



Education Law eBulletin

A newsletter for educators.

February 2003

current issues

Videotaping of female students constituted criminal offence

A teacher in Ontario was recently convicted of two counts of invitation to sexual touching after making videotapes of young female students sucking on lollipops in various manners and making comments with sexual overtones. The teacher had told the students that the videos were for an educational purpose. The students apparently did not view the videotaped activities as sexual.

The Court rejected the teacher's evidence that the purpose of the project was to show the students how to create ads for commercial purposes, finding it to be inconceivable and inconsistent. The Court concluded that the only possible purpose of the videos could be the simulation of oral sex on a male genital, and found that the teacher was enjoying the video to satisfy a sexual purpose. The teacher was sentenced to four months in jail and two years' probation (during which time he cannot own or possess video equipment). The teacher has commenced an appeal of the decision.

School boards should be aware that certain activities between a teacher and a student can be found to constitute misconduct, even criminal behaviour, despite the fact that the student involved does not him or herself believe the conduct improper or offensive. School boards should take care to investigate any type of suspicious activity by teachers involving students, to prevent similar misconduct in their schools.

classroom supervision

Teachers leaving the classroom - the legal implications

At times, principals may be faced with teachers stepping out of their classroom for non-emergency matters. Should this be a concern? Yes - here's why: A teacher who leaves her class unattended may be in breach of her obligations under the *Education Act*. By law, teachers are required to: "maintain, under the direction of the principal, proper order and discipline in the teacher's classroom and while on duty in the school and on the school ground" (*Education Act*, s. 264(1)(e)); and "be present in the classroom or teaching area" and ensure that the area is ready for pupils at least 15 minutes before class in the morning and 5 minutes in the afternoon (unless otherwise assigned by the principal) (Regulation 298, s. 20(d)). In addition, a teacher who leaves the classroom without permission risks potential discipline by the College of Teachers for professional misconduct, which includes a teacher "failing to supervise adequately a person who is under the professional supervision of the member", and failing to comply with the

Education Act (Regulation 437/97).

A principal who allows improper absences from the classroom by a teacher may also be breaching the *Education Act* given that a principal is required to: "provide for the supervision of pupils during the period of time during each school day when the school buildings and playgrounds are open to pupils" and "provide for the supervision of and the conducting of any school activity authorized by the board" (Regulation 298, s. 11(3)(e)(f)); and "give assiduous attention to the health and comfort of the pupils" (*Education Act*, s. 265(1)(j)).

Schools also have a common law duty to supervise their students. Unapproved classroom absences increase potential legal liability for the teacher, principal and school board should any harm or injuries occur during the teacher's absence. A finding of liability is likely to result where the teacher's presence would have prevented the occurrence. The degree of supervision owing depends on a number of factors, including the age, makeup and propensities of the class. The reason for and duration of the absence or lack of supervision factor into a determination of liability.

Having one teacher simply "cover" for another teacher who leaves the classroom is no solution. An incident could take place in either or both of the classes that teacher is now trying to supervise, and the principal now has two classes which arguably could be deemed "inadequately" supervised.

Continued ...

caselaw

University of Waterloo v. Ontario (Minister of Finance) *Ontario Court of Appeal*

The Court denied the University a retail sales tax rebate in respect of a student residence constructed on the campus.

Sandhu (Guardian ad litem of) v. Chong *British Columbia Supreme Court*

The Court awarded a pupil over \$40,200.00 in damages against another pupil who assaulted him at school during lunch hour; a claim against the school board was struck.

Freer (Guardian ad litem of) v. Okanagan/Skaha *School Dist. No.67* *British Columbia Supreme Court*

The Court ordered payment of damages of \$1,500.00 by a school board to a student who was injured following a phys-ed class soccer game; the supervising teacher was found to be negligent in his care of the plaintiff after the injury.

Summaries of these cases and others can be found in the Shibley Righton Education Law NetLetter published by Quicklaw. Visit www.quicklaw.com.

