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Bill 52 - Learning to 18

Legislative Concerns and Qualified Praise

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Justice for Children and Youth is a legal clinic and the operating arm of the Canadian Foundation for Children, Youth and the Law. The clinic provides select legal representation to youth aged 17 and under in the areas of income maintenance, education, criminal law, family law, mental health law, health law, constitutional law and human rights.

The Foundation prepares policy/law reform positions on issues relating to the legal practice of the clinic based on the needs and experience of its clients. The Foundation also conducts test case litigation, through interventions and applications, on specific issues related to the rights of children and youth. The clinic also provides public legal education to youth and youth-serving agencies.

Introduction

Justice for Children and Youth (JFCY) recognizes that one of the most important individual legal rights that a school-age child has is the right to attend school. We also appreciate the importance and value of secondary school completion for youth in Ontario. Requiring compulsory secondary school attendance until graduation or until 18, however, is not an appropriate legislative response if the goal is to significantly improve completion rates in the province. Any revision of the education statute in Ontario to attain such a goal should be geared towards improving curriculum deficiencies and creating specifically drawn and well-funded alternative education programs that better meet the needs of youth struggling to complete their diplomas. Certainly, the equivalent learning initiative is one positive aspect of the *Education Statute Law Amendment Act* or Bill 52, but these programs need to be more fully articulated and funded to be effective. JFCY does take issue with the more punitive provisions of the Bill. Rather than imposing punitive measures to truancy offences, like increased fines, license suspensions and reduced privacy rights, we believe any legislative amendments to the *Education Act* should seek to motivate and accommodate youth in their educational endeavors.

This brief will highlight what JFCY believes to be some of the positive amendments or elements of the Bill, along with what we believe to be a series of significant legislative pitfalls. General recommendations addressing these matters, along with suggestions for further reform will also follow.

I. Compelling Attendance to the Age of 18

Bill 52 amends the *Education Act* so as to raise compulsory school attendance from 16 to 18 years of age. High school students would now be required to attend school or an apprenticeship or workplace training program until age 18 or until they graduate. Those programs that fall outside traditional classroom instruction are referred to in the Bill as "equivalent learning."

JFCY finds that compelling attendance for 16 and 17 year olds is not a wise or necessary strategy for elevating completion rates in Ontario. First, by compelling 16 or 17 year old students back to school or to stay in school, the Bill ignores or devalues the autonomous rights of youth and their ability to choose. Cynical in its approach to education and youth, the Bill disregards a youth's resolve to and interest in completing secondary education.[1] Second, the use of compulsory education in Bill 52 is an ineffective tool against youth disengagement from secondary school, since, as will be shown, compulsory attendance for youth produces a marginal improvement in drop out rates, and does not address the real issue of the need for adequate, inspiring and accommodating curriculum at the secondary school level.

Currently in Canada, only New Brunswick mandates compulsory education to age 18, having introduced legislation to that effect in 1999.[2] Still, there appears to be no correlation between this legislation and dropout rates. Although there has been a decrease in drop-out rates in that province, Statistics Canada reports a national trend over the past decade of declining drop-out rates.[3] In fact, Ontario and New Brunswick have similar drop-out rate statistics, declining from roughly 15% in 1990 to a 9% rate by 2005.[4] This fact would undermine any allegations of a causal connection between compulsory secondary schooling and improved graduation rates. Without denying the need to increase graduation rates and the importance for most youth to stay in school and attain a high school diploma[5], clearly legislating attendance is not the solution. The

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[1] A recent study on early school leavers, done for the Ministry of Education, found that although youth disengagement stories were characterized by despair, the majority of youth are struggling with a multitude of risk factors but at the same time are determined to make better lives for themselves with plans to return to school in the future. See, Ministry of Education, "*Early School Leavers: Understanding the Lived Reality of Student Disengagement from Secondary School,"* May 30, 2005 at http://edu.gov.on.ca.eng/parents/schoolleavers.pdf.

[2] See, *New Brunswick Education Act*, Clause 15(1)(b).

[3] See, Geoff Bowlby, Labour Force Survey, Statistics Canada, "Provincial Drop-out rates – Trends and Consequences," online: Statistics Canada < http//:www.statcan.ca/English/freepub/81-004-XIE/2005004/drop.htm#a.

[4] *Id*.

[5] For a detailed perspective on the importance of education attainment for disadvantaged youth and the deleterious effect of dropping out, see, Sonja Grover, "Why aren't these youngsters in school? Meeting

effectiveness of these types of punitive and compulsory measures found in Bill 52 is illusory because ultimately they accomplish very little. Where adapted or legislated in other jurisdictions in Canada and the United States, the improvements made to graduation rates have been marginal at best.[6] This kind of bill simply doesn't work.

