

The Safe Schools Act of Ontario:
A lesson for the rest of the country: How not to do it

John P. Bell
Jennifer Tremblay

-Shibley Righton LLP

Last summer, The Safe Schools Act (“Bill 81”), which amends the Ontario *Education Act* (R.S.O. 1990, E.2) was enacted. Bill 81 significantly alters and expands the student discipline process in Ontario. Its controversial and unprecedented provisions concerning suspensions and expulsions are to be proclaimed in force in the upcoming months.¹

Bill 81 imposes “mandatory” suspensions and expulsions on pupils who commit certain prescribed infractions, empowers teachers to suspend pupils for up to one day without appeal and empowers principals to expel pupils for up to one school year. Bill 81 further prescribes detailed procedures governing suspensions and expulsions.

This paper reviews Bill 81 and compares it with student discipline legislation in other jurisdictions across Canada. It further discusses problems with the new legislation and suggests preferable solutions to student discipline matters.

I THE CURRENT ONTARIO EDUCATION ACT PROVISIONS

SUSPENSION

Subsection 23(1) of the Act presently permits a principal to suspend a pupil for a maximum of 20 days for:

“persistent truancy, persistent opposition to authority, habitual neglect of duty, the wilful destruction of school property, the use of profane or improper language, or conduct injurious to the moral tone of the school or to the physical or mental well-being of others in the school.”

Within seven days of the suspension, an adult pupil or parent/guardian may appeal the suspension to the Board, at which time, the Board may remove, confirm or modify the suspension. Where appropriate, the Board may order that any record of the suspension be ‘expunged’(23(2)).

EXPULSION

Presently, a Board may expel a pupil from all of its schools on the grounds that “the pupil’s conduct is so refractory that the pupil’s presence is injurious to other pupils or persons” if:

- (a) the principal and the appropriate supervisory officer so recommend;**
- (b) the pupil and the pupil’s parent or guardian have been notified in writing of,**

¹ At the time of the writing of this paper, the Ministry of Education is endeavouring to have the suspension and expulsion provisions proclaimed in force by June 29, 2001.

- (i) the recommendation of the principal and the supervisory officer, and
- (ii) the right of the pupil where the pupil is an adult and otherwise of the pupil's parent or guardian to make representations at a hearing conducted by the board;
- (c) the teacher or teachers of the pupil have been notified; and
- (d) such hearing has been conducted (s. 23)(3)).

Although an expulsion may be considered as permanent, Boards in Ontario frequently exercise their discretion to re-admit an expelled pupil to a school (s. 23(5)).

II SUSPENSIONS AND EXPULSIONS ACROSS CANADA

Legislation regarding suspensions and expulsions varies significantly across Canada; however, some common themes cross the jurisdictional borders. Appendix "A" to this paper summarizes the relevant provisions in each of the respective jurisdictions. We note that differences in legislation traverse virtually all aspects of the student discipline regime, as do some similarities, and we highlight the following:

Who Imposes the Discipline

Legislation in each jurisdiction empowers specific parties to impose student discipline. This responsibility varies across the country. For example, in Alberta, Manitoba, P.E.I., Newfoundland, (and soon in Ontario) teachers have the power to suspend. Generally, a teacher can only suspend a pupil for a short period of time (i.e. ranging from one class period to two days) and the teachers' powers are limited either by the principal or by the Board.

Meaning of 'Suspension' and 'Expulsion'

In New Brunswick and Nova Scotia there are no expulsions. Some jurisdictions define expulsion as the removal of a pupil from a particular school for over ten days (Alberta), while others consider expulsion to be a permanent removal from all schools in a jurisdiction, unless re-admitted in the Board's discretion (Manitoba, and presently Ontario).

'Suspension' is generally defined as the removal of a pupil from a particular school for a fixed period of time. Jurisdictions provide a range of discipline and the period of suspension will vary based on the situation. Minor suspensions include exclusion from one class or suspension of privileges; such as bus privileges. At the other end of the spectrum, suspension for a serious transgression can result in removal from school and related activities for up to one year (Saskatchewan).

Grounds for Discipline

The grounds of suspension and expulsion also vary across jurisdictions, but generally the focus is whether the pupil has breached required conduct or demonstrated insubordination. In the case of expulsions, the test is generally whether the conduct of a pupil is detrimental to the other pupils or staff.

Appeal Procedures

In some provinces, there is no right to appeal from certain suspensions. For example, in New Brunswick, a parent is only entitled to appeal a suspension where the pupil has been suspended for five days (not necessarily consecutive) over the school year. In instances of more serious suspensions or expulsions, there are often automatic rights to appeal. In Alberta, a party may request that the Minister review an expulsion; however, the Minister has the discretion to decide not to review the matter.

Requirement to Provide Alternative Education for Excluded Students

In most jurisdictions there is no legal requirement for a Board to provide alternative education to a pupil who has been suspended or expelled. In B.C., Alberta, and soon Ontario, Boards are legally required to provide alternate education.

Role of School Boards

In B.C., the Boards set their own rules which govern the suspension of pupils. The legislation merely requires that the Board follow its own procedures to suspend, and that pupils be provided alternative education. Boards in other jurisdictions are more restricted by legislation in their suspension and expulsion procedures. With the enactment of “the *Safe Schools Act*,” Ontario will become the most highly regulated jurisdiction in matters of discipline.

III BILL 81 CHANGES

The following are the more significant changes to the suspension and expulsion processes set out in Bill 81. For a detailed examination of all of the relevant provisions in Bill 81 as compared to the present sections, we refer you to Appendices “B” and “C” to this paper.²

SUSPENSION

Mandatory Suspensions

Mandatory suspensions will be imposed on pupils who engage in the following listed “infractions”:

- uttering a threat to inflict serious bodily harm on another person;
- possessing alcohol or illegal drugs;
- being under the influence of alcohol;
- swearing at a teacher or at another person in a position of authority;

² These charts were initially prepared by Byrdena MacNeil and John Bell for a previous presentation to the Ontario Public School Boards’ Association.

- committing an act of vandalism that causes extensive damage to school property at the pupil's school or to property located on the premises of the pupil's school; and,
- engaging in an activity which, under a Board policy, is one for which suspension is mandatory (306(1))

Bill 81 provides that the mandatory suspension period will range from one to 20 school days. These limits can be varied by regulation. To address the accommodation issue, different standards can be established for different circumstances and different classes of persons (306(2)). When determining the length of a suspension, the principal must consider the pupil's history, factors prescribed by regulation, and such other matters that the principal considers appropriate (306(9)).

Despite the requirement for mandatory suspensions in the above circumstances, the Act further provides that suspensions are not mandatory in circumstances as may be prescribed by regulation (306(5)). To date, no regulations have been enacted regarding suspensions. It remains to be seen what the effect will be of the impending suspension regulations.

Moreover, it is not clear what definitions are to be applied when deciding whether a pupil has committed any of the listed infractions. For example, in the case of infractions which are described as *Criminal Code* offences, such as "uttering a threat," is the criminal definition to be applied? How will terms such as "swearing" and "extensive damage" be defined? Will "extensive damage" be determined vis-à-vis monetary damage to a school or will it relate to the effect of the damage on the operation of the school facility? Further, since different Board policies will provide for different additional "infractions" for which suspensions are also mandatory, this will likely lead to inconsistency across the province.

Section 309(21) stipulates that the Minister may issue policies and guidelines to Boards to assist principals and teachers in interpreting and administering s. 309.

Authority for Teachers to Suspend

Under the new legislation, teachers have the authority to suspend pupils for the first time in Ontario. A teacher who observes a pupil committing any of the listed infractions will be required to suspend the pupil for the minimum period of one day or refer the matter to the principal (306(3)). If a teacher suspends a pupil but feels that a longer suspension is warranted, the teacher will be required to recommend an extension of the suspension to the principal (306(7)). Upon receipt of such a recommendation, the principal may extend the suspension for a period up to the maximum duration of 20 days (306(8)).

The principal has no discretion to extend a suspension imposed by a teacher unless the teacher recommends such an extension. This is certain to lead to tension between teachers and principals. Given the debate in Ontario over teacher workloads, teachers may choose to defer all suspensions to the principal at the outset.

Discretionary Suspensions

A pupil may also be suspended by a teacher or principal in respect of activities which are stipulated by Board policy to be activities for which suspension is discretionary (307(1)). The

pupil may be suspended from (a) school and school-related activities; or (b) from one or more classes or one or more school-related activities or both (307(2)). The period of suspension ranges from the minimum suspension period specified by Board policy to a maximum of 20 days. The maximum may be varied by regulation and different standards may be established for different circumstances or different classes of persons (307(3)). Teachers are only empowered to suspend a student for a period up to the minimum suspension period (307(6)). As in the case of mandatory suspensions, teachers can recommend that the principal extend the suspension (307(7)).

