charged with professional misconduct because members of the teaching profession have a legal and ethical duty to report to CAS when they have reasonable grounds to suspect a child is in need of protection. Mr. Quaglia was aware of this duty to report and, instead of doing so, attempted to mediate. Mr. Quaglia pled guilty to the charge. As punishment, he received a reprimand, which was recorded on the public register. Mr. Quaglia was also ordered to successfully complete, at his own expense, a course on professional boundaries.

Questions

1. In this chapter, we discussed the importance of reporting suspected child abuse and the fact that this is a statutory obligation for teachers. How much information do you need to have before you are obliged to report? Did Mr. Quaglia have enough information? Support your answer with facts from the case and the text.
2. Mr. Quaglia had been teaching successfully for 25 years without a disciplinary charge on his record. Do you think the consequences of his action were proportional and appropriate? Why or why not?
3. Section 11(h) of the Charter says, "Any person charged with an offence has the right … if finally found guilty and punished for the offence, not to be tried or punished for it again." How does this align with what Mr. Quaglia experienced? Explain your answer, including a rationale for his experience.

NOTES

1 *Youth Criminal Justice Act*, S.C. 2002, c. 1.
2 M. Allen, "Police-Reported Crime Statistics in Canada, 2017," *Statistics Canada*, July 23, 2018, online, https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54974-eng.htm.
3 Ibid.
4 J. Leon, "The Development of Canadian Juvenile Justice: A Background for Reform" (1977) 15:1 *Osgoode Hall Law Journal* 71, at 81.
5 J.J. Kelso, "Delinquent Children: Some Improved Method Whereby They May Be Prevented from Following a Criminal Career" (1907) 6:3 *Canadian Law Review* 106.
6 T. Sussel and M. Manley-Casimir, "Special Education and the Charter: The Right to Equal Benefit of the Law" (1987) 2 *Canadian Journal of Law and Society* 45. See also A.W. MacKay and J. Burt-Gerrans, "Inclusion and Diversity in Education: Legal Accomplishments and Prospects for the Future" (2003) 3:1 *Education & Law Journal* 77; and A. Wayne MacKay, "Safe and Inclusive Schools: Expensive … Quality Education: Priceless, for Everything Else There's Lawyers!" (2008) 18 *Education & Law Journal* 21.
7 MacKay and Burt-Gerrans, supra note 6.
8 See *Children and Family Services Act*, S.N.S. 1990, c. 5, s. 22, which indicates that a child is in need of protective services when they have killed or seriously injured another person, or caused serious property damage as a result of a lack of supervision by a parent or guardian, or when that parent or guardian refuses the services or treatment necessary to prevent a recurrence of the behaviour.
9 A.W. MacKay, "Respectful and Responsible Relationships: There's No App for That: The Report of the Nova Scotia Task Force on Bullying and Cyberbullying," February 29, 2012, online, https://www.ednet.ns.ca/docs/cyberbullyingtaskforcereport.pdf.
10 *F.N. (Re)*, 2000 SCC 35, [2000] 1 S.C.R. 880.
11 Ibid., at para. 52.
12 Ibid., at para. 56.
13 A.W. MacKay, "Principles in Search of Justice for the Young: What's Law Got to Do with It?" (1995) 6:1 *Education & Law Journal* 181.
14 *Singh v. Board of Reference and Board of School Trustees of School District No. 29 (Lillooet)* (1987), School Law Commentary, Case File No. 3-5-8 (B.C.S.C.).
15 Ibid.
16 *Children's Aid Society of Ottawa v. N.S.*, [2005] O.J. no. 1070 (Q.L.) (S.C.).
17 *R. v. O'Connor*, [1995] 4 S.C.R. 411.
18 See *R. v. M.A.*, 2006 CanLII 37136 (ONSC), where the court refused to order disclosure of the Ontario Student Record to the applicant, a criminal defendant who was accused of sexual assault of his daughter; and *R. v. Maddison*, 2008 NSPC 82, where the court ordered disclosure of certain records of a particular student with certain personal details redacted, and denied access to other of the student's records.
19 See Alberta's *Health Information Act*, R.S.A. 2000, c. H-5; British Columbia's *E-Health (Personal Health Information Access and Protection of Privacy) Act*, S.B.C. 2008, c. 38; Manitoba's *The Personal Health Information Act,* S.M. 1997, c. 51; New Brunswick's *Personal Health Information Privacy and Access Act,* S.N.B. 2009, c. P-7.05; Newfoundland and Labrador's *Personal Health Information Act,* S.N. 2008, c. P-7.01; Northwest Territories' *Health Information Act,* S.N.W.T. 2014, c. 2; Nova Scotia's *Personal Health Information Act,* S.N.S. 2010, c. 41; Ontario's *Personal Health Information Protection Act*, S.O. 2004, c. 3, Sched. A; Saskatchewan's *The Health Information Protection Act,* S.S. 1999 c. H-0.021; and Yukon's *Health Information Privacy and Management Act*, S.Y. 2013, c. 16.
20 *Tarasoff v. Regents of the University of California*, S.F. 23042 (C.A.S.C. 1974).

