

IFMEMORANDUM

To Dean Sarnecki, ACSTA

From Anna Loparco

Date February 20, 2019

Subject File No.: 137142-1

I. Questions Presented

- 1. Whether a Catholic separate school student reverts to a public school resident if a Catholic program is unavailable for the student in the Catholic separate school district?**
- 2. Whether funding follows a Catholic separate school resident to a public school if a Catholic program is unavailable in the Catholic separate school district?**

II. Brief Answer

Pursuant to section 44(4) and 220(6) of the *School Act*, residency is determined by faith *and* location. Once a Catholic separate school district is established, a student residing within the boundaries of the Catholic separate school district is a resident of the Catholic separate school district and is not a resident of the public school district. A school board has a duty imposed by section 45(3) of the *School Act* to facilitate the enrollment, upon the request of the parent, if there are sufficient resources and facilities to accommodate the non-resident student. The enrollment of the non-resident is usually determined on a case-by-case basis and various factors such as the location of the school board and space might determine whether a non-resident will be enrolled.

When a resident student ceases to be enrolled with a school in a separate school district, there is no remaining requirement to fund their education. According to the *Funding Manual for School Authorities*, funding for k-12 education in Alberta is provided primarily on a per-student basis, based on enrollment as of September 30, which includes special education programs for students with disabilities. For the average student, movement between school boards after September 30 is expected and funding would not follow the student but is expected to average out between the school boards.

Section 62(1)(b) permits a school board to enter into educational service agreements with other Alberta school boards if it is unable to provide specific programming for the resident students and directs them to attend another school board. Special education agreements are entered into on a case-by-case basis and various factors such as: the relationship between the school boards, the type of programming required and the availability of resources might affect whether the accepting school board enters into a special education agreement with the non-resident's school board.

III. Analysis

1. **Whether a Catholic separate school student reverts to a public school resident if a Catholic program is unavailable for the student in the Catholic separate school district?**

I. Introduction

The preamble to the *School Act* [2000], Chapter S-3, recognizes that Alberta's public school system is comprised of "two dimensions, the public schools and the separate schools", separate schools rights are "guaranteed under the Constitution of Canada", and the Government of Alberta is committed to "the preservation and continuation of its one publicly funded system of education through its two dimensions: the public schools and the separate schools".

All Catholic separate school boards are both "Catholic" and "separate", the first adjective being an ecclesiastical designation and the second being a legal designation. The same dichotomous designation is relevant to Catholic public school boards, which are both "Catholic" and "public". The designation "separate" or "public" schools is a civil or legislated designation; all jurisdiction, authority and duties with respect to separate schools are constitutionally and legislatively determined.

It is generally understood that publically-funded separate Catholic education is constitutionally guaranteed in the Province of Alberta. Those provisions for Catholic public education are in full accord with the constitutional provisions respecting publicly-funded denominational school rights in Alberta, section 93 of the *Constitution Act*, 1867, section 17 of the *Alberta Act*, 1905, and section 29 of the *Charter of Rights and Freedoms*, and is recognized in the current *School Act* in the definitions of public and separate school districts and separate school electors.

II. Once an individual is characterized as a resident of a Catholic separate school district they do not revert to a public school resident irrespective of the programming offered by the Catholic separate school district

Under the *School Act*, Section 8(1) of the *School Act* broadly defines the right of access to education as every individual between the ages of 6 and 19 is entitled to have access in that school year to an education program in accordance with the *School Act*. Resident student is defined as an individual who is entitled to have access to an education program under section 8 and who is a resident student, as determined under section 44. Residency is determined by faith and location. If an individual resides within the boundaries of a separate school district and shares the same faith as those who establish the district, that individual is a resident of the separate school district, not of the public school district. The *School Act* deems a student to be a "resident student" of the district or division in which the student's parent resides.

Section 44(3) starts with the presumption that every individual is a resident of a public school district or division. It reads:

(3) Subject to this section, every individual is a resident of a public school district or division.

Residency, for the purpose of Catholic schools is set out in sections 44(4) and 220(6) of the *School Act* which read:

“44(4) Where a separate school district is established, an individual residing within the boundaries of the separate school district who is of the same faith as those who established that district, whether Protestant or Roman Catholic,

(a) is a resident of the separate school district, and

(b) is not a resident of the public school district.

...

220(6) ... after a separate school district is established, a person residing within the boundaries of the separate school district who is of the same faith as those who established that district, whether Protestant or Roman Catholic, as a resident of the separate school district and is not a resident of the public school district.”