Review and Appeal of Suspension

Bill 81 provides for a mechanism to review a decision to suspend for over one day and this review is to be conducted by the Board, pursuant to Board policy. The legislation extends the right of review to the pupil, parent (where the pupil is a minor) and “such other persons as may be specified in a policy of the board” (308). This means, a Board is empowered to specify in its policy that certain persons (in addition to the pupil or parent) have the right to request a review of the suspension.

A Board could decide to afford the right to request the review of a suspension to a group of persons who, in the past, have never had such a right. For example, the Board could prescribe that the “victim” of a suspended pupil’s actions is entitled to request a review of the suspension of a pupil. Perhaps a more likely example is a teacher who has imposed a one-day suspension and who disagrees with the principal’s subsequent decision not to extend the suspension. Such a policy could lead to a large increase in suspension reviews. Further, Bill 81 is silent as to how rights of review are given to third parties without violating the confidentiality that governs the review process.

Following a review, the pupil, parent (of a minor pupil) and persons specified in Board policy can appeal a decision to suspend, which appeal is to be heard by the Board (usually an appointed committee) in accordance with Board policy (308(4-7)). Again, the Board can, through Board policy, extend this appeal right to individuals such as in the examples given above, thereby leading to an increased volume of suspension appeals.

Alternate Education

Bill 81 provides that the Minister of Education may require Boards to maintain certain programs, courses and services for pupils who are suspended or expelled and that the Minister may impose different requirements for different circumstances, different locations or different classes of pupils (312(1-2)). The Minister may also establish programs for expelled pupils and require Boards to provide information about the programs to such pupils (312(4)). Further, the Minister may establish policies and guidelines regarding pupils’ eligibility to participate in and to complete such Board or Ministry programs (312(5)).

EXPULSION

Mandatory Expulsions

Bill 81 provides that mandatory expulsions will be imposed on pupils who commit any of the following infractions:

- **Possessing a weapon, including possessing a firearm.**
- **Using a weapon to cause or to threaten bodily harm to another person.**
- **Committing physical assault on another person that causes bodily harm requiring treatment by a medical practitioner.**
- **Committing sexual assault.**
- **Trafficking in weapons or in illegal drugs.**
- **Committing robbery.**
- **Giving alcohol to a minor.**
- **Engaging in another activity that, under a policy of the board, is one for which expulsion is mandatory (309(1)).**

However, as in the case of suspensions, subsection 309(3) provides that expulsions are not mandatory in circumstances as prescribed by regulation. Regulation 37/01 was recently enacted in respect of the expulsion sections. This regulation exempts pupils from the imposition of mandatory expulsions where:

- (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 (s. 2)**

Subsections (a) and (b) are intended to apply to pupils with special needs; however, we predict that (a) and (b) will be utilized in defence of certain mandatory expulsion infractions such as trafficking in illegal drugs and giving alcohol to a minor, where the offender is under the influence of alcohol or drugs at the time.

Subsection (c) creates a test for determining whether a mandatory expulsion can be ordered. Clearly, where it is determined that the pupil's continuing presence in the school does not create an unacceptable risk the safety of any person, no mandatory expulsion can be imposed.

The effect of this section appears to return the test for expulsion to that which is in the current legislation:

“where the pupil's conduct is so refractory that the pupil's presence is injurious to other pupils or persons” (23(3)).

Both Regulation 37/01 and section 309(3) of Bill 81 are silent on the matter of when this discretion is to be exercised and by whom (i.e. the principal or the Board). J. Paul R. Howard explores this issue in his recent article entitled “Expulsion Hearing: New Regs, New Wrinkles” to be published in a forthcoming issue of Education Today, published by the Ontario Public School Boards' Association. He notes that although the legislation is unclear, the Legislature presumably intended that the Board and the principal are both competent to exercise such discretion, depending on whether the principal proceeds with an inquiry (wherein he or she will exercise the discretion) or the matter is referred to the Board (who will exercise its discretion). Mr. Howard further notes that perhaps the principal will be required to exercise this discretion when first considering whether the student (who allegedly committed the mandatory expulsion infraction) should be suspended. If this is the case, the workload of principals which was already increased by the Bill 81 changes will be even further increased.

Subsection (c) of the regulation may be an acknowledgment on the part of the Ministry of Education that the 20 day deadline for determining mandatory expulsions cannot be met for many Boards in Ontario. If so, its goal will not be achieved. The only result will be an increase in the caseload of discretionary expulsions subject to the same 20 day time limit.