Furthermore, Bill 52 fails to recognize that a more accurate image of the problem in secondary school education is one of a student pushed out of school rather than dropped-out. At the least, the *Education Act* provides all students in Ontario a right to attend school.[7] The difficulty seems to be according that right to the more challenging students. JFCY has observed an unfortunate trend amongst secondary schools across the province, where pupils have been turned away, summarily withdrawn from the rolls or forced to "voluntarily" withdraw from a school because of erratic attendance, weak academic performance or an over-zealous response to a student's behaviour.

Sixteen year old Mohammed thought that he was expelled from school near the end of the school year because of his poor attendance record. Following the summer, he was determined to get back on track and re-enrol in school. The principal refused to let him come back until he had taken two correspondence courses and passed them. Through the intervention of a lawyer, he learned that he had not been "expelled" but had been "voluntarily de-enrolled" by the principal. The principal also took the position that he could do this because Mohammed was over 16. Mohammed was able to voluntarily re-enrol with the assistance of the lawyer.

Canada's Charter obligations to disadvantaged adolescents" (2002) 10 *The International Journal of Children's Rights* 1.

[6] The findings from current studies of the United States stay-in-school legislation show that the beneficial effects of this compulsory approach are small, especially considering the fact that a strict interpretation of the law would imply that virtually no teenager would be allowed to leave before age 18. Clearly, this is not the case. Essentially, the effect of raising the school leaving age above 16 was on average that an individual's length of schooling increased by 6 – 8 weeks, that it decreased the dropout rate by between 1.2 to 2.1 percentage points and increased the number of young adults with at least some college learning by 1.5 to 2.1 percentage points. See, Philip Oreopoulos, "Stay in School: New Lessons on the Benefits of Raising the Legal School-Leaving Age." C.D. Howe Institute Commentary, December 2005 at 10-11.

[7] *Section 32, Education Act.*

Schools contribute to the problem by systematically excluding and discharging "troublemakers" and other problematic students with social or academic difficulties from school. Schools are using punishments such as suspensions or expulsions and are effectively pushing-out students who are overtly expelled, or covertly discouraged from remaining in school, particularly those disengaged students that do not easily fit within a rigid and circumscribed educational model.[8] Excluding students who pose the greatest challenges to the educational system is an abdication of the heavy responsibility on educators. It is quite simply an admission of failure and goes against everything education is meant to foster.

> Sasha was a 15 year old student who had been excluded from attending her school by the principal. Sasha was going through personal difficulties and was in counselling. One day Sasha engaged in self-harming behaviour by cutting her arm in a couple of places. The principal excluded her because of this incident, stating that he was concerned that she couldn't be kept safe and that her behaviour was concerning to others. It was only through the intervention of a lawyer that the principal was convinced to allow her back into school.

Thus, the focus of any legislative initiative seeking to ameliorate completion rates in Ontario must shift toward providing the needed supports for these secondary students, and seeking to motivate them through positive incentives, flexible and culturally relevant

[8] High school suspensions are related to early school withdrawal. The impact of zero tolerance or no tolerance school policies which result in suspensions and expulsions in the United States has been studied by The Civil Rights Project at Harvard University. It was found that "overzealous approaches to promoting safety" have resulted in high numbers of suspensions and expulsions, and that "more than 30% of sophomores who drop out have been suspended" and that a disproportionate number of students suspended and/or expelled are students of colour. See, *supra* note 1 at 70. Certainly, the suspension and expulsion rates in Ontario are of concern, with the Ministry of Education reporting that 7.2% of the total student population were suspended in 2003-2004. See, Ministry of Education, "McGuinty Government Releases Data on School Discipline," Nov. 23, 2005 at http://ogov.newswire.ca/ontario/GPOE/2005/11/23/c8925.html?lmatch=&lang=_e.html. While a recent study by the Toronto District School Board indicates a decrease in the use of suspensions, it is reported that suspension rates remain high in certain public schools in the city and disturbingly slightly more than half of all suspensions were of elementary students. See, Jill Mahoney and Jeffrey Hawkins, "Suspension rates stubbornly high in some schools," *The Globe and Mail* (April 13, 2006). Furthermore, the decrease in suspensions in Toronto public schools does not speak to the number of exclusion cases that may be occurring at the TDSB schools.

curriculum and individualized learning.[9] A student's right to an education[10] should be supported and protected, and it is upon the educators and legislators that this burden rests. It is not the student who should be penalized or pushed out of school because of a failure to provide adequate or appropriate education. Furthermore, these educational protections and supports are needed primarily for the challenging, vulnerable and disengaged student struggling to stay in school, not the motivated honor roll student.

