From "Zero Tolerance" to Progressive Discipline: Ontario's Bill 212

Educational Leadership Today and Tomorrow: The Law as Friend or Foe
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The passage of Bill 212

The Education Act of Ontario, as amended by the Education Amendment Act (Progressive Discipline and School Safety), 2007 (Bill 212) was passed by the Ontario Legislature with unanimous consent on June 4, 2007. It has now been in effect for over two months, since February 1, 2008. The Bill amends the somewhat controversial "Safe Schools" provisions of the Education Act related to the suspension and expulsion of students. At the same time, a new regulation came into force. Regulation 472/07 sets out the mitigating factors a principal must consider when investigating suspensions and expulsions. This paper surveys some of the changes brought about by the legislation, explains the historical circumstances giving rise to the new regime, and comments on its ambitious revisioning of student discipline in Ontario.

Highlights

Bill 212 repeals sections 306 to 311 of Ontario's Education Act and provides numerous changes with respect to the suspension and expulsion of students. The new legislation modifies the existing system of suspension and expulsion of students who engage in certain prohibited activities while keeping elements of the existing system of discretionary and mandatory suspensions. The list of infractions which may lead to suspension has been expanded to include bullying – an important step in achieving safe schools and in recognition of the growing problems related to the phenomenon of cyberbullying and other types of bullying and largely the result of lobbying efforts by teacher federations. Under the new s. 306(1), suspension must be at considered where bullying occurs.

The new system builds in flexibility and progressive consequences for infractions, and provides students with programs while suspended and expelled. Significantly, Bill 212 changes the decision making structure so that teachers are no longer responsible for suspending students.

There are several other important changes which have now been included in the law, including:

- The principal is solely responsible for suspending students and making recommendations to the board for expulsion. Bill 212 repeals the provision that gave teachers the authority to suspend students for a day. Suspensions rest once again within the authority of the principal.[1]

- School boards are required to assign suspended students to a special program.[2] Students who are expelled from all schools of a board must be assigned to a program for expelled students.[3] All school boards must have at least one program for suspended students and at least one program for expelled students.[4]

- A suspension imposed under the new list of activities leading to possible suspension in s. 306 can be appealed to the board in accordance with the provisions dealing with appeal of suspensions.[5] On an appeal, the board must either confirm the suspension, reduce the length of the suspension or quash the suspension.

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[1] *Education Act*, R.S.O. 1990, Chapter E.2, ss.306, 310.

[2] *Ibid. s. 306(5).*

[3] *Ibid. s. 311.5(b).*

[4] *Ibid. s. 312.*

[5] *Ibid. s. 309.*

- Following the suspension of a student, in accordance with the list of activities leading to suspension,[6] the principal must promptly conduct an investigation to determine whether to recommend to the board that the student be expelled.[7] If the principal decides not to recommend expulsion after investigation, he or she must confirm the suspension, reduce the length of suspension or withdraw the suspension. At this point, the suspension can be appealed to the school board unless it was withdrawn.

- After investigation, if the principal recommends expulsion, he or she must prepare a report containing his or her findings and recommendations.[8] The board must then hold an expulsion hearing.[9] The board must consider the submissions of every party to the hearing (i.e. the principal, student, student's parent or guardian). The board must decide whether to expel the student.

- If the board decides that expulsion is the proper course of action, it must further decide whether the student should be expelled from his or her school or from all schools of the board. The board is not permitted to expel the student if more than 20 days have passed since his or her suspension.[10] If after investigation expulsion is not recommended, the board must confirm, reduce the length or quash the suspension.[11] This decision is final.[12]

"Zero tolerance" no longer

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[6] *Ibid. s. 310.*

[7] *Ibid.* s. 311.1.

[8] *Ibid.* s. 311.1(7).

[9] *Ibid. s.* 311.3.

[10] *Ibid.* s. .311.3(8).

[11] *Ibid. s.* 311.4(1).

[12] *Ibid.* s. 311.4(4).

The Safe Schools Act, 2000 S.O. 2000, c. 12 was introduced by the Ontario's Conservative Government under Premier Mike Harris. It mandated Codes of Conduct for schools and provided mechanisms for the suspension and expulsion of students. Under this previous regime, which had been widely (but inaccurately) characterized as a type of "zero tolerance" regime, the government of the day was reacting to a perceived disintegration of the professional, respectful culture of Ontario schools.