Principal - Decision to Conduct Inquiry or Referral to Board

Upon determining that a pupil has committed one of the specified infractions, the principal must promptly either (1) refer the matter to the Board to hold an expulsion hearing (in accordance with Board policy); or (2) conduct an inquiry to determine whether the pupil committed an infraction for which expulsion is mandatory (309(4), 310(3)).

If the principal is convinced after conducting an inquiry that an “infraction” was committed, he or she may either impose a “limited expulsion” (exclusion from school and related activities for a specified period to a maximum of one year) or refer the matter to the Board for its determination (309(7), 310(3)). Section 309(13) permits a Board to delegate its duty to hold an expulsion hearing and its powers and duties in this regard to a committee of the Board.

A Board, in conducting an expulsion hearing must determine whether an infraction was committed. If it so determines, it must impose either a ‘limited expulsion’, as defined above, or a full expulsion (307(11)). A full expulsion is an exclusion from all schools (and school activities) in Ontario until the pupil meets such requirements as are established by regulation (307(16)).

Regulation 37/01 stipulates that such a pupil may return to school after successfully completing a “strict discipline program” or “satisfying the objectives required for the successful completion of a strict discipline program.” This latter determination is to be made by “a person who provides a strict discipline program” (3(1-2)). A “strict discipline program” is defined as a program approved as such by the Minister. These provisions raise the question of what specific programs will be approved by the Minister and who will be considered a ‘person’ who provides a strict discipline program.

Discretionary Expulsion

A principal or a Board also has the authority to proceed to expel a pupil where a pupil engages in an activity that, under a Board policy, is one for which expulsion is discretionary. An analogous procedure applies to discretionary expulsions as that which applies to mandatory expulsions (307(1)).

Time Limit for Expulsions

Neither the principal nor the Board may expel a pupil if more than 20 days have expired since the pupil was suspended, unless all parties agree to extend the time period (309(8)(12)). It is difficult to imagine a situation where a pupil would consent to extend a time period within which an expulsion is to be processed where the alternative is for the pupil to escape expulsion. In effect, if all expulsion matters are not determined within the 20 day period, the pupil will be returned to school. In other words, in those circumstances, the “licence fee” for a pupil to commit the most egregious acts is a 20 day suspension. It remains to be seen given the recent enactment of the mandatory expulsion test in the regulations how much the caseload of expulsion

hearings will be increased for Boards. Even with this test it is unlikely that large urban Boards will be able to meet the 20 day time limit.

Access to School Premises

In the event that Boards have difficulty meeting the 20 day timeline for expulsions, principals may look to other provisions in Bill 81 in order to ensure the safety of their schools, and in particular the provisions concerning access to school premises. Bill 81 provides a means by which a principal can control access to school premises which may be more useful to principals than the current legislative provisions.

Presently, the Ontario *Education Act* contains a provision permitting the principal to refuse to admit to school:

“a person whose presence in the school or classroom would in the principal’s judgment be detrimental to the physical or mental well-being of the pupils”
(265(m)).

It is generally interpreted in Ontario that the term “person” includes pupils. A student who has been excluded from school has the right to appeal the decision to exclude to a full board of trustees. It is for this reason that Boards have been reluctant to use this section notwithstanding its effectiveness for dealing quickly with unsafe situations at schools.

Section 305 of Bill 81 and Regulation 474/00 now provide principals with the authority to exclude persons from school premises in prescribed circumstances. Regulation 474/00 gives principals the discretion to deny access to pupils (persons are defined to include pupils) (2(1)1.) Principals can deny access to persons where it is felt that the person’s presence is detrimental to the safety or well-being of a person on the premises (3(1) Reg. 474/00). Where a person refuses to comply with the denial to access, he or she is liable to prosecution under the *Provincial Offences Act*. In other words, it will be the courts who control and sanction the denial of access matters. The legislation does not provide a right to appeal to persons who are denied access to the school premises.

The advantage now to Boards is that they may deny students access to school property without having to sit as an appellate body to determine the denial to access issues. These provisions will provide a valuable tool for a principal to “exclude” pupils in cases where a board committee cannot decide on the expulsion within the 20 day limitation period.

Review Body

Bill 81 extends the right to a parent, pupil who is not a minor, or another person as specified by Board policy, to appeal an expulsion by a Board. When an expulsion decision has been made by a principal, an appeal is heard by the Board in accordance with Board policy. Where the expulsion has been imposed by the Board itself, an appeal is to a “person or entity designated by regulation.” Bill 81 empowers the Minister to establish an entity for this purpose (311).