Sheri, age 11, was excluded from school because of behavioural issues that had not yet been identified. She also has a heart condition. Sheri did not have OHIP or other medical coverage (her parents paid for her health needs directly). Following a meeting with the parents and the school about her behavioural issues, a number of assessments were identified that would assist in determining how to meet Sheri's educational needs. Some of the assessments would be expensive and the parents could not afford them. Following a sports practice at the school where Sheri was dizzy, the Principal asked that Sheri's mother to take her to see a doctor. The mother refused because Sheri had simply overexerted herself. The Principal contacted CAS and refused to allow Sheri to return to school because the school did not have the facilities to care for Sheri.

The compulsory and punitive provisions in Bill 52 ignore the fact that the low graduation rates in Ontario are more likely a result of failure rates rather than drop out rates amongst secondary school students. [11] According to Alan King of Queen's University, in his

[9] The recent study on early school leavers was prepared for the Ontario Ministry of Education to assist in understanding and addressing the issues surrounding school disengagement by youth who are presently leaving the secondary school system prior to earning their diploma. In identifying key risk and protective factors for early leavers, the study recognized that school disengagement by youth is determined by complex relationships among multiple causes. Amongst the school-related risk factors listed were suspensions and ineffective discipline, inadequate curriculum, and disregard of student learning styles. And the school-related protective factors for youth included positive school climate, alternative education, guidance counselors and teaching style and care. Ultimately, the report's recommendations for the education system emphasized the following key principles: be more understanding, be more flexible, and be more proactive in reaching out to youth, families, and communities. See, *supra* note 1. With the exception of the equivalent learning provisions, Bill 52's compulsory and punitive measures fly in the face of these recommendations made by the Ministry's own study of the very problem the Government proposes to address with this piece of legislation.

[10] Education is a legal right. The pupil's right to an education, and the scope of that right, are derived from legislation, the *Charter* and broader human rights law. Specifically, children's right to an education can be viewed as so fundamental to their development as to be recognized under *section 7* of the *Charter* as being essential to their "life, liberty and security of the person."

[11] Statistics Canada reported a substantial decline in the drop-out rate in Ontario over the past decade. By 2004-2005 the provincial drop out rate was 9.1%, down from 14.7% at the start of the 1990s. See, Geoff

ongoing government-commissioned report on Ontario's secondary school reform, a major factor in current low graduation rates is high incidences of failed compulsory credit and workplace-preparation courses. That is, the majority of the students taking these courses cannot graduate because they cannot accumulate all the 18 compulsory and 12 optional credits currently required for graduation.[12] Dr. King states that students "will continue to be at risk of not graduating unless Grade 9 and 10 courses are redesigned to be more consistent with their needs, and workplace-preparation courses in Grade 11 and 12 are targeted to more realistic vocational goals."[13]

An antidote to the Bill's compulsory attendance provision is the ability to excuse or exempt a pupil from its application. Bill 52 significantly expands the Minister's authority to make regulations concerning excusal from compulsory attendance. Beyond conditions and procedures, the Minister may now prescribe programs or other activities that will excuse a pupil from attendance at school. As well, the Minister will be able to stipulate criteria and standards for those excusal programs or activities, and establish a review mechanism to ensure compliance.

Vague and discretionary though it may be at this time, such a provision does mitigate against the deleterious effects of an inflexible compulsory scheme.[14] The Premier's announcement of Bill 52 in December 2005 came, however, with no mention of money or funding, despite the fact that school boards could now be mandated to provide equivalent learning programs to its secondary students.[15] To date, there has been little money announced that relates to the equivalent learning provision of Bill 52. The Honourable Mary Anne Chambers, the Minister of Children and Youth Services, recently

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Bowlby, Labour Force Survey, Statistics Canada, "Provincial Drop-out rates – Trends and Consequences," online: Statistics Canada < http//:www.statcan.ca/English/freepub/81-004-XIE/2005004/drop.htm#a.

[12] A.J.C. King, *Double Cohort Study, Phase 4 Report* (October 2005). Ontario Ministry of Education, online: Ontario Ministry of Education <http://www.edu.gov.on.ca/eng/document/reports/phase4/index.html at 78.

[13] *Id*. at 16.
[14] See, *Subsection 11(8).*
[15] *Subsection 8(1), para. 3.0.1*.

announced a $200,000 pledge for a "Learn to Work" program in the Ontario Public Service that will help 20 students age 16 to 18 get their high school diplomas through service work experience and credit recovery.[16] While $2.6 million was allotted by the Minister of Children and Youth Services to hire 39 youth outreach workers for Toronto social agencies, this money will not provide the Boards with support they will need to keep youth in school, whether by way of guidance counselors, educational assistants or ESL programs. Generous and well-placed funding for equivalent learning programs is one way to secure its success.

