

Students at the Centre

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Suspensions and Expulsions: Safer Schools for Whom?

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By Jennifer Birrell and Paul Marshall¹

I. Introduction

Safety is a fundamental tenet of the education system. Without safety in schools, children cannot blossom to their full potential and teachers cannot fulfill their pedagogical mandate.

Recent years have witnessed increasing violence in schools and shown how vulnerable school communities are. From the shooting of Jason Lang at W. R. Myers High School in 1999 to the killing of Anastasia de Sousa at Dawson College in 2006, we have seen that violence does not discriminate between small towns and big cities and when it strikes, life, of both its victim and of entire communities, comes to a screeching halt.

In the wake of such tragedies, safety concerns have grown exponentially. As a society, we have come to realize that bad behaviour and rowdiness in schools are not just about kids being kids, to be shrugged off as part of their growing process. The underlying malaise among children now bears the names and faces of young lives lost to violence. There exists an understanding of the need to be proactive and to examine behavioural issues at their root before more dreams are shattered and more lives lost.

So far, one of the weapons in the fight against violence and bad behaviour has been the implementation of stricter discipline, in the form of suspensions and expulsions, in schools

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coupled with an effort to inculcate values such as responsibility, accountability, civility and respect to children. The rationale behind this thinking being that students will learn consequences attached to their actions and that conflict can be resolved in amiable ways; they will learn to take responsibility and to ponder over the personal and societal implications of deviant behaviour. This approach has resulted in increased policing of behaviour in schools. Both educators and legislators are now weighing down on violence and refusing to tolerate disruptions to positive learning environments.

This approach is highly laudable inasmuch as it zooms in on the “bullies” of today and attempts to reform by planting the seed of responsibility and accountability at an early age so that they become responsible citizens of tomorrow. However, the question that must be addressed is whether this *prima facie* focus on the perpetrators leaves any energy or resources to address the other roles/responsibilities. It is this very point that the authors of this paper seek to examine, in light of this year’s CAPSLE conference theme of “students in the centre”.

II. “Safe Schools”

There is no one definition of a safe school. On the Ontario Ministry of Education website, a safe school is described as enabling “learning and teaching within an environment that fosters responsibility, respect and academic excellence”. While most would tend to agree with this description, it is worth noting that safety is a relatively fluid concept and that the yardstick to measure safety will vary depending on where one stands as a stakeholder. For example, the government may measure safety by the money pumped towards safety

initiatives in a given year. A school board may measure safety by the number of suspensions/expulsions issued in a school year. A teacher may measure safety by how threatened she feels of being assaulted by a student in class or having her car damaged in the school lot. A student may measure safety by how anxious he feels to get on the school bus in the morning, or when facing his peers in the school yard. Support staff may measure safety by the frequency of assaults by special needs students. Parents may measure safety by the degree of trust they have in the quality of care provided by their children’s educators. Lastly, if one were to ask unions or federations, they may measure safety by the number of workplace incident grievances filed by their members.

Given this subjective notion of safety, it goes without saying that each stakeholder will have its own perspective as to how to redress potentially unsafe situations. In light of the relatively recent enactment of the *Safe Schools Act*² in Ontario, a review of how this legislative initiative seeks to meet these myriad safety concerns is appropriate.

III. Safe School Legislation

The *Safe Schools Act* was enacted in Ontario in June 2000. The long title of the Act is quite telling as to the intent of its creators: “An act to increase respect and responsibility, to set standards for safe learning and safe teaching in schools and to amend the *Teaching Act*”. Thus, the *Safe Schools Act* seeks not only to render students accountable for their actions, but also to inculcate civic values to them. It is aided in this objective by the promulgation of the

² *Safe Schools Act*, 2000, S.O. 2000, c.12 – Bill 81.

*Ontario Schools Code of Conduct*³ which in turn sets clear provincial standards of behaviour for not only students but school boards, teachers and school staff, parents or guardians, police and community members.

Together, the *Safe Schools Act* and the *Ontario Schools Code of Conduct* gave new meaning to student discipline. The tandem replaced the previous standard for discipline under section 23 of the *Education Act*⁴ with a formula designed to restore authority and give greater bite to teachers, principals and school boards in applying discipline. Whereas in the past students could only be disciplined for refractory conduct, and that too at the principal's discretion, the new legislation sets clear rules and prescribes mandatory suspensions and expulsions for students who break the rules. For example, teachers who previously had their hands tied when it came to discipline may now impose suspensions for misconduct requiring mandatory suspensions.⁵ In addition to mandating the imposition of compulsory sanctions, the *Safe Schools Act* further mandates principals and school boards to implement various initiatives to promote a safer school environment. For example, principals can now use their discretion in refusing access to school premises to individuals whose presence they deem detrimental to the safety or well-being of another person on the premises.⁶

There is no doubt that the *Safe Schools Act* is empowering to educators and that the *Code of Conduct* defines clear roles and responsibilities for everyone. The new disciplinary process set forth by the legislators was a formidable crackdown on bad behaviour and violence and sent a loud and resounding message to the education community. This message is commonly

³ *Ontario Schools Code of Conduct* available on the Ministry of Education website at www.edu.gov.on.ca.

⁴ *Education Act*, R.S.O. 1990, c. E. 2.

⁵ *Safe Schools Act*, s. 306(3).

⁶ *Education Act*, Access to School Premises, O. Reg. 474/00, s. 3(1).

construed by some as the “zero tolerance” flavour of the *Safe Schools Act*. It is notable however that, in their zeal, the legislators overlooked one simple but fundamental feature of discipline: the legislation failed to provide for a mandatory framework of reconciliation between the perpetrators and the victims. While the legislation boasts, as an objective, the instilling of responsibility and respect in students and the resolution of conflict in non-violent ways, it unfortunately lacks a mechanism whereby students who have wronged effectively take responsibility for their actions and communicate their understanding of the wrong committed to the victims of their actions. The absence of a mandatory mediation process, of compulsory community service or even an apology as a sanction under the legislation, all of which gets the perpetrators to *really* ponder and understand the ramifications of their actions and bring a sense of personal closure to victims, is sorely noted. In this regard, discipline under the *Safe Schools Act*, like prosecution under the *Criminal Code*, does not hold the victim “at the centre”.

IV. The Disciplinary Process

Disciplinary penalties under the *Safe Schools Act* take the form of mandatory suspensions, mandatory limited or full expulsions, discretionary suspensions or discretionary expulsions. The discretionary forms of discipline are established and levied by school boards pursuant to the powers conferred on them by the statute.⁷ As a result, school boards across the province are mandated to develop policies which, on one hand, would apply the statutory sanctions for prescribed offences and on the other, apply sanctions for behaviours that they consider injurious to their individual school communities. For example, following the enactment of

⁷ *Safe Schools Act*, ss. 307(1) and 310(1).

the *Safe Schools Act*, the Toronto District School Board created its Chart of Consequences for Inappropriate Behaviour⁸ that details offences and sanctions singled out by both the legislation and the Board itself.

School boards have had a vital role in the implementation and enforcement of the disciplinary process proponed by the legislation. In effect, with the new regime in place, school boards have been called upon to police and adjudicate on disciplinary matters. While discipline may not be new to the education environment, the legal obligation to have policies and procedures in place for the application of the statutory sanctions, the establishment of processes to inform students and parents of the new standards of behaviour and the nature and scope of training of teaching and support staff with respect to safe teaching and learning environment, indeed is.

These changes have had an impact on the school systems. Educators have been called upon to become investigators, counsel and decision makers in addition to their responsibilities to educate. Where principals used to focus on such important issues as: curriculum, leadership, staffing and comprehensive management of their school, many now must also focus on the number of students expelled and suspended for misconduct, and ensuring fairness before imposing these sanctions. The Toronto District School Board website, for example, indicates that, before using the Chart of Consequences, the principal “will conduct an investigation, and consider discretionary factors such as age, degree of harm, history, level of understanding, accommodation of special education needs as well as the mitigating circumstances (as set out in the *Education Act*). In addition, principals will consider whether

⁸ *Chart of Consequences for Inappropriate Behaviour* available on the Toronto District School Board website at www.tdsb.on.ca.

racial or other harassment predicated the student's behaviour and whether the principles of progressive discipline have been followed.”⁹ And to illustrate just how colossal a task this entails for principals, factor in that from September 2005 to February 2006, 8,352 students were suspended and 133 students were expelled within the Board’s jurisdiction alone.¹⁰ With this focus on discipline and perpetration, how much of the finite pool of resources can be used attending to the needs of victims of such misbehaviour?

In fulfilling this statutory mandate, school boards and principals have been caught in a simmering legal cauldron of human rights issues, administrative law lessons and civil liability suits, amongst others. Every action in the disciplinary process may fall under legal scrutiny in this increasingly litigious, rights-based democracy that we live in.¹¹

V. The Disciplinary Quagmire

Following the enactment of the *Safe Schools Act*, critics were quick to deplore the new rules as “zero tolerance” policing, and argued that those charged with implementing the new rules failed to properly apply mitigating factors, discriminated against racial minorities and exceptional students and criminalized their behaviour.¹² Parents with children suspended or expelled from school for breaking the rules turned to courts to assert their right to an education. Educators found themselves in a sort of catch-22; bombarded from all sides for

⁹ *Ibid.*

¹⁰ *Ibid.*, Suspensions and Expulsions.

¹¹ Eric M. Roher and Robert W. Weir, *An Educator’s Guide to Safe Schools*, Aurora Professional Press, 2004 at pp. 2-5.

¹² Ken Bhattacharjee, *The Ontario Safe Schools Act: School Discipline and Discrimination*, available on the Ontario Human Rights Commission website at www.ohrc.on.ca.

how they were handling discipline and damned if they acted and damned if they didn't. The following jurisprudence illustrates the legal conundrum of school boards and principals.

A. Of Human Rights Issues

On October 6, 2005, the Ontario Human Rights Commission settled its complaint with the Dufferin-Peel Catholic District School Board.¹³ The complaint arose from concerns that school discipline policies were being applied in a manner that discriminated against students from racialized communities and students with disabilities and, in particular, that mitigating factors were not being sufficiently considered before suspensions and expulsions were meted out to students. As a result of the settlement, the Dufferin-Peel Catholic School Board committed to undertake a number of measures ranging from anti-racism awareness and disability accommodation training, to sharing information on accessing the appeal process. Other initiatives included making alternative educational programs and services available to all students under suspension or expulsion, and working with the Commission to look at gathering statistics and ensuring measures undertaken to respect the principles set out in the *Ontario Human Rights Code*.¹⁴

On November 14, 2005, the Ontario Human Rights Commission reached a similar settlement with the Toronto District School Board.¹⁵ The complaint against the School Board was that it had failed to accommodate racialized students and students with disabilities in the application of discipline, which amounted to a failure to provide equal access to education

¹³ News Release, *Commission settles complaints with the Dufferin-Peel Catholic District School Board*, October 6, 2005, available online at the Ontario Human Rights Commission website at www.ohrc.on.ca.

¹⁴ *Ibid.*

¹⁵ News Release, *Human Rights Settlement Reached with Toronto District School Board*, November 14, 2005, available online at the Ontario Human Rights Commission website at www.ohrc.on.ca.

services, which in turn constituted discrimination and violated the *Human Rights Code*. In the 17-part settlement, the School Board agreed, amongst other things, to survey the extent to which the *Safe Schools Act* is having an adverse impact on individuals protected under the *Human Rights Code*, to rewrite its Grid of Consequences to ensure that the use of discretion and mitigating factors are emphasized in meting out discipline and to develop a procedure with respect to the recruitment, retention and promotion of racialized teachers to bring an equitable representation that is reflective of the Toronto community.

In *School District No. 44 (North Vancouver) v. Jubran*,¹⁶ the School Board was held responsible by the British Columbia Human Rights Tribunal for the homophobic bullying of one of its students over the course of 5 years and it was ordered to cease its contravention of the *Human Rights Code* and refrain from committing the same or similar contravention. Despite the fact that the school actively investigated the incidents of harassment against the complainant and disciplined the culprits, the Tribunal found that the progressive discipline applied (which included discussions of their behaviour and possible consequences with each offending students and the application of measures such as detentions, meetings with parents and suspensions) had been ineffective in stopping the harassment of Mr. Jubran and that the School Board had failed to provide him an educational environment free from discriminatory harassment. In this case, Mr. Jubran did not even identify himself as homosexual but that fact was deemed irrelevant by both the Tribunal and the British Columbia Court of Appeal.

B. Of Administrative Law Lessons

¹⁶ *School District No. 44 (North Vancouver) v. Jubran*, [2002] BCHRT No. 10, affirmed by 2005 BCCA 201 (CanLII). See also Emond Harnden's Education Law Alerts at <http://www.emond-harnden.com/publications/aug05/schooldistrict44vjubran.shtml>.

In *Jackson v. Toronto Catholic District School Board*,¹⁷ Andre, an African-Canadian “exceptional pupil”, brought a knife to school. It was actually a double-edged blade inside a silver pen. During recess, he threatened two schoolmates with the instrument. The incident was reported to the principal who investigated pursuant to s. 309 of the *Safe Schools Act*. He reported the incident to his superintendent, called the police since a weapon was involved and then contacted Andre’s mother to apprise her of the situation and the possibility of Andre’s expulsion. At the end of his inquiry, the principal decided to impose a limited expulsion from April 8, 2002 to March 31, 2003. In reaching his decision, he satisfied himself that the recess incident had substantially happened, he considered Andre’s special needs and his previous incidents of inappropriate and increasingly aggressive behaviour, and finally he considered whether any mitigating circumstances existed. Andre’s mother appealed the expulsion to the Board and in court on the basis of procedural unfairness. She alleged a failure to provide reasonable notice of the expulsion hearing, to provide proper disclosure of the accusers’ witness statements, to permit full answer and defense, to provide Andre the right to counsel and to provide reasons for the principal’s decision. The Court held that the School Board and the principal acted in good faith at all times and in accordance with the principles of fundamental justice. Andre’s expulsion was maintained.

C. Of Civil Liability Suits

In *Trépanier (Tuteur) c. Proulx*,¹⁸ two students, Francis and Olivier, got involved in a schoolyard fight. Francis slugged Olivier in the left eye and knocked him out. The latter suffered damage to his eye which eventually required surgery. The damage was later

¹⁷ *Jackson v. Toronto Catholic District School Board*, 2006 CanLII 23951 (ON S.C.D.C.). See also Emond Hamden’s Education Law Alerts at http://www.emondhamden.com/whatsnew/mar07/Jackson_TCSB.shtml.

¹⁸ *Trépanier (Tuteur) c. Proulx*, IIJCan 393 (QC C.S.).

exacerbated by an unfortunate accident to the same eