

THE SAFE SCHOOLS ACT, ONE YEAR LATER LESSONS LEARNED ¹

1. INTRODUCTION

Last year at CAPSLE 2001, we described the essential features of the *Safe Schools Act, 2000* ("Bill 81"), especially in the area of suspensions and expulsions, and shared some of our criticisms of the new discipline process in Ontario. *See Appendix "A"*

That process requires principals to assume the roles of investigator, decision maker and prosecutor. It further requires - if the ultimate sanction of a full-expulsion is to be utilized - a quasi-judicial proceeding before a committee of trustees, i.e. a "disciplinary committee" of the board. In short, the process has been rendered more legalistic, adversarial and more complex. *See Appendix "B"*. The process of discipline bears too close a resemblance to the criminal justice system.

The goal of this paper is to update substantive changes or additions to the process and to share some of the lessons learned since September 1, 2002. The focus will primarily be on the expulsion process mainly because that is where most of the interaction has occurred between principals, legal counsel, and trustees.

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We will review the regulatory changes which have been implemented since the writing of our previous paper. We will also share some lessons learned by educators and legal counsel and provide our prognosis as to how the discipline process will continue to evolve.

2. NEW LEGISLATIVE CHANGES

At the time of the writing of our previous paper, Regulation 37/01 was in place (which provided criteria which removed conduct from the requirement for ‘mandatory’ expulsions) but the significance of the regulation was not fully appreciated. Subsequently, Regulation 106/01 was enacted which applies the same criteria to suspensions as those applied with respect to expulsions set out in Regulation 37/01. In particular, if any one or a combination of the following is identified an expulsion or a suspension is not mandatory.

- (a) the pupil does not have the ability to control his or her behaviour;
- (b) the pupil does not have the ability to understand the foreseeable consequences of his or her behaviour; or
- (c) the pupil’s continuing presence in the school does not create an unacceptable risk to the safety of any person.

These issues must be decided by both the principal and the Board Committee at different stages within the discipline process. This has been a rather difficult task for many principals. Part of the reason is that when examined closely, it becomes apparent that (a) and (b) are more medical questions than educational. Principals are understandably intimidated by a requirement to make that type of a decision.

Legal counsel representing students have not raised these issues in defence of their clients actions as frequently as we expected last year.

3. NEW APPEAL RULES

Regulation 37/01 also provides for the appeal of an expulsion imposed by a board to the Child and Family Services Review Board (“CFSRB”).² Last summer, Regulation 303/01 to the *Child and Family Services Act* was enacted, which provided for some basic time lines within which an appeal must take place. Last month, the CFSRB released its own Rules of Procedure which govern the new expulsion appeal process (the “CFSRB Rules”).³

² s. 311(5) and Regulation 37/01 to the *Education Act*

³ One expulsion hearing took place prior to the creation of the Rules of Procedure, and consequently, the parties were required to agree to a mutually acceptable procedure for the proceedings. In this case, the appeal was heard as a trial de novo on the trial record.

[This is the first time that the CFSRB has considered appeals in matters of student discipline.]

Regulation 70 and the CFSRB Rules provide that:

- appeals are governed by the *Statutory Powers Procedure Act*, R.S.O. 1990, Chap. 522 as amended (SPPA) (CFSRB Rules 1);
- the appeal will likely be by a trial *de novo*, i.e. matter is heard as a new trial⁴;
- the appeal can be written, electronic, orally (or any combination thereof) (CFSRB Rule 37);
- the parties can bring motions (CFSRB Rule 19) and pre-hearing conferences can be required between the parties (CFSRB Rule 26);
- a notice of appeal must be initiated within 60 days of the decision (Reg 70, s. 69.1(2)) and a hearing must be convened within 30 days of the notice of appeal (Reg 70, s. 69.1(7)); and a decision must be rendered within 10 days of the completion of the hearing (Reg 70, s. 69.1(9)); and,

⁴ Although not explicit, the CFSRB Rules implicitly provide for a trial *de novo* hearing of an expulsion matter. This is the position which has been taken by the CFSRB. In our view, it is questionable whether the CFSRB has jurisdiction to conduct a trial *de novo* upon the appeal of an expulsion hearing as

- the CFSRB board can make orders regarding the disclosure of documentation (CFSRB Rule 33). This rule seems to permit disclosure beyond the “reasonable information” standard of the SPPA.
- the board may make an order for costs if certain conditions are satisfied.
- the principal, who as a party to the discipline hearing before the board committee had the responsibility for proving the case, is not a party to the appeal in absence of an order to that effect.

As of the writing of this paper, only one appeal has been heard. In that case the appeal from a decision to impose a limited expulsion was dismissed. Accordingly, the limits of the tribunal’s authority on appeal and the validity of its rules have not yet been tested.

opposed to appeals on the record.

Some have suggested that the CFSRB, when considering expulsion appeals, should consider a broad range of information including whether the school board had provided the student with sufficient or necessary programs and supports prior to the expulsion incident. One member of the CFSRB confirmed publicly that it views its role upon review of an expulsion matter as being restricted to simply determining whether an ‘infraction’ as defined under Bill 81 took place, and if so, whether mitigating factors set out in regulation 37/01 exist. This would seem to be a narrower focus than that which section 309(19) of the *Education Act* which requires the board committee to consider a wide range of issues including the “pupil’s history.”

4. LESSONS LEARNED

A discipline process within an education system should be, by definition, a learning experience for the participants. To that end, the following is a list of some of the more significant lessons educators and the lawyers who represent them have learned thus far. We have deliberately not listed these lessons in order of priority, we have left that to the reader:

Lesson 1 – Do not interpret this legislation in a narrow, legalistic manner

Section 309(1) of Bill 81 provides that the listed infractions only apply if a student commits the infractions “while he or she is at school or is engaged in a school-related activity”;

Some school officials and lawyers representing students have taken the view that mandatory expulsions are not applicable where an infraction takes place “off-school property” i.e. a robbery which took place during lunch at a local student hang out. Bill 81 should not be so narrowly construed. The Supreme Court of Canada has made it clear that social policy legislation must be given wide and liberal interpretation. Further, section 10 of the *Interpretation Act*, provides that:

“10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for a public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit. R.S.O. 1990, c. I, 11, s.10.”

It is surely not the intention of the legislature that acts which are not on the physical school property, but clearly relate to school matters are not to be included under Bill 81.

As a result, we recommend that principals do one of the following: 1) give the term “school-related activity” a wide definition to include any activity occurring during the school day” or 2) frame the grounds of expulsion within the language for discretionary

expulsions under section 310 of the Act (which does not specify that the act must take place “at school” or while “engaged in a school related activity”).

Lesson 2 – Proving the expellable infraction at a discipline hearing can be harder than a Latin exam

Principals and their legal representatives have sometimes experienced difficulties collecting evidence to present to the committee when the police will not provide access to evidence or witnesses (in cases where criminal charges are laid). Since the crown attorney is only required to provide disclosure to the accused student within 30 days of the charges being laid, and the school may required to hold an expulsion hearing prior to that time, police are sometimes reluctant or refuse to provide evidence gathered by their investigation.

This is particularly so where the actions in question are acts of violence, including sexual assault.

This risk can be minimized by fostering an effective, collaborative working relationship between the school and the local police, wherein investigating police officers co-operate as witnesses. Investigation officers when called to testify at these hearings are usually able to obtain sufficient approval from the Crown Attorney’s office to provide enough evidence to meet the burden of proof required in these cases.

In extreme cases when no evidence is available both the principal and the school board must find an alternate way to fulfill their duties to maintain the required level of safety within the school. Two strategies which have been employed are:

- (i) the principal within the 20 school day time limit imposes a limited expulsion which is appealable by the student to the board committee. This permits the principal to fulfill his or her responsibilities under the legislation and also expands the time frame since appeals of that nature do not have to be heard within the 20 day limit;
- (ii) principals and directors of education, rather than continue with the discipline hearing process, have denied access to the offending student under section 309(5) of the *Education Act*. This device gives the principal greater flexibility in determining the length of the denial and the conditions that the student must satisfy before the denial is lifted. It also ensures that some appropriate action has taken by the principal in consequence of the conduct in question.

Lesson 3 – The 20 school day deadline for an expulsion decision is extremely difficult to meet regardless of whether evidence is or is not available

Given the frequency of expellable infractions within any given school system, the enormous workload already imposed on principals and senior school administrators, the

practical reality exists that the 20 day deadline cannot always be met. This is particularly so where the action in question is so egregious that a principal refers the matter to the board committee for hearing within the 20 day deadline.