The equivalent learning proposals in the Bill are a positive step toward ameliorating the status of secondary education in Ontario. The skeletal nature of these amendments, however, makes it hard to assess their value and effectiveness. The legislative framework is so empty that it would be difficult to comment usefully on this initiative until we are also able to review draft regulations. Detailed and clear provincial expectations about these equivalent learning programs are needed so as to provide more guidance to the school boards. This guidance is particularly pressing given that the Bill specifically empowers the Minister to require boards to develop and implement policies and procedures that would enable pupils to participate in equivalent learning. [17]

JFCY is concerned about the lack of specificity in the legislation and its relegating the details of the equivalent learning initiative to as-yet undefined regulations. The problem consists of the potential for inconsistent messaging when there is skeletal legislation that shifts or hides the substance of its proposals in the regulations. We saw this problem arise with the implementation of the *Safe Schools Act.* The *Safe Schools Act, 2000* introduced a new regime for suspensions and expulsions in Ontario. While the *Act* provided that upon the commission of a certain offence a mandatory suspension is warranted, *section 306(5)* stated that the suspension of a pupil is not mandatory in such circumstances as may be prescribed by regulation. *The Suspension of a Pupil*

[16] See, "McGuinty Government Providing More Opportunities for Youth," News Release Communique, Ministry of Children and Youth Services (Feb. 14, 2006); Tess Kalinowski, "Another $28M for City Youth," *The Toronto Star* (Feb. 15, 2006).

Regulation[18] ultimately provided that the suspension of a pupil is not mandatory if certain mitigating circumstances exist. The broad discretion and inconsistent messaging from the combined application of the *Safe Schools Act* and regulations made it too easy for school boards to suspend and expel challenging students without consideration or appreciation for those mitigating circumstances articulated by the regulations. School boards and principals across Ontario implemented a damaging policy of zero tolerance in certain school discipline cases, the end result of which has been lawsuits filed by parents and students and a settlement by the Toronto District School Board with the Ontario Human Rights Commission.[19] In the case at hand, the success of or benefits to be derived from these equivalent learning programs would be more effectively supported by specificity as to content and minimum funding requirements within either the regulations or the legislation itself. In so doing, a clear and consistent message would be extended to school boards and educators regarding provincial expectations about the value of equivalent learning programs.

<u>Recommendation 1</u>: Strike the compulsory attendance to 18 provisions of Bill 52, but retain the equivalent learning provisions, providing clear provincial expectations about these programs in detailed regulations and within the body of the *Education Act*.

II. Bill 52 Grants Standing to 16 and 17 Year Olds

JFCY supports those provisions of Bill 52 that implicitly recognize the autonomous rights of youth by extending standing to pupils who are at least 16 years old. Specifically, the proposed legislation revises *clause 1(2)(b)* of the Act so as to allow for the possibility that the authority, right, obligation or reimbursement of a parent or guardian can now vest in a 16 or 17 year old pupil. Regulations as to the circumstances under which this vesting can occur, however, have not yet been drafted or delineated. The Bill also shifts certain

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[17] *Subsection 8(1), para 3.0.1*

[18] *O. Reg. 106/01*.

[19] See, Ontario Human Rights Commission, online: <http://www.ohrc.on.ca/english/news/e_bg_tdsb-settlement-terms.shtml

rights and responsibilities onto sixteen and seventeen year old pupils who have withdrawn from parental control. Parents and guardians are now explicitly exempted from the responsibility of compelling attendance of this emancipated class of youth. See, *subsection 21(5).* The Bill extends to these youth the responsibility to pay the increased fines or bonds imposed in habitual absence offences[20], the ability to qualify as resident pupils[21] and the right to request exemptions from religious education. See, *subsections 30, 36 and 42(13).*

JFCY recommends that full standing under the *Education Act* be extended to sixteen and seventeen year olds, whether emancipated or not, or at the least a vesting of all parental or guardian rights and responsibilities upon the youth's withdrawal from parental control. Specifically, we would like to see the recognition of a youth's right to appeal under the *Education Act* extended under Bill 52, especially as to special education identification and placement decisions and disciplinary decisions. The *Education Act* indirectly grants standing to a student in his or her own suspension or expulsion hearing by according to the Board, the authority to allow an appeal by "such other persons as may be specified by a policy of the board." See, *subsections 311(1)* and *308(1).* The legislation clearly grants discretion to boards to grant appeal rights to other persons. JFCY recommends, however,

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[20] Bill 52 increases the fines and bonds for offences related to non-attendance at school set out in *section 30* of the *Education Act.* Students who are convicted of habitual absence from school can already be fined a maximum of $1000. See, *section 30(5), Education Act* and *section 101(1), P.O.A.* This penalty would be extended to include 16 or 17 year-old students, who are now compelled to attend under *section 21* of the *Act* and therefore can be found guilty of habitual absence. The maximum penalty for parents or guardians who fail to ensure their children under the age of 18 attend school, and employers who hire students during school hours, would be increased from $200 to $1000. However, parents or guardians are no longer liable for 16 and 17 year olds who have withdrawn from parental control.