Section 44(4) and 220(6) states once a Catholic separate school district is established, a student residing within the boundaries of the Catholic separate school district is a resident of the Catholic separate school district and is not a resident of the public school district. Sections 44(4) and 220(6), provide that faith, Protestant or Catholic, is the determinant as to whether one is a resident of a particular school district, public or separate.

Sections 44 and 45 of the *School Act* requires that if a Catholic separate school district is expanded over a new area, then those individuals residing within the expanded boundaries of the separate Catholic school district who are Catholic, will become residents of the Catholic separate school district and cease to be residents of the public school district. After an area has been established and the parent(s) is of the minority faith, they are no longer considered to be residents of the public school board, which is the board all other individuals fall under.

The *School Act* uses geographical boundaries to determine the parameters of a separate school district, rather than the type of program offered by the separate school district. The wording of the legislation indicates that, once a Catholic separate school district is established in a geographical area, and the student is of the Catholic faith, the student becomes a resident of the Catholic separate school district and cannot be a resident of the public school district, irrespective of the programs provided by the separate school district. Once an individual is characterized as a resident of the Catholic separate school district they do not revert to a public school resident even if they attend a public school.

III. A School Board is Required to Enroll Non-Resident Students of Another Board on Application of the Student's Parent and if There are Sufficient Resources

While the legislative scheme references geographic boundaries as determining the status of student's residency, the *School Act* also emphasizes choice and flexibility. In Alberta, it is common for a school board to educate non-resident students. A school board is required to enroll resident students of another board upon request of the parent of the student under section 45(3), if in the opinion of the enrolling board

there are sufficient resources and facilities available to accommodate the non-resident student. The school has a duty imposed by section 45(3) of the *School Act* to facilitate the enrollment of the non-resident student, provided only, that there is sufficient resources and facilities to accommodate the student. The decision to enroll a student in a program provided by a school board or district to which the student is not a resident is made by that student's parent and the non-resident school board subject only to the availability of resources. That school board to which the student is a resident does not have the authority to interfere in that decision. A school board does not, therefore, have exclusive jurisdiction over its resident students.

Section 45(3) of the *School Act* reads as follows:

45(3) A board shall enroll a resident student of the board or of another board in the school operated by the board that is requested by the parent of the student if, in the opinion of the board asked to enroll the student, there are sufficient resources and facilities available to accommodate the student.

2. Whether funding follows a Catholic separate school resident to public school if a Catholic program is unavailable in the Catholic separate school district?

I. Introduction

In communities with separate school jurisdictions, property owners declare their religious affiliation, either Protestant or Roman Catholic, so their education property tax dollars can be directed to those separate school jurisdictions. Alberta Catholic separate schools have dual constitutional rights to a declared property assessment base (section 17(1) of the *Alberta Act*, 1905, and chapters 29 and 30 of the *Ordinances of the North-west Territories*, 1901) and to equity and fairness in government funding (s.17(2)).

Sections 170 through 178 of the *School Act*, comprising the Alberta School Foundation Fund sections, are those provisions which were successfully defended in the Supreme Court of Canada in *Alberta Public School Boards' Association v. Alberta (Attorney General)*, [2000] SCC 45. They provide a detailed system whereby a separate school board may "opt out" of the Fund and continue to requisition from its taxation assessment base but receive from the government the "same amount per student for the school year" as all other public and separate school boards (the "top-up"), and if the separate school district or division requisitions more from the municipality than the amount per student per year paid to all other public and separate school boards, any refund to the Fund will be "subject to the rights under the Constitution of Canada of separate school electors" (the "claw-back"). These provisions allow equal funding to be provided for separate school boards as compared to their public school counterparts under the principles of equity incorporated in section 17(2) of the *Alberta Act*, 1905.

All Catholic separate school boards in Alberta have opted out of the Alberta School Foundation Fund under the *School Act*, s. 171(2). That resolution "remains in effect until it is rescinded by the board by another resolution" (*School Act*, s. 171(3)). Opting out of the *School Act* was accomplished by resolution drafted by ACSTA, returned to ACSTA, and delivered to the Minister as a complete package, by ACSTA.