21 A.W. MacKay and P. Rubin, *Study Paper on Psychological Testing and Human Rights in Education and Employment* (Toronto: Ontario Law Reform Commission, 1996).
22 See, for example, the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56.
23 MacKay and Rubin, supra note 21, at 163-164.
24 *Child, Youth and Family Services Act*, R.S.O. 2017, c. 14, s. 125.
25 *Child and Family Services Act*, S.N.W.T. 1997, c. 13, s. 8(2).
26 See Saskatchewan's *Child and Family Services Act*, S.S. 1989-90, c. C-7.2, s. 11; Nova Scotia's *Children and Family Services Act*, S.N.S. 1990, c. 5, s. 22; Manitoba's *Child and Family Services Act*, C.C.S.M., c. C80, s. 17; and Prince Edward Island's *Child Protection Act*, R.S.P.E.I. 1988, c. C-5.1, s. 9.
27 R. Rosencrantz, "Rejecting 'Hear No Evil Speak No Evil': Expanding the Attorney's Role in Child Abuse Reporting" (1994-95) *Georgetown Journal of Legal Ethics* 327, at 331.
28 See Alberta's *Children, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12, as amended by S.A. 2003, c. 16, s. 9, or see New Brunswick's *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 30(3).
29 W.F. Foster, "Child Abuse in Schools: Legal Obligations of School Teachers, Administrators, and Boards," paper presented to the national CAPSLE conference in Vancouver, British Columbia, April 29 to May 2, 1990.
30 T.L. MacGuire and D.S. McCall, *Child Abuse: A Manual for Schools* (Vancouver: EduServ, 1987), III-2. Also consider the reasonable discipline discussion in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, at paras. 36-40.
31 MacGuire and McCall, supra note 30, at III-5.
32 Ibid., at III-2.
33 Ibid.
34 *Children and Family Services Act*, S.N.S. 1990, c. 5, s. 22.
35 *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76.
36 See *R. v. Maddison,* 2009 NSPC 16, where the court found that an educational assistant who worked with a student with significant special needs had acted within the scope of section 43 in applying corrective force against the student either for purposes of ensuring compliance or to restrain aggressive behaviour.
37 See, for example, *R. v. Burtis*, 2012 ABPC 12, where a special education teacher was convicted of assault for pinching a student's ears. The student had autism, and repeatedly touched other people's ears; the teacher responded by pinching and pulling the student's ears and stating, "[T]here, how does that feel?" and "[Y]ou wouldn't like it if your friends did that to you." The court found that this was not corrective or objectively reasonable in nature. See also *R. v. Jonkman*, 2010 ABPC 245, where the court found a teacher guilty of assault for grabbing a grade 6 student by the arm and pulling him from his desk. See also *Ogg-Moss v. R.*, [1984] 2 S.C.R. 173, in which a counsellor in a facility for adults with mental disabilities was charged with assault for hitting an adult resident in the face with a metal spoon.
38 *Children and Family Services Act*, S.N.S. 1990, c. 5, s. 23.
39 *Young v. Bella*, 2006 SCC 3, [2006] 1 S.C.R. 108.
40 Ibid. (emphasis in original).
41 D. Brown, "Truants, Families and School: A Critique on the Literature on Truancy" (1983) 35:3 *Educational Review*.
42 A. Dean, "The Attendance Board: An Alternative to Taking Truancy to Court," paper presented to the national CAPSLE conference in Vancouver, British Columbia, April 29 to May 2, 1990. See also G. Eastman, S.M. Cooney, C. O'Connor, and S.A. Small, "Finding Effective Solutions to Truancy: What Works," (2007) 5 Wisconsin Research to Practice Series (Madison, WI: University of Wisconsin–Madison/Extension).

43 R. Keel, *Student Rights and Responsibilities: Attendance and Discipline* (Aurora, ON: Canada Law Book, 1999).

44 Memorandum from Ontario Ministry of Education to Directors of Education, Secretary-Treasurers and Supervisory Officers of School Authorities, September 29, 2010, *Changes to Supervised Alternative Learning, Part-time Attendance, and Attendance Policy for 14-17 year olds*, online, http://www.edu.gov.on.ca/eng/policyfunding/memos/september2010/ChangesAlternateLearning.pdf.

45 *In the Matter of K.G.* (1987), School Law Commentary, Case File No. 2-1-6 (Alta. Prov. Ct.).

46 *R. v. Jones*, [1986] 2 S.C.R. 284.

47 Paul Clarke and Bruce MacDougall, "The Case for Gay–Straight Alliances (GSAs) in Canada's Public Schools: An Educational Perspective" (2012) 21 *Education & Law Journal* 143.

48 *Accepting Schools Act*, S.O. 2012, c. 5. The Report of the Nova Scotia Task Force on Bullying and Cyberbullying, supra note 9, also recommends that school boards and their staffs facilitate support groups for marginalized student populations.

49 Supra note 9. In the amended preamble to the Nova Scotia *Education Act* (amended by Bill 30 in June 2012), there is also reference to an inclusive and whole-school approach that combats bullying and promotes school safety.

50 *An Act to Amend the Alberta Bill of Rights to Protect Our Children*, SA 2015 c. 3.

51 *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554. In this case Justice L'Heureux-Dubé provided a compelling dissenting opinion in which she proposed an evolving model of the concept of "family."

52 *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710.

53 *E.T. v. Hamilton-Wentworth District School Board*, 2017 ONCA 893, is an Ontario Court of Appeal case that also addresses Charter issues. This case addresses the integration of same-sex-parented families, among other topics, into the curriculum. This case is discussed at length in Chapter 3.

54 *Criminal Code*, R.S.C. 1985, c. C-46.

55 *R. v. Dawson*, [1996] 3 S.C.R. 783, 1996 CarswellNS 420, at para. 30.

56 For an interesting discussion of the issues surrounding parental access and control, see C. Armsworthy, "Turning a Triangle into a Trapezoid: Custodial Disputes, Changing Families, and Redefining Parental Rights in Canadian Education Law" (2012) (unpublished, archived at Schulich School of Law Library).

57 L. Robinson, "Custody and Access," in E. Mendes da Costa, ed., *Studies in Canadian Family Law* (Toronto: Butterworths, 1972), 546.

58 *Divorce Act*, R.S.C. 1985, c. 3 (2d Supp.), s. 16(5).

59 Bill C-22, *An Act to Amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act, the Garnishment, Attachment and Pension Diversion Act and the Judges Act and to Amend Other Acts in Consequence* (second reading February 25, 2003). This bill died on the order paper.

60 W. Foster, "Medication of Pupils: Teachers' Duties" (1995-96) 7 *Education & Law Journal* 45.

61 See Alberta Teachers' Association, *Teacher Guide: Administration of Medication/Medical Services: Rights and Risks*, 2019, online, https://www.teachers.ab.ca/SiteCollectionDocuments/ATA/Publications/Teacher-Guides/MS-24-TG-28M%20Administration%20of%20Medication.pdf.

62 *Winnipeg Teachers' Association v. Winnipeg School Division No. 1.*, [1976] 2 S.C.R. 695.

63 Foster, supra note 60.

64 Ibid.

65 Ibid.

66 Ibid.

67 A.W. MacKay and T.L. Flood, "Negligence Principles in the School Context: New Challenges for the 'Careful Parent'" (1999-2000) 10:1 *Education & Law Journal* 371.

68 Ibid.

69 New Brunswick Department of Education, *Teacher Assistant Guidelines for Standards and Evaluation*, online, https://www2.gnb.ca/content/dam/gnb/Departments/ed/pdf/K12/Inclusion/TeacherAssistantGuidelines.pdf.

70 *Sabrina's Law*, S.O. 2005, c. 7, online, http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_05s07_e.htm.

71 "Edmonton School May Ban Sale of Milk," CBC News, May 31, 2005, online, http://www.cbc.ca/news/canada/story/2005/05/31/alberta-milk050531.html. See also, Isabel Grant, "Life, Liberty and Peanut Butter?" *The Globe and Mail*, November 26, 1997.

72 See, for example, Canadian Society of Allergy and Clinical Immunology, *Anaphylaxis in Schools and Other Settings* (3rd ed.), online, https://foodallergycanada.ca/wp-content/uploads/Anaphylaxis-in-Schools-and-Other-Settings-3rdEdition_final_WEB.pdf.

73 The duties of teachers are usually laid out explicitly in the provincial legislation governing education. See, for example, the *School Act*, R.S.P.E.I. 1988, c. S-2.1, s. 98, or the *Education Act, 1995*, S.S. 1995, c. E-0.2, s. 231.

74 *A.C. v. Manitoba (Director of Child and Family Services)* 2009 SCC 30, [2009] 2 S.C.R. 181.

75 *Ontario College of Teachers v. Quaglia*, 2018 ONOCT.