[21] The Bill extends the right to become qualified as a resident pupil to persons who are 16 or 17 years old and have withdrawn from parental control and to persons who are at least 18 years old. Bill 52 adds *subsections 36(1)(a.1), (2)(a.1), (3)(a.1) and (4)(a.1)* to the *Education Act*, so that a person now qualifies as a resident pupil if he or she is 16 or 17 years of age, has withdrawn from parental control and resides in the district or separate school zone. The attendance rights of these 16 and 17 year olds are qualified, however, by *section 43.3.* This new provision authorizes the making of regulations prescribing circumstances in which a person otherwise qualified as a resident pupil under the *(a.1)* clauses of *section 36*, shall not be so qualified. The Bill does simplify *subsections 36(1)(c), (2)(c), (3)(c) and (4)(c),* so that a person qualifies as a resident pupil where he or she is not a supporter of any board, is at least 18 years of age and resides in the secondary school district or separate school zone. Amongst other things, the Bill eliminates the twelve-month residency requirement for these provisions. In so doing, it may facilitate and accelerate the qualification of new immigrant or transient youth at least 18 years of age trying to attend in a new district or zone.

that Bill 52 amend the *Education Act* so that the legislation explicitly grants standing on appeal to all pupils at least sixteen years of age, regardless of whether they have withdrawn from parental control.

These recommendations as to standing are premised on the fact that children and youth hold rights as individuals in and of themselves, not at the discretion, or through the benevolence of their parents or those standing in their place. A youth's entitlement to standing is supported, in part, by the Supreme Court of Canada recognition in the *Eaton* case that a student's rights and interests are separate from those of the parent. If it is legally unsound to assume that parents will always make special education decisions in their child's best interests, then it is incumbent on the decision maker to grant standing to the child who is neither too young nor too disabled to make their wishes known. The same reasoning applies to student discipline proceedings when the student's very right to attend school is at risk.[22] Certainly in the arena of education, by the age of sixteen, where children's direct interests are being affected, they should be granted standing.

JFCY represented a 16 year old gifted student who sought standing in the appeal of his limited expulsion from his school. The principal opposed his standing and cross-examined his mother on her affidavit supporting him. In the end, the school board ruled that his mother could adequately represent his interests and he was not permitted to participate. His mother then conducted the appeal and refused even to call him as a witness or permit him to attend at his own hearing. The board affirmed the limited expulsion.

However, in addition to standing, the resident pupil scheme needs to be carefully reconsidered. In Ontario, the *Education Act* provides that every person who is a qualified resident pupil has the right to attend school.[23] This is the right of the pupil, not the parent or guardian or the pupil. Nevertheless, somewhat at odds with the statutory rights, a certain class of youth, however, is being penalized and denied access to schools by the current resident pupil scheme. JFCY commends this Government's expansion of resident

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[22] See, *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, 278-79.

[23] *Education Act*, s*ection 32*.

pupils to include emancipated youth. Such an amendment, however, does not recognize that the scheme, in its entirety, is outdated, given that schools are now funded per enrolled student, provided the child and parent reside in Ontario, and there is no justifiable tax reason to preclude resident pupil from being defined by a child's residence alone.

JFCY has received many calls from youth struggling to continue their education in the face of a rigid resident pupil scheme. One such call was from a sixteen year old girl who left her home in North Bay because of an abusive stepfather. She came to Toronto to live with her aunt and tried to enrol in school. The school Board told her that she could not do so because she was not a "resident" pupil, as defined under the *Act*. In other words, her guardian did not live in the same district. She was told she would have to have her aunt get legal guardianship for her before she could apply.

In another case, a fourteen year old girl left her mother's home because of verbal and emotional abuse. She moved in with her older sister. The Children's Aid Society was okay with her living with sister. The school would not accept her, however, even though parents lived in Toronto, because she was not living with custodial parent. The school told her that her sister should apply for legal custody.

