

Expulsion Hearings: New Regs, New Wrinkles

By J. Paul R. Howard

On March 9, 2001, the Minister of Education announced a new initiative in the implementation of Bill 81, the *Safe Schools Act, 2000*,¹ pursuant to which, under new regulations, those students who are made subject to a full expulsion order for serious infractions will not be permitted to return to school until they successfully complete a “strict discipline program” approved by the Minister. Buried within the new Ontario Regulation 37/01,² however, is a provision describing certain situations where, contrary to the legislation, expulsion is not mandatory at all. This new regulation will likely only further complicate the expulsion hearing process and exacerbate the considerable logistical problems school boards already face under Bill 81.

Under section 309 of the *Education Act*, added last year by Bill 81, a student faces mandatory expulsion if he or she commits any of the following infractions: possessing a weapon, including a firearm; using a weapon to threaten someone; committing robbery, sexual assault or serious physical assault that results in bodily harm; trafficking in weapons or illegal drugs; giving alcohol to a minor; or any other activity for which a mandatory expulsion is prescribed by a school board’s policy.

Where a student commits any of the enumerated infractions, the principal must immediately suspend the pupil, and then Bill 81 forces the principal to make a critical decision between two distinct processes: the principal may either immediately refer the matter to the school board for an expulsion hearing, which may result in a *full* expulsion order (i.e., expulsion from every school in the province until such time as the student completes what the newly announced “strict discipline program”), or may conduct an inquiry, at the end of which the principal may impose a *limited* expulsion (i.e., expulsion for a finite period of time from the school the student was previously attending) or, again, simply refer the matter to a board hearing.

However, the new Regulation 37/01 contains a type of “notwithstanding clause” that completely exempts a student from the operation of the mandatory expulsion provisions of the legislation if, pursuant to s. 2 of the Regulation, the pupil is considered to be unable to control or understand the foreseeable consequences of his or her behaviour or the pupil’s “continuing presence in the school does not create an unacceptable risk to the safety of any person”. But who is going to make that decision in any given case – the principal or the board? Unfortunately, neither the Regulation itself nor s. 309(3) of the Act which authorized the making of the Regulation answers that important question (and although s. 309(19) states that either the principal or the board may consider any “factors as may be prescribed by regulation” or otherwise appropriate in considering “the *type and duration* of expulsion”, that is a quite different question from considering whether any expulsion is warranted or applicable in the first place).

Nonetheless, presumably the Legislature intended that both the principal or the board, as the case may be, are competent and required to make that decision depending on which of the two processes the principal elects following suspension. That is, if the principal decides to immediately refer the matter to the board for a full expulsion hearing, it would appear to be for the board to consider whether the expulsion of the student is not mandatory under s. 2 of Regulation 37/01. Conversely, where the principal embarks on a limited expulsion inquiry, presumably it will be the principal who

is forced to decide whether the pupil is unable to control or appreciate the consequences of his behaviour or whether her continued presence in the school would not create an unacceptable safety risk. (But might it be that in every case that decision must be made by the principal when first considering whether to suspend the student for having “committed an infraction for which expulsion is [or is not, depending on whether s. 2 of the Regulation applies] mandatory”?)

Don’t look now, but the expulsion process just got significantly more complicated. First, the new Regulation has now considerably increased the number of issues that the principal or board must contend with. Not only will the principal in the inquiry or the board in the hearing have to make the essential factual findings of whether the alleged conduct did or did not occur (which often raise the same sort of thorny evidentiary determinations that courts of law in a criminal trial must make), not only will they have to sort out, as my fellow education law commentators³ have observed, some troubling definitional concerns such as whether it is appropriate to employ the criminal definition of, say, “trafficking” and “sexual assault” in the school context, but now under s. 2 of the Regulation they must also make an informed medico-legal decision as to whether the offending student has the ability to control his behaviour or understand the foreseeable consequences of her conduct. In the same vein, they must also make a Solomon-like judgment of whether, for example, a student who gave alcohol to a minor at a school dance or who inappropriately touched his former girlfriend on a field trip in circumstances amounting to sexual assault poses, by their continued presence in school, an “unacceptable risk” to the safety of others.

Secondly, assuming Bill 81 contemplates that in some cases principals are going to be forced to make these decisions, then in order to assess the practical impact of the legislative scheme and the new Regulation 37/01, one needs to ask the question of whether principals will *accept* that type of onerous responsibility. Remembering that it is the principal who at the outset may elect either to conduct a limited expulsion inquiry or to refer the matter to the school board for a full hearing, one would not be surprised, or unsympathetic, if principals simply referred all expulsion matters to a board hearing as a matter of course.

Finally, Regulation 37/01 will inevitably exacerbate the logistical pressures that school boards already bear under s. 309(12), which requires that any expulsion decision must be made within 20 days after the student was first suspended. In order to assess the potential volume of expulsion matters that may come before the board, the reader is invited to calculate the number of potential infractions that might occur at each secondary or junior high school (one every month or two weeks?) and at each elementary school (half the former number?), multiply those figures by the number of such schools within the whole board, and then consider how many such hearings can realistically be conducted by board members within a 20-day deadline, allowing for the fact that, of course, trustees will have other responsibilities besides sitting on expulsion hearings all day. Now also consider how much Regulation 37/01 will increase the backlog of cases by slowing down each hearing with additional complex issues, while at the same time generating scores of new cases should overwhelmed principals decide to refer all expulsion matters to the board automatically. Thus, what has potentially been created is a licence for some students to commit the most egregious conduct and escape expulsion for it, simply because the school board may not be able to dispose of its caseload within 20 days.

Although neither the mandatory expulsion sections of Bill 81 nor the operative provision of Regulation 37/01 have yet been proclaimed in force as law, the Minister has stated they will be in

effect “before the next year”. As one should not realistically expect the provisions will be amended or corrected, it’s a bit like the Kansas farmer looking out the farmhouse window and seeing the funnel cloud coming across the field.

1. *Safe Schools Act, 2000*, S.O. 2000, c. 12 (assented to 23 June 2000).
2. “Expulsion of a Pupil”, O. Reg. 37/01 (filed 26 February 2001).
3. John P. Bell, “*Safe Schools Act: Step Forward or Backward?*” (Address to the Ontario Public School Boards’ Association, 2001 Labour Relations Symposium, 30 March 2001; based on a paper by Byrdena M. MacNeil & John P. Bell, “*Safe Schools Act, 2000 (Bill 81)*”, (18 September 2000), at p. 12) [unpublished].

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