Regulation 37/01 designates the Child and Family Services Review Board as the entity to hear the expulsion appeals (“CFSRB”) (4). We note that the CFSRB was not established by the Minister for this purpose, but is a body which currently hears appeals under the *Child and*

Family Services Act and the *Day Nurseries Act* concerning issues regarding the residential placement of children, the admission of children to emergency secure treatment and licences under both of the above-referenced statutes.

Subsection 4(2) of the Regulation provides that upon hearing an appeal, the CFSRB may:

- 1) Confirm the board's decision;**
- 2) Modify the type or duration of the expulsion;**
- 3) Impose, change or remove conditions that must be satisfied if the pupil is to return to school in Ontario following an expulsion.**
- 4) Overrule the decision of the board and reinstate the pupil.**

The CFSRB may also order that the record of expulsion be expunged (4(3)). No further explanation of the CFSRB's powers and duties is provided in this Regulation.

Several questions are raised, including: What is the specific procedure to be followed by the CFSRB when hearing an appeal? Will some deference be shown by the CFSRB to the Board's decision to expel given the Boards' specialized experience in expulsion matters? How will the CFSRB's present duties be married with its new obligations under the *Education Act* regime - what will happen if a conflict of interest arises?

It is further noted that the CFSRB is bound by its own Rules of Procedure. These Rules are presently being revised in light of the new obligations that CFSRB is assuming under Bill 81. At this time, it is unclear as to direction the procedural rules will take regarding expulsion appeals.

The CFSRB is bound to apply the Rules to all proceedings before it, except where otherwise specified. The Rules as they presently read provide procedures to be followed in various aspects of the proceedings, including: notice, service of documents, motions, disclosure, and evidence. The Rules also empower the CFSRB to direct the parties to attend at pre-hearing conferences. It is provided that pre-hearing conferences are open to the public unless the CFSRB directs otherwise. Given the confidential nature of student information, one questions whether a similar rule will be applied to the expulsion appeal process. It is hoped that the revised Rules will respect the confidential nature of these sensitive proceedings.

IV PROBLEMS WITH BILL 81 AND SOME SUGGESTED SOLUTIONS

PROBLEMS

We have already noted some of the major problems with this legislation including:

- 1) Potential conflict between principals and teachers regarding the length of mandatory suspensions;
- 2) Uncertainty as to what definitions apply to certain mandatory suspension and expulsion "infractions";

- 3) Inability of school boards to meet the 20 day limitation period within which expulsion orders are to be made;
- 4) The effect of exemption provisions set out in Regulation 37/01 on mandatory expulsion hearings; and,
- 5) The ability of the CFSRB to exercise its discretion in the area of expulsions where it has no prior experience. Further, whether the CFSRB will show the same “curial deference” to decisions made by school boards as have the courts historically.

SOME SUGGESTED SOLUTIONS

- 6) The Ministry of Education provide further clarification vis-à-vis what factors should be considered by teachers in respect of their recommendations to extend suspensions beyond one-day.
- 7) The Ministry of Education, by regulation, provide clarification as to the definitions of the listed ‘infractions.’
- 8) The Ministry of Education issue a regulation redefining the timeline as being a period of time within which a hearing must be commenced, not within which an expulsion decision must be finalized. This would permit for a Board to commence a hearing, and subsequently adjourn to a later date if the Board is unable to hear the matter within the 20 day period.
- 9) The Ministry of Education could direct that subsections 2(a) and 2(b) of Regulation 37/01 only be used regarding exceptional pupils. Further, the Ministry of Education could clarify when, and by whom, the discretion in section 2 of the Regulation will be exercised, in order to avoid unnecessary litigation.
- 10) The Ministry of Education, by regulation, prescribe what procedural safeguards apply to CFSRB proceedings to ensure the confidentiality of the proceedings.

CONCLUSION

From our review and analysis of the legislation in other provisions, Bill 81 takes the discipline process regarding suspensions and expulsions into untried areas. The unprecedented level of regulation imposed by Bill 81 turns the Ontario student discipline process on its ear by creating a multi-level appeal process, hampering the discretion of decision makers, and creating uncertainty as to its processes. It is hoped that further clarification will be provided by the Ministry of Education to assist in the confusion which will inevitably ensue in the education sphere with the implementation of the Bill 81 amendments.