Bill 52 extends and proposes to accord youth more rights than is currently in place under the *Education Act.* JFCY heralds this shift, though finds the motivation for such amendments wrongheaded, in that the purpose for these statutory changes may have more to do with releasing parents from liability, than with affording youth power and control over their educational decisions.

<u>Recommendation 2</u>: Sixteen and seventeen year old pupils have or be granted full standing under the *Education Act.*

<u>Recommendation 3</u>: Upon withdrawal from parental control by a sixteen or seventeen year old pupil, there should be a full vesting of all rights, responsibilities and obligations of a parent or guardian under the *Education Act*.

<u>Recommendation 4</u>: Strike out those penalty provisions increasing fines and bonds for habitual absence offences.

III. The Reduction of Privacy Rights with *Subsection 30(5.1)* of the *Education Act*

Jonathon had been charged and found guilty of robbery under the *Youth Criminal Justice Act* in relation to an incident that was unrelated to school activities. He was given a custodial sentence followed by probation with a condition that he attend school. When he was released from custody he tried to re-enrol in school but was refused by the principal because of his youth record which had become known in the school community.

One area of concern for JFCY is the reduction of youth privacy rights in a new provision to the non-attendance section of the *Education Act*. *Subsection 30(5.1), paragraph 3* of Bill 52 permits the full disclosure of a youth's identity where there is a conviction for the habitual absence offence and the imposition of a driver's license suspension. Such a disclosure is specifically exempted from the application of *section 99(1)* of the *Provincial Offences Act*, which prohibits the publication of the identity of a young person in connection with an offence or alleged offence. The significance of a breach of this prohibition is reflected in the potential imposition of a $10,000 fine if convicted.[24] *Subsection 99(2)* of the *P.O.A.* does, however, enumerate six specific exceptions to the prohibition ban that allows for the publication of certain kinds of information. Some of these exceptions include disclosure by a police officer for investigative purposes, disclosure to an insurer for resulting claim investigations, or disclosure in the course of the administration of justice but not for making the information known in the community.[25] In the case at hand, limited but relevant entities like the school in question or the Ministry of Transportation could be lawfully notified of a youth's license suspension through these exceptions already embedded in the *P.O.A.* Rather than endorse a more restricted scheme for disclosure, Bill 52 completely withdraws protection to a youth's identity upon conviction and license suspension, qualifying more as a public shaming initiative than an administrative tool.[26]

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[24] *Subsection 99(2), P.O.A.*

[25] See, *subsections 99(3)2., 3., and 4., P.O.A.*

[26] The Supreme Court of Canada has already recognized the harmful effects of public stigmatization schemes and the process of labelling on young offenders and their rehabilitation. The school board in that case admitted that they used the fact of an unproven charge under the *Young Offenders Act*, one unrelated to school, as the basis for excluding and suspending students. See, *Re F.N.*, [2000] 1 S.C.R. 880.

Cassandra was a grade 11 student who had never been disciplined in school before. She was very artistic and wanted to become a writer. She created her own website that included her artwork and poetry, some of which took on a dark or ironic tone. In one section, she had created a "hit list" of sorts that included famous musicians whose music she didn't like, as well as her "little brother" and one person from school. When other students showed it to the teachers, Cassandra was given a limited expulsion with a condition that she cannot return to school without a letter from a psychiatrist stating that she was not a danger to others. She appealed the expulsion but was unsuccessful. Rather than return to school where she felt humiliated in front of her peers and her teachers, she took internet courses and eventually dropped out of school.

<u>Recommendation 5</u>: Strike out *paragraph 3* of *subsection 30(5.1)*, thereby maintaining the confidentiality of a youth's habitual absence offence and any resulting license suspension, pursuant to *section 99(1)* of the *Provincial Offences Act*.

IV. Driver's License Suspension Provisions is Misguided, Ineffective and Unnecessary

A significant change in Bill 52 is its amendment to the *Highway Traffic Act* linking school attendance with student driver's licenses. Specifically, the Bill authorizes the making of regulations that would require persons who are under 18 years old to be in compliance with the compulsory attendance provisions of the *Education Act* in order to apply for any class or level of drivers license or for an endorsement on their driver's license or take a practical or written examination in respect of a driver's license or endorsement.

Many school boards have long since recognized that truancy charges against students and parents simply do not work. In one case from a number of years ago, JFCY represented a 14 year old girl and assisted her mother, both of whom were charged with truancy. At the first court appearance the lawyer was able to advise the school attendance counselor that the real issue was not a refusal to attend school, but the 14 year old girl's fear of bullying at the school that she had previously attended. The mother, who was functionally illiterate, relied upon the eldest daughter to get her younger sibling to school. Subsequent intervention by the school social worker assisted this family in enrolling both children in an appropriate school. No one had asked the girl or her mother what the issue was before taking them to court.

