



## Education Law eBulletin

A newsletter for educators

SPECIAL ISSUE: SAFE SCHOOLS

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## UPDATE ON PROPOSED SAFE SCHOOLS LEGISLATION: BILL 212

On April 17, 2007, the Minister of Education introduced the long-anticipated changes to the Safe Schools regime in Ontario with the first reading of Bill 212, *An Act to amend the Education Act in respect of behaviour, discipline and safety*. If passed, the legislation would be known as the *Education Amendment Act (Progressive Discipline and School Safety), 2007*. The full text of Bill 212 can be found on the Legislative Assembly website at the following link:

[http://www.ontla.on.ca/web/bills/bills\\_detail.do?locale=en&BillID=1618](http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=1618)

Although many had lobbied for a major upheaval of the Safe Schools provisions, the proposed legislation appears to leave the general structure of the current regime intact but modifies the steps to be followed when implementing discipline.

It had been suggested that the new legislation abolishes the “zero tolerance” model. However, in our opinion, despite widespread misunderstanding to the contrary, a zero-tolerance regime has not existed in Ontario since the enactment of Regulations 37/01 and 106/01. These regulations stipulate mitigating factors that administrators must consider before imposing suspensions and expulsions, which effectively negate the zero tolerance approach that was arguably prescribed by the *Education Act* prior to the regulations.

In any event, Bill 212 effectively follows a similar approach to student discipline as found in the current legislation; however, the labels of “mandatory” discipline are removed and additional mitigating factors will apparently be introduced through regulations to follow.

Some of the key changes proposed by Bill 212 are as follows:

### SUSPENSIONS

The list of infractions for which suspension is currently “mandatory” (under section 306) are now infractions for which suspension is discretionary. Bullying has been added to this list.

Bill 212 now makes it clear that the enumerated infractions need not take place on “school property” *per se* but may ground student discipline if the conduct “will have an impact on the school climate.”

The proposed law provides for suspensions from one or more classes to be served in school (in addition to out of school suspensions).

As expected, the Bill removes a teacher’s power to impose suspensions for up to one day in length, which exists under the current law. In practice, however, this power was not exercised by teachers, largely due to the direction of the federations.

Under current law, there is no right to appeal a suspension which is for one day or less. On its face, Bill 212 removes that restriction such that a student could appeal any suspension, even if it is only from one class. Unless this is addressed in the regulations, the new Bill will dramatically increase the potential number of suspension appeals.

The provisions under the current legislation for a suspension “review” conducted pursuant to school board policy (generally by a supervisory officer) would be consolidated into a single right of a student to appeal the suspension to the school board. The board’s decision is final. The school board’s power to hear an appeal can be delegated to a committee of at least three members. Currently, the *Education Act* empowers a school board to delegate its duties to a committee of the board, but does not stipulate a minimum number of members.

Appeals of suspensions would be required to be heard within 10 days of receipt of a notice of appeal (unless otherwise agreed by the parties).

### EXPULSIONS

The list of infractions for which expulsion is currently “mandatory” (under section 309) would be treated as a list of infractions for which expulsion is discretionary.

As is currently the case, where a principal believes any of these infractions may have taken place, the principal must impose a suspension antecedent to a possible expulsion. As such, there remains a requirement for the mandatory suspension of a pupil suspected of conduct that may result in the imposition of an expulsion (now labelled as a discretionary expulsion).

Although expulsions are now labelled “discretionary” rather than “mandatory, the initial suspension imposed pending consideration of expulsion (the “antecedent suspension”) remains mandatory.

Before deciding whether to recommend an expulsion, the principal would be required to conduct an investigation subject to board policy and certain requirements set out in Bill 212, including a requirement that the principal “make all reasonable efforts to speak with” the pupil, parent/guardian (unless the pupil is an adult or 16 or 17 and has withdrawn from parental consent) and “any other persons who the principal has reason to believe may have relevant information.”