One of the most severe provisions imposed mandatory suspension, expulsion and police involvement for certain types of infractions. The Act imposed mandatory suspensions for behaviour such as possessing alcohol or illegal drugs, threatening to inflict serious bodily harm on another person, and drinking. The Act imposed mandatory expulsions for students who, for example, were found with a weapon, or had during the course of a fight caused harm to another to the extent that the person required medical treatment.[13]

To provide some context: in 2000-01, the year before the Safe Schools Act was implemented locally, 113,778 Ontario students were suspended, and 106 students were reported expelled. But, suspensions and expulsions spiked in the first two years after the Act was introduced. By the third year, in 2003-04, the number of suspended students was 152,626 and the number of expelled students was 1,909.[14]

Over time, the Safe Schools regime created more and more controversy. The Toronto District School Board (TDSB) was especially active in assessing the effect of the so called "zero tolerance" regime. According to the Falconer Report, discussed in more detail below, the TDSB created a Task Force ("Safe and Compassionate Schools Task Force") and a

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13 School Community Safety Advisory Panel, *The Road to Health: A Final Report on School Safety* (January 4, 2008),online: http://www.schoolsafetypanel.com/finalReport.html ("The Falconer Report") at 25.

14 Ministry of Education Media Release, "McGuinty Government Releases Data on School Discipline" (November 23, 2005), online: http://ogov.newswire.ca/ontario

follow-up Work Group ("Safe and Compassionate Schools Work Group") to deal with the widespread perception that the implementation of the Safe Schools regime targeted children and youth of racialized and marginalized communities.[15] The TDSB Task Force's final report indicated that there was perception that the regime had simply given schools the power to *remove* students who seemed to have problems.[16] Obviously, the entire school community was concerned about the perception that students in trouble would be deprived of a public school education.

The criticisms gained momentum to the extent that the Ontario Human Rights Commission publicly raised its concern about the application of the Safe Schools Act and internal school discipline policies, which it too viewed as having a disproportional impact on racialized students and students with disabilities. Statistics collected from the Toronto District School Board (TDSB) showed that the percentage of suspended and expelled students had increased significantly following the introduction of the legislation.[17]

In July 2005, the Commission initiated a complaint against the TDSB and the Ministry of Education.[18] , in order to seek a systemic resolution of the discriminatory effect it believed the Act was having on certain student groups. Specifically, the complaint alleged that the TDSB had failed to meet its duty to accommodate racialized students and students with disabilities in its application of discipline, including a failure to provide adequate alternative education services for racial minority students and students with disabilities who were suspended or expelled. The Commission stated that this amounted to a failure on the part of the TDSB to provide equal access to education services and that this constituted discrimination, contravening sections 1, 11 and 9 of the Ontario Human Rights Code.

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15 *Supra* note13 at 26.

16 *Ibid.* at 27.

17 *Ibid.* at 26.

18 Ontario Human Rights Commission, Media release. "Commission to investigate application of safe schools legislation and policies" (July 8, 2005), online: http://www.ohrc.on.ca/en/resources/news/NewsRelease.2006-05-19.6754834630.

In what was called a "public interest settlement", just a few months later the TDSB (the Ministry of Education settled separately later) accepted and acknowledged the widespread perception of the discriminatory effect of the application of current school disciplinary legislation and policies and agreed to implement measures to address the concerns raised.[19] In addition to a number of other commitments, the TDSB undertook to collect and analyse data on suspensions and expulsions to determine the extent to which the Safe Schools legislation was having an adverse impact on individuals protected under the Code.

Around the same time, the Commission also mediated a positive settlement in four complaints against another school board, the Dufferin-Peel Catholic District School Board.[20] One of the key issues raised in the complaints was that "mitigating factors", such as attention deficit disorder or other disabilities, were not being sufficiently considered before imposing a suspension or expulsion. In some instances, students related that they were the target of racial or other harassment. The Commission's review of research in other jurisdictions showed that it was important for education systems to take into account the discriminatory impact that suspension and expulsion measures can have on racialized students and students with disabilities, particularly on students' ability to complete an education.

As part of the resolution, the Dufferin-Peel Catholic District School Board undertook initiatives ranging from anti-racism awareness and disability accommodation training. Other initiatives included making alternative educational programs and services available to all students under suspension or expulsion, and working with the Commission to look at gathering statistics and ensuring measures undertaken with respect to the principles set out in the Ontario Human Rights Code.

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19 Backgrounder - Human Rights Settlement Reached with Toronto District School Board and Terms of Settlement (November 16, 2005), online: http://www.ohrc.on.ca/en/resources/news/Nov142005Backgrounder.