There is a disturbing and glaring absence of any nexus here between the proposed punishment, withholding a youth's driving privileges, and the alleged "offence" of a student's failure to attend school. At the very least, this lack of a correlation undermines the value of meaningful consequences. JFCY has long held the view that that habitual absence offences under the *Education Act* are in general unnecessary and ineffective as tools for compelling school attendance and should be abolished. Our position is that truancy should be recognized as an educational problem that calls for a response by the educational system through appropriate educational programs and services. [27] Neither retribution, symbolic punishment, nor denunciations are effective or necessary approaches to the problem of school attendance, where the only true harm done is to the student themselves. Given that with truancy the only loss is a personal one, any meaningful consequence for a student's failure to attend school should come not in the form of a general deterrent, which time and time again has proven not to work with youth. What disengaged youth need are incentives to attend and assistance in seeing what they are losing out on by not completing their secondary education. Thus, JFCY believes that it is misguided and detrimental to impose punishments for truancy at all, let alone ones that bear no relation to the "offence" itself. Furthermore, such a punitive approach to an educational problem instills or fosters in youth a cynical and distrusting relationship with the educational system.

If these driver's license suspension provisions were introduced as a means to increasing high school graduation rates, the Ontario Government is proceeding under a misguided notion that punitive and deterrent measures will actually be an effective tool against what is wrongly perceived as being a complacent or indifferent pupil.[28] Controlling driving

[27] See, Justice for Children "Educational Solutions for Educational Problems: Response to the Ontario Ministry of Education's Discussion Paper: Policy Directions for Compulsory Attendance Legislation" (March 1987).

[28] There has been little research done on the effect of these license suspension laws have on truancy or dropout rates. In the United States twenty-four states have some type of policy connecting student attendance and/or achievement to the privilege of driving. Nine states that require attendance at school to receive a driver's license: Alabama, Rhode Island, Georgia, South Carolina, Idaho, Texas, Indiana, West Virginia and North Carolina. Eleven states suspend licenses for truancy and/or academic problems: Arkansas, Louisiana, California, New Mexico, Nevada, Delaware, Ohio, Florida, Tennessee, Kentucky and Wisconsin. Five states have policies that address both the initial issuance of a driver's license and the ability of the state to suspend it for academic or attendance reasons. See, Molly Burke, "Sanctions on

privileges may not be the influential currency envisioned by this legislation. Certainly, the withholding or suspension of a driver's license is unlikely to make a difference to those disengaged students already marginalized by or struggling within the secondary school system. Nor is it clear whether this carrot and stick approach toward attendance will truly instill in young people "a lasting, positive attitude toward learning that will keep them motivated to stay in school until the graduate or turn 18," a goal articulated in the preamble to Bill 52. The suspension of driving privileges as a deterrent to leaving school is merely a "band-aid" solution to a deep wound which requires more responsive measures.[29] JFCY proposes that improvements in attendance and graduation rates requires accommodation of learning needs and inducements to stay in school rather than such a punitive measure.

One of the less obvious and deleterious effects of Bill 52 is the exclusion of youth drivers from insurance coverage. This new class of uninsured drivers is created by Bill 52, exposing parents to increased liability and accident victims to decreased compensation. The increase under Bill 52 in the class of the uninsured drivers is objectionable, in part, given the absence of a justifiable nexus between a youth's driving abilities, his or her license suspension for habitual absences and the resulting depletion of insurance coverage. The *Motor Vehicles Act*, which proscribes when an accident victim can access the Motor Vehicles Claims Fund, authorizes the Minister of Transportation to suspend the driver's license of a judgment debtor, found liable for damages or losses from an accident, until he or she repays the amount paid out by the Fund.[30] The benefits of no-fault insurance are withheld in this situation so as to encourage safe and responsible driving – the license suspension is a rational tool toward that end. The same cannot be

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Driving Privileges." StateNotes: Accountability/Sanctions, Education Commission of the States (February 2006).

[29] As recently observed by People for Education, linking drivers' licenses to graduation in the future does not address this curriculum and resource problem, or the present needs of students in secondary schools. See, People for Education, "Government putting the graduation cart before the education horse," Media Release, December 12, 2005.

[30] See, *Section 10(1), Motor Vehicles Act.*

said for the license suspension scheme in Bill 52 – it is neither rational, nor ultimately necessary.