Efforts have been undertaken with the Ministry of Education officials to persuade them to expand the 20 day period. Thus far, those efforts have been met with opposition particularly from individuals or groups representing student interests who argue that this “quick justice” is necessary to ensure continuity of the student’s education. This requirement for quick justice will continue to place the focus within the 20 days on “getting ready for trial”, rather than identifying solutions which are in the best interest of all concerned.

Lesson 4 – Settle as many as you can

Given the increased time constraints and practical complexities of conducting an expulsion hearing within the twenty day period, early resolution of the discipline issue can be a very useful and productive tool. Early resolution also means a move away from the adversarial attitudes of the expulsion proceedings to a problem solving approach which is more conducive to an educational setting.

Settlement arrangements between parties can be incorporated into an order of a board tribunal which is enforceable as such. Some potential types of settlement include:

- (a) principal's limited expulsion with a parents' agreement not to appeal;
- (b) reduced duration of limited expulsions if conditions are met by the student;
and,
- (d) consent to full expulsion with waiver of appeal right upon entry into strict discipline program.

If parties are unable to fully resolve the matter, it is also possible to try to focus and limit the proceedings by the parties jointly submitting an agreed statement of facts or commissioned evidence. If parties are unable to do this without assistance, this could be considered in the context of a pre-hearing conference. In the context of the increasingly adversarial proceedings, in our view, any creative mechanism which may be used to simplify and streamline the proceedings will likely be welcomed by the tribunal.

Lesson 5 – The process urgently needs a mandatory dispute resolution system

The focus of a discipline process within an education system should not be legalistic and adversarial. Rather, the emphasis should be on addressing the problems which have caused the incident and which are created thereby. Dispute resolution does not work in all cases, particularly where serious criminal charges are pending. However, in the vast

majority of cases the requirement to negotiate in a non adversarial context can only serve to lighten the educator's load and achieve a more creative, and beneficial discipline result.

Lesson 6 – The Child and Family Services Review Board

As of the writing of this paper, only one appeal has proceeded to the CFSRB. This occurred prior to the enactment of the CFSRB Rules. As a result, it is difficult to predict what lessons are to be learned in the appeal process. We predict that there will be much debate on the part of all parties involved as to what practices will be followed upon appeal before further protocols are discovered and developed which will function appropriately in the unique context of an expulsion appeal. There will certainly be one or more judicial reviews in the near future on issues such as party status of principals; appeal by trial *de novo*; interpretation of "at school" or school related accounting and costs.

The CFSRB appeals will encourage further adversarial dynamics, and an even greater legalistic approach than that already seen at the expulsion hearing stage. As has been the experience with expulsion hearings, as the complexities of the situation conflicts with tight time schedules, parties will be forced to consider more creative, practical solutions to these matters, or find means to streamline the appeal process.

Lesson 7 – Trustees sitting on discipline committees take their job seriously and don't like lawyers getting in the way

In all of the discipline hearings in which we have participated the trustees have not confined the issues to merely the conduct in question and its immediate consequences. Rather, they take pains to learn as much as possible about the offending student, his or her family situation and any special needs which are identifiable. Although that has not hampered the trustees' ability to decide the threshold issue of expulsion, it has, on a number of occasions, affected the kind of expulsion that has been imposed. Mitigating circumstances surrounding the student can influence trustees to impose a limited rather than a full expulsion.

Lawyers who play too many "lawyer games" within the discipline hearing will do so at the peril of the trustees presiding. Trustees do not like histrionics, dramatics or too many objections from legal counsel representing any of the parties to the proceeding. A lawyer who cross-examines a student witness in an overly aggressive manner will incur the wrath of the trustees, either directly or through the exercise of their discretion at the end of the evidence.

Lesson 8 – Principals who participate in a discipline hearing, as required, are better educators than before

There no greater learning device than the experience under cross-examination of explaining or defending an action taken and decisions made at the material times. Principals who have experienced an expulsion hearing as a party and a witness are much better note takers, interviewers and decision makers.

CONCLUSION

We are constantly learning from experience as to how to implement the new Safe Schools Act in a way which is conducive to the unique educational context. We are struggling to reconcile the dichotomy of an adversarial system being imposed in a setting which is far better suited to resolving matters through cooperation and teamwork. We are also beginning to uncover all of the many dynamics which have entered into the expulsion hearing setting and learned how to refocus the interests of all of those concerned to not lose sight of the best interests of the students. Ironically, the discipline process in Ontario's schools will yield more positive results than removing the student for an indefinite period. That will be in spite of Bill 81, not because of it.

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