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Classroom supervision, *continued*

Accordingly, principals must require that teachers stay in their classrooms. Stress their responsibilities to the students and the potential risks of leaving their classes. Teachers who leave their classroom (except for emergency situations) should be reprimanded so that it is made clear that this type of conduct is unacceptable.

safe schools

Witness subpoenas

Under the *Statutory Powers Procedure Act*, witnesses can be subpoenaed to give evidence at suspension appeal and expulsion hearings. In cases where the police have been called to the school in respect of a disciplinary incident, it can be helpful to call the investigating officer to give evidence of the police investigation. Students can be subpoenaed to be witnesses at a hearing. Usually it is only necessary to call students as witnesses in cases involving credibility issues. If the case involves a student's possession of a weapon, for instance, you will probably not require the testimony of other students since evidence of the possession itself satisfies the ground for expulsion and that evidence can be obtained from the school authorities and the police. As always, though, each case will obviously depend on its own unique fact situation.

Special attention should be paid to cases involving a criminal act against a student-victim and a "he says, she says" situation (e.g., a sexual assault). While the evidence of the victim is most helpful, in such cases, the police and Crown Attorney should be consulted before calling the victim as a witness since the Crown may not wish to have the victim testify or be cross-examined prior to a criminal trial. If that is the case, you should proceed with the evidence of the investigating officer(s), the school authorities, and any circumstantial evidence (e.g., a surveillance tape showing the victim and the perpetrator walking towards the scene of the incident). You may also need to call as witnesses any students, staff, or family members who have information relating to the incident, including anyone to whom the victim disclosed the incident.

update

Jubran - Judicial Review of Human Rights Tribunal Decision

The bullying decision of *Jubran v. North Vancouver School District No. 44* (previously discussed in our October 2002 eBulletin) was recently overturned by the B.C. Supreme Court.

At first instance, the B.C. Human Rights Tribunal found the school board liable in respect of discrimination and harassment based on sexual orientation which Jubran suffered at the hands of his fellow students. The Tribunal made this finding despite rejecting Jubran's argument that the school administration had failed to take steps to stop the bullying.

Upon judicial review to the B.C. Supreme Court, the decision was overturned. The Court held that since the student was not a homosexual and the other students did not perceive him to be a homosexual, the students' conduct did not fall within s. 8 of the British Columbia *Human Rights Code* which precluded discrimination based on sexual orientation. Since the Tribunal had made a fatally flawed decision, the decision was quashed.

In our view, the Tribunal's decision was also flawed in that it failed to explain how the school board's alleged breach of duty caused the harm suffered by the student. Given the nature of the Court's decision, however, there was no need for this matter of causation to be addressed.

It is not yet known whether the B.C. Supreme Court's decision will be further appealed to the B.C. Court of Appeal.

freedom of information

Privacy Complaints and MFIPPA

Last time we discussed the obligations of a public institution to protect individuals' privacy, in part by ensuring that personal information in the possession of the institution is not released except in circumstances permitted by the *Municipal Freedom of Information and Protection of Privacy Act*. What happens when someone thinks a school board employee has improperly released personal information?

"Privacy complaints" are often brought informally to the attention of a school board when a student, parent or employee informs the school or board administration of his or her concern about the release of specific information. The "complainant" may or may not refer to MFIPPA and, indeed, may not even be aware of it. Likewise, educators on the "front lines" often receive and resolve such complaints without reference to MFIPPA.

Under MFIPPA, the responsibility for freedom of information and privacy matters can be, and usually is, delegated to a specific employee, such as a freedom of information and privacy coordinator or officer. (ss. 2, 49) For those who wish to pursue the matter, complainants may approach the designated employee in writing or verbally. Additionally, complainants can lodge a formal complaint with the Information and Privacy Commissioner/Ontario (IPCO). However, the IPCO itself recommends that complainants first approach the institution and attempt to resolve the matter. ("Your Privacy and Ontario's Information and Privacy Commissioner" Brochure, IPCO, September 2000)

If the complainant cannot resolve the matter directly with the school board, the IPCO will consider the complaint in the context of MFIPPA and past decisions with respect to similar complaints. The IPCO can refuse to pursue a complaint which it determines from the outset has no merit. In other cases, it will assign a Mediator to investigate and attempt to resolve the matter.

Next time: What can the IPCO and/or the school board do in response to a privacy complaint?

We welcome your comments and questions. Send them, and any updated contact information, to byrdena.macneil@shibleyrighton.com. If you wish to unsubscribe to this eBulletin, please send a blank e-mail to unsubscribe@shibleyrighton.com

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