Section 234, stat. con. 5(1) of the *Insurance Act* creates a clear statutory condition requiring that an insured "shall not drive or operate or permit any other person to drive or operate the automobile unless the insured or other person is authorized by law[31] to drive or operate it." In light of Bill 52, a new class of uninsured or unauthorized drivers is created. What this can mean, for example, is that if a young person gets into an accident while driving his or her parent's car with a suspended license, a likely if not foreseeable scenario, this may be considered a breach of the statutory condition. Liability for any resulting losses or damages will, therefore, shift away from the insurer and onto the parent.[32] This hardly focuses the family attention on the young person's educational troubles but rather distracts the family away from them, thereby adding to the problem. This liability shift can mean increased family tension, if not in the most extreme cases, the loss of the family home. Again, if the goal of Bill 52 is to increase rates of high school completion amongst youth in Ontario, then the solution cannot be one that undermines those protective factors for keeping youth engaged and in school, like a stable family environment.[33]

Furthermore, s*ubsection 58(1)(d)* of the *Insurance Act* clearly releases an insurer from being required to pay various claims by a driver whose license had been suspended prior to the date of any accident. This could conceivably leave a youth injured from an

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[31] The *Highway Traffic Act* clearly provides that only persons holding valid, unsuspended driver's licenses have authority in law to drive on a highway in Ontario, and can be prosecuted for the *section 53* offence of driving while license is suspended. See, *Sections 31, 32(1), (5) and (7) and 36.*

[32] In order for a parent not to have "permitted" a son or daughter to drive while unauthorized, the parent is required to take "all reasonable and prudent precautions to see that the statutory condition was not contravened." See, *Henckel v. State Farm Mutual Automobile Insurance* [1997] 33 O.R. (3d) 253. If a breach of the statutory condition is found, relief may still be granted by a court from forfeiture under *section 129* of the *Insurance Act*, but only where there is imperfect compliance rather than non-compliance with a statutory condition. Permitting a youth to drive while under suspension would certainly qualify as non-compliance – relief under *section 129* is far from a certainty for parents seeking coverage for such acts by their children.

[33] See, *supra* note 1 at 63.

accident, caused while driving under suspension, without coverage for income replacement, education disability, disability or loss of earning capacity benefits. The significant loss of these benefits for an injured young driver would be due to the irrelevant and unrelated factor of his or her student attendance record. Another insurance-related effect of Bill 52 is the potential reduction of compensation sources for victims of any accident caused by the uninsured young driver.[34] Finally, all Ontarians funding the Motor Vehicle Claims Fund pay when insurers are able to legally avoid their liability under their policies. The unintended consequence of the license suspension provision may be to further burden the taxpayer with increased claims or demands on the Motor Vehicle Claims Fund.

<u>Recommendation 6</u>: Strike the driver's license suspension provisions from Bill 52.

[34] In Ontario, every motor vehicle liability policy is deemed by statute to provide for statutory accident benefits ("SABs"). These include income replacement, caregiver, rehabilitation and supplementary medical benefits. *Section 268(2)* of the *Insurance Act* provides the "cascading" response of insurance policies to a SAB claimant in the following way: (1) the claimant's own policy; (2) the policy insuring the vehicle in which the claimant was riding; (3) the policy insuring the other vehicle involved in the accident; and (4) the Motor Vehicle Claims Fund. See, also *The Superintendent of Financial Services v. Markham General Insurance Company* [2002] 62 O.R. 93d) 637 at para. 3. Since 1980, a broad, statutory scheme was put into place requiring all motor vehicles in Ontario to be insured, as well as the inclusion of uninsured motorist coverage in all policies in Ontario. Thus, an insured person can make a claim against his own insurer to pay any judgment against an uninsured tortfeasor. See, *Chambo v. Musseau* [1993] O.J. No. 2140 (C.A.). Still, an insurer may be deemed "unavailable" for the purpose of the cascading responsibility for SABs under *s. 268(2)* where the insured has breached a statutory condition, like driving while unauthorized by law. In so doing, the insurer may be able to avoid financial obligation or responsibility to innocent third parties.

V. Summary of Recommendations

1. Strike out the compulsory attendance to eighteen provisions of Bill 52, but retain the equivalent learning provisions, providing clear provincial expectations about these programs in detailed regulations and within the body of the *Education Act*.

2. Sixteen and seventeen year old pupils have or be granted full standing under the *Education Act.*

3. Upon withdrawal from parental control by a sixteen or seventeen year old pupil, there should be a full vesting of all rights, responsibilities and obligations of a parent or guardian under the *Education Act*.

4. Strike out those penalty provisions increasing fines and bonds for habitual absence offences

5. Strike out *paragraph 3* of *subsection 30(5.1)*, thereby maintaining the confidentiality of a youth's habitual absence offence and any resulting license suspension, pursuant to *section 99(1)* of the *Provincial Offences Act*.

6. Strike out the driver's license suspension provision from Bill 52.