II. Funding is determined on a per-student basis on September 30 irrespective of student residency status

Alberta Education publishes a *Funding Manual for School Authorities* (the “*Funding Manual*”) on an annual basis. The *Funding Manual* provides precise details of funding and how it is distributed to school authorities. Failure to follow the *Funding Manual* could result in a school authority losing its funding, being required to repay, or having its funding withheld. Alberta Education provides base funding that corresponds to the number of students enrolled at a school on September 30th of a school year, for all publicly funded schools in Alberta.

Additional funding is provided to the school authority on the basis of the number of special needs students. The *Funding Manual* sets out differential funding to account for the varying types of disabilities such as severe disabilities or mild/moderate disabilities. Funding for special needs individuals is also determined based on enrolment as of September 30th.

Funding for k-12 education in Alberta is provided primarily on a per-student basis. The funding framework allocated to school authorities is based on the demographic (the number and type of students served) and geographic (area of the province in which the students are being served) environment in which services are delivered to students. Kindergarten and Grades 1 to 9 students are funded on a per-student basis. Grades 10 to 12 students are funded based on the number of high school credits taken.

When a student ceases to be enrolled with a school in a separate school district, there is no remaining requirement to fund their education, even if they are a resident of the separate school district (*Jobb v. Parkland School Division No. 70*, [2017] AHRC 3 [*Jobb*]). Where a student is no longer attending and therefore not eligible or funded, the school division had no responsibility for the student’s programming (*Jobb*).

In accordance with the *Funding Manual* and *School Act*, if a Catholic resident enrolls and attends a public school starting September 1, the public school would receive funding for that student, irrespective of their residency status. The student would continue to be a Catholic resident, with non-resident status at the public school, however, the public school would receive funding for the education of the Catholic non-resident student. A special funding agreement between the two school boards would not be required.

If a Catholic resident that does not require specialized programming enrolls in a public school board after September 30th, a funding agreement would also not be required. The *Funding Manual* and *School Act* contemplates movement between school boards after September 30 and assumes movement between school boards will balance out. However, enrollment of the non-resident student would depend on whether the accepting school board had the resources to accommodate the student, such as classroom space.

III. A School Board can Enter into Educational Service Agreements with other School Boards

The *School Act* provides for situations in which a school authority may send funds to another division for its resident student to attend a school elsewhere in limited circumstances. Section 45 of the *School Act* provides that “a board shall ensure that each of its resident students is provided with an education program consistent with the requirements of this *Act* and the regulations.”

Section 62(1)(b) permits a school board to enter into educational service agreements with other Alberta school boards or persons to provide education programs with respect to its resident. The use of section 62(1)(b) indicates that a school division has determined that it is not able to provide appropriate programming for a student in the best interest of the resident-student and can direct that student to enroll in another school board. In cases where the school authority has not directed a resident student elsewhere and the parent has elected for the student to enroll in another school, the school authority receives no funding for that student and has nothing that it could direct to the chosen school, in accordance with the *School Act* and the *Funding Manual*.

Section 62(1)(b) of the *School Act* is permissive and does not limit a school board's authority to offer an education program to non-resident students to circumstances in which there has been an agreement with another school board (*Calgary Board of Education v. Palliser Regional Division No. 26*, [2007] A.W.L.D. 3281, [2007] A.W.L.D. 3282). It is up to the accepting school board to determine whether they have the resources to accommodate the student and whether a special funding agreement should be entered into. Whether a school board chooses to enter into a special funding agreement with another school board is determined on a case-by-case basis and depends on a number of variables such as the accepting school board's relationship with the non-resident's school board, the circumstances of the non-resident, location and size of the school board and resources to accommodate the non-resident student.

For special needs Catholic residents enrolled in a public school as of September 1, the public school would receive the funding for the Catholic student resident. However, if the Catholic school determines after September 30 they do not have the appropriate programming to support the special needs individual enrolled in their school, and has received funding, they could direct the student to attend a public school that has appropriate programming for the student. The public school would determine whether they have enough resources to accept the non-resident student and whether they want to enter into an agreement with the Catholic school board for the education of the special needs non-resident student in recognition of the additional costs to that their education may require. It would be up to the accepting public school board to determine whether a special funding agreement should be entered into.

Section 62 of the *School Act* reads as follows:

62(1) A board may, without the approval of the Minister,

(a) enter into an agreement with

(i) a person, or

(ii) a joint committee established under section 63, respecting the provision of educational, managerial or other services with respect to the operation of schools;

(b) with respect to its resident students, enter into an agreement with another board or person to provide education programs;

(c) enter into an agreement with another board, a non-profit organization or a municipality concerning the promotion and development of recreation and community services.