20 Backgrounder - Commission settles complaints with the Dufferin-Peel Catholic District School Board , Public Interest Remedies (October 6, 2005), online: http://www.ohrc.on.ca/en/resources/news/PublicInterestRemedies.

Almost two years later, the Ministry itself entered into related settlement with the Commission, promising to continue with its comprehensive review of the Safe Schools provisions of the Education Act. The Ministry agreed to request amendments to the relevant regulations to include mitigating factors and require principals and school boards to consider mitigating facts prior to suspending or expelling any student.[21] All references to "zero tolerance" had to be wiped out entirely, including the language in the Education Act, related regulations, and policies.

By this time (April 2007), it was clear that the rigid suspension and expulsion statutory regime did have an unwanted differential effect – as confirmed by the Ontario Human Rights Commission. There was anecdotal evidence to the effect that student disenfranchisement was heightened by the suspensions, and students who were suspended or expelled were wearing their punishment as a badge of honour. Programs for students of school were few and far between, and there was a lack of educators who had experience in dealing with violent and potentially violent youth. Now, in effort to do away with this inflexible approach to punishment, Regulation 472/07 sets out the following mitigating factors for the school's administrator to take into consideration, should they in fact mitigate the seriousness of the activity for which a student was punished:

1. The pupil's history.
2. Whether a progressive discipline approach has been used with the pupil.
3. Whether the activity for which the pupil may be or is being suspended or expelled was related to any harassment of the pupil because of his or her race, ethnic origin, religion, disability, gender or sexual orientation or to any other harassment.
4. How the suspension or expulsion would affect the pupil's ongoing education.
5. The age of the pupil.

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21 Terms of Settlement (April 10, 2007), online: http://www.ohrc.on.ca/en/resources/news/edsettlementen.

6. In the case of a pupil for whom an individual education plan has been developed,
   I. whether the behaviour was a manifestation of a disability identified in the pupil's individual education plan,
   ii. whether appropriate individualized accommodation has been provided, and
   iii. whether the suspension or expulsion is likely to result in an aggravation or worsening of the pupil's behaviour or conduct.[22]

Stick, Meet Carrot: returning to principles of progressive discipline

As of December 2004, the new Liberal government commenced a review of the Safe Schools Act and its related policies and programs, by appointing a "Safe Schools Action Team". The Safe Schools Action Team issued its final report to the Minister of Education in June of 2006.[23]

Bill 212 is the result of this long process. According to information published by the government, Bill 212 aims to "combine discipline with opportunities for students to continue their education" if suspended or expelled.[24] To combat criticisms that students forced to leave the school environment were essentially abandoned, one of the changes to the Education Act requires school boards to offer concrete programs to students who have been suspended or expelled for more than five days. Four Policy/Program Memoranda

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22 Ontario Regulation 472/07, Suspension and Expulsion of Pupils, s.3.

23 Safe Schools Action Team, "Safe Schools Policy and Practice: An Agenda for Action" (June 2006), online: http://www.edu.gov.on.ca/eng/ssareview/report0626.pdf.

24 Media Release, Statement by Minister of Education Kathleen Wynne re: school safety (January 10, 2007), online: http://ogov.newswire.ca/ontario/GPOE/2008/01/10/c8084.html?lmatch=&lang=_e.html

(PPM) have been issued to assist school boards in implementing these programs: Nos. 141, 142, 144 and 145.[25]

Policy/Program Memoranda: corrective *and* supportive discipline

Under PPM 141, "School Board Programs For Students On Long-Term Suspension", a "long-term suspension" means a suspension of more than five school days. In the case of long-term suspensions, Bill 212 requires school boards to offer at least one board program for suspended students.

Boards are also expected to provide "homework packages" for students who have been suspended for less than six days. In addition, boards are expected to actively encourage suspended students to participate in the board program for suspended students. Interestingly, boards cannot compel students on long-term suspension to participate in a board program for suspended students.

A Student Action Plan (SAP) must be developed for every student on a long-term suspension who commits to attend the board program for suspended students. The SAP will outline the objectives for students and be tailored to meet the student's specific needs. The program must include an academic component for students on a suspension of six to 10 school days. For students suspended for 11 to 20 school days, the program must consist of both an academic and a non-academic component.

PPM No. 142, "School Board Programs For Expelled Students", requires school boards to provide at least one program for students who have been expelled from all schools of the board. Such programs are required to have an academic and non-academic component. Boards are expected to encourage expelled students to participate in the board program for such students but school boards cannot compel expelled students to participate in these programs. However, expelled students who wish to return to school must satisfy the

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[25] All of the Ministry of Education Policy/Program Memoranda are available on the Ministry website at http://www.edu.gov.on.ca/extra/eng/ppm/ppm.html.

objectives required for successful completion of a program for expelled students.[26] A student who has been suspended pending an expulsion hearing must be assigned to a board program for students on long-term suspension.