Under the Bill, the principal must determine whether to recommend that the board expel the pupil. If the principal chooses not to recommend expulsion, the principal is required to: (1) confirm the suspension; (2) shorten its duration; or (3) withdraw the suspension and expunge the record. If the suspension is not withdrawn, the pupil/parent may appeal to the board, which may confirm, reduce or set aside the suspension (and expunge the record).

If the principal recommends expulsion, he or she is required to prepare a report which includes a recommendation regarding whether the pupil should be expelled from the particular school at which the student attends or from the entire school board, and what type of school or alternate program may be appropriate in the circumstances.

An expulsion hearing is to be heard by the school board. As in the case of suspension appeals, the Bill permits the board to delegate this power to a committee of at least three members (although the current law does not provide for such a minimum requirement). Practically speaking, suspension appeals, expulsion hearings and expulsion appeals are sometimes being conducted by panels consisting of less than three members under the current law.

Bill 212 stipulates various procedures that a school board must follow at an expulsion hearing, and includes a requirement that the board consider submissions of all of the parties and solicit views regarding whether the pupil should be expelled from the particular school or all schools within the board. Some commentators had expected Bill 212 to expressly require a school board, where it decides to expel a pupil, to give reasons for its decision, as is arguably required by the common law. It is somewhat surprising that Bill 212 makes no mention of any such obligation to give reasons.

After the expulsion hearing, the board must decide whether to expel the pupil (either from the one school or all board schools) or not. Either type of expulsion by the board may be appealed to a tribunal prescribed in the regulations (currently designated as the Child and Family Services Review Board).

If the board decides not to expel the student, the board is required to refer the matter back to the principal for reconsideration of the antecedent suspension and to determine whether to (1) confirm the suspension; (2) shorten its duration; or (3) withdraw the suspension and expunge the record. Again, if the principal does not withdraw the suspension, the pupil/parent may appeal the antecedent suspension to the board pursuant to the procedure set out above. This explicit right to appeal the antecedent suspension following an expulsion hearing does not currently exist, and practically speaking, the antecedent suspension has generally not been treated as an independent suspension in such circumstances.”

Therefore, under Bill 212, where a pupil is not expelled and the principal does not withdraw the antecedent suspension prompting the student to appeal, this may result in two hearings being conducted by the school board in respect of essentially the same circumstances: the first being an expulsion hearing, and the second, a suspension appeal (to determine what, if any, record of the antecedent suspension would remain in the student’s record). The rationale for this multiplicity of proceedings is unclear. In particular, it is not clear why the Bill does not empower the school board, in the course of determining the expulsion appeal, to also consider the appropriateness and/or duration of the antecedent suspension.

Given that under the proposed law any appeals from suspensions (including antecedent suspensions) must be conducted within 10 days (unless otherwise agreed), and given that appeals do not appear to be restricted to appeals of one day or more, one would expect that this may well give rise to significant difficulties in convening suspension appeals and expulsion hearings in the circumstances (particularly with committees of three members being required to hear each matter).

#### **MITIGATING FACTORS AND PROGRESSIVE DISCIPLINE**

Under Bill 202, “mitigating factors or other factors prescribed by regulation” must be considered in the following circumstances:

- (1) by a principal when determining whether to impose a discretionary suspension;
- (2) by a principal when determining the duration of a discretionary suspension;
- (3) by the principal when determining the duration of an antecedent suspension;
- (4) by the principal when determining whether to recommend an expulsion; and,
- (5) by the school board when determining whether to impose an expulsion.

Bill 202 provides no details regarding the nature of such mitigating or other factors. Recently, the Ministry of Education entered into a settlement agreement with the Ontario Human Rights Commission (the “OHRC”) in respect of a complaint that the OHRC had initiated against the Ministry regarding the *Safe Schools Act*. In the settlement entered into on April 10, 2007, the Ministry agreed that within 120 days of the signing of the settlement, it would request through the Cabinet’s regulation process amendments to Regulations 37/01 and 106/01 so that the following mitigating factors proposed by the OHRC are represented in the regulations:

- (1) whether racial or other harassment was a factor in the student’s behaviour;
- (2) whether the principles of progressive discipline have first been attempted;
- (3) the impact of the suspension or expulsion on the student’s continued education;

- (4) whether the imposition of suspension (or expulsion) would likely result in an aggravation or worsening of the student's behaviour or conduct;
- (5) the age of the student;
- (6) in the case of a student with a disability, whether the behaviour was a manifestation of the disability and whether appropriate accommodation, based on the principle of individualization, had first been provided; and
- (7) the safety of other students.

It remains to be seen whether other factors will be proposed in the regulations and how these proposed changes will be framed.

Progressive discipline has been proclaimed as one of the key components that the Ministry intended to incorporate through Bill 212. However, the only express reference to progressive discipline found in the Bill appears to be in the name of the proposed law. Notably, the second of the mitigating factors set out in the OHRC settlement terms above makes reference to progressive discipline, but one would have expected to see a more significant focus on progressive discipline either in the Bill itself or perhaps in the regulations to follow.

As well, there is no reference in Bill 212 to matters relating to pupils with special needs, nor any reference to matters of discrimination, both of which have made the current legislation the subject of much debate and criticism.

## **OTHER**

It was widely expected that the new legislation would remove or modify the power to deny access to a pupil (or other person) as prescribed under section 305 of the Education Act (and Regulation 474/00). However, Bill 212 makes no changes to section 305, and accordingly the denial of access provisions remain intact.

We note that under Bill 212 the rights to appeal a suspension or expulsion may be exercised by either the parent, or an adult pupil (i.e. 18 years or older), or now a pupil aged 16 or 17 years who has withdrawn from parental control. This latter provision addresses the "mature minor" gap that exists under the current legislation.

Under Bill 212, the strict discipline programs currently in place will be dismantled, and by February 1, 2008, each school board will instead be required to provide (in accordance with Ministry policies and guidelines) at least one program for suspended students and at least one program for expelled students. The Ministry apparently intends to provide funding to the school boards for such programs.

Bill 212 requires principals to assign disciplined students to alternative programs as prescribed by the Ministry. In the case of a suspended student, a principal must assign the pupil to a board program for suspended pupils in accordance with any policies or guidelines issued by the Ministry. In the case of a student expelled from all schools within a school board, at the expulsion hearing, the board must assign the pupil to a program for expelled pupils. In the case where a student is expelled only from his or her own school, at the expulsion hearing, the board is required to assign the pupil to another school within the school board.

Other provisions of Bill 212 address the ability of a student to return to either the same school board or a different board after successful completion of a program for expelled pupils (or satisfaction of the objectives of same). A school board cannot refuse to admit a student because he or she had previously been expelled (if the requirements for re-admission have been met). There is reference in the Bill to a pupil being entitled to apply in writing to return to the same school from which he or she was expelled (although there is no corresponding duty on the board to grant the application for re-admission). The implications of this proposed provision are unclear from the context.

## **OVERVIEW**

Bill 212 does not substantially revise the grounds on which an administrator may impose discipline, but it does change the procedural steps that must be followed to impose such discipline. Certain procedural changes that seem innocuous on their face could create significant practical difficulties for administrators and school boards, particularly as they relate to suspension appeals.

Further, the creation of a subsequent right of the parent/pupil to appeal the antecedent suspension imposed in respect of a potential expulsion could lead to an undesirable multiplicity of proceedings regarding the identical fact situation, and could also lead to a taxing of school board resources.

It is hoped that the proposed legislation could be streamlined and more effectively structured to address the practical realities prior to it becoming law.

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We welcome your comments and questions. Send them, and any updated contact information, to [bryce.chandler@shibleyrighton.com](mailto:bryce.chandler@shibleyrighton.com). If you wish to unsubscribe to this eBulletin, please send a blank e-mail to [unsubscribe@shibleyrighton.com](mailto:unsubscribe@shibleyrighton.com)

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