With PPM 145, "Progressive Discipline and Promoting Positive Student Behaviour", the Ministry re-emphasizes the return to progressive discipline by encouraging "early intervention" strategies and actively promoting and supporting appropriate and positive student behaviours. Each board is now required to have its own progressive discipline policy in place.

These approaches appear to represent a fundamental change in the treatment of suspended and expelled students: from rejection and isolation to educational initiatives individually designed to address the students' particular needs. It seems at this stage that these changes are a step in the right direction. However, it remains to be seen, of course, whether these changes can be successfully implemented; whether boards can find the funds to provide relevant and effective alternative programs; and how and by whom instruction will be provided to suspended and expelled students.

Finally: Real Consequences for Bullying

One of the other important changes in Bill 212 is the inclusion of bullying in the Act as grounds for suspension, along with the traditional infractions such as possessing illegal drugs. This measure represents an positive development, especially considering that anecdotal surveys have documented a growing problem of aggressive, disruptive and violent bullying behaviour in the schools, both between students and by students against teachers or other members of the education community.

Under Bill 212, suspension, and when necessary, expulsion must be considered where bullying occurs.[27] Many in the educational community had requested formal recognition

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[26] *Supra* note 1 at s.314.1.

[27] *Supra* note 1 at s.306(1).

of bullying and violence directed at students and other members of the school community as a serious problem. The term "bullying" is defined not in the legislation itself, but in PPM No. 144: "Bullying Prevention and Intervention". PPM No. 144 points out that children who suffer prolonged victimization through bullying, as well as children who use power and aggression to bully, may experience a range of psycho-social problems that can extend into adolescence and adulthood. Addressing this as a serious issue is consistent with emerging trends in harassment law generally.

The PPM's definition of "bullying" is broad enough to include not only student-on-student behaviour but abuse of power more broadly, including student-on-teacher or student-on-administrator behaviour including The PPM requires boards to use the following definition of bullying in the development of policies and prevention efforts:

> Bullying is a typical form of repeated, persistent and aggressive behaviour directed at an individual or individuals that is intended to cause (or should be known to cause) fear and distress and/or harm to another person's body, feelings, self-esteem, or reputation. Bullying occurs in a context where there is a real or perceived power imbalance.

Behaviour that is physical (e.g., hitting, pushing, tripping), verbal (e.g., name calling, mocking, or making sexist, racist, or homophobic comments), or social (e.g., excluding others from a group, spreading gossip or rumours) all constitute examples of bullying, according to the Memorandum.

Importantly, and as many affected stakeholders have pointed out for some time now, bullying is also recognized as occurring through the use of technology (e.g., spreading rumours, images, or hurtful comments through the use of e-mail, cellphones, text messaging, Internet websites, or other technology). It seems the law has finally caught up to the cyberbullying and internet-based defamation so frequent in schools today. While many incidents have happened under the radar, other examples have been widely publicised, such as the Scarborough student who was suspended for creating a degrading webpage about a vice-principal, and the 18 high school students in Caledon East who were

suspended after using Facebook to publish insulting information and comments about their principal.[28]

The Ministry also implemented the following measures to tackle the problem of bullying in schools:

- a 3 million dollar partnership with Kids Help Phone, a hotline providing anonymous counselling to students who are dealing with bullying issues;
- a registry of bullying prevention programs; and
- funding to help schools purchase, create or expand their bullying prevention programs.

The "Falconer Report" Makes Waves

Following a rash of serious violent incidents at schools in Toronto, including the death of 15-year-old Jordan Manners in 2007, the Toronto District School Board struck a panel to conduct a school-specific review on issues of violence, of C.W. Jefferys Collegiate Institute (where Jordan Manners' death occurred) and at Westview Centennial Secondary School. It is worth noting that both of these are secondary schools. The three-person panel was mandated to make findings and recommendations to the Director of the Toronto District School Board by July 16, 2007 with respect to:

- The practices and procedures at C.W. Jefferys in the two years prior to May 23 2007 with regards to student supervision, student discipline and building security;
- Factors influencing the ability of C.W. Jefferys in particular or the Toronto District School Board schools in general to maintain student order and discipline; and,

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28 Beatrice Schriever, "Cyberbullying", *Professionally Speaking* (September 2007), online: http://www.oct.ca/publications/professionally_speaking/september_2007/cyberbullying.asp.

- Improving practices in TDSB schools with regards to prevention, school supervision, discipline and security which will create a positive, safe and welcoming school environment.

In the latest in the series of reports aimed at understanding and addressing the cycle of discipline and violence, the panel issued "The Road to Health: A Final Report on School Safety on January 10, 2008[29] ("The Falconer Report"). The Falconer Report generated a strong media reaction and much attention to the issues by various stakeholders throughout Ontario. This was in part due to its stark findings regarding the prevalence of guns, knives and weapons at the two schools and its clear pronouncements about the need for racial equity.

The Report includes primary research and surveys regarding safety issues at the two TDSB secondary schools studied. It also explores, more broadly, Aboriginal education in the TDSB, gender-based violence, trustee governance, and school safety issues generally (i.e., barriers to reporting, the relationship between discipline and equity, funding, etc.). It states that its intent is to offer a blueprint for change.

The Report issued 126 recommendations, targeted mainly at the TDSB, other school boards, and the Ministry of Education. Among them:

- Recommendation 93-99: Schools with high suspension/expulsion rates – at-risk schools – should be staffed with a social worker, a child and youth worker, and a child and youth counsellor. The TDSB should hire 20 new full-time social workers and child and youth counsellors.[30]

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[29] The Road to Health: A Final Report on School Safety (January 4, 2008),online: http://www.schoolsafetypanel.com/finalReport.html ("The Falconer Report").

[30] *Ibid.* at 521.

- Recommendation 91: Students should be required to wear identification cards around their necks ("lanyards").[31]
- Recommendations 88-89: Potential storage areas for weapons should be the subject of regular searches, including consideration of random usage of TDSB-owned canine units "sniffer dogs" that specialize in firearms usage. The panel also discussed security cameras and controlling access doors with adult monitors.[32]

Other recommendations are aimed at community partners, such as the City of Toronto, the Toronto Police Service, the United Way of Greater Toronto, and the Toronto Community Housing Corporation. The report encouraged a multi-layered inter-agency response to marginalized youth and communities, and a re-invention of the existing "Interdivisional Committee on Integrated Responses to Priority Neighbourhoods".[33]

The Falconer report focussed its efforts on two secondary schools. We suggest that more work needs to be done on the early identification of issues in the elementary panel on the belief that the seeds of violence in high school are sewn at an early age in the earliest of elementary grades.

Elementary teachers have noted that they are often the "early warning" mechanism for the public education system. From junior kindergarten forward, elementary teachers identify behavioural issues among young students and strive to find early intervention supports for youths in their care. Early intervention programs are often difficult to locate and resources are scarce. The system itself does not appear geared up to encourage early identification and intervention. There is a dearth of specialist available in the earliest years in public school boards. If any of the Falconer recommendations in this area are accepted, it is hoped that professional social workers, specialised teachers and mental health professionals may become more available in the early years of a student's public

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[31] *Ibid.* at 515.

[32] *Ibid.* at 505-516.

[33] *Ibid.* at 553.

education. Students who are not specifically "identified" as having special needs may still exhibit anti-social or violent behaviours in their early years, and this type of behaviour may require early intervention, before youths find themselves disenfranchised and exhibiting increasingly unacceptable behaviour by the time they arrive in our high schools.

The Falconer report paints a disturbing picture of certain secondary schools in crisis, where students are not safe; where the educational community is fearful; where weapons are commonplace, and where "sniffer dogs" are being actively considered.

Conclusion

Bill 212 has given all involved in the education communities an opportunity to be proactive, both in workplaces and outside the four walls of schools, in bullying prevention and in crafting progressive solutions for the students who need supportive, individually-tailored attention. The goals of these changes are commendable. It remains to be seen and shown by statistical evidence (the gathering of which has been agreed to by the Ministry of Education in the landmark settlement[34] in 2007) whether this new regime of progressive discipline will decrease rates of violent incidences leading to suspension or expulsion, whether the most severe disciplinary measures will continue to affect racialized and otherwise marginalized students in a disproportionate way, and whether the programs offered to disenfranchised youth are having some effect.

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[34] *Supra* note 21 at Part III, Monitoring for Disproportionate Impact (Data Collection). The Ministry of Education agreed to make suspension and expulsion data available by board on its website on a regular basis, and to support the efforts of school boards prepared to collect data for the purpose of determining the extent to which these forms of discipline may have an adverse impact on individuals protected under the Ontario Human Rights Code. The Ministry agreed to hire an independent, qualified researcher with expertise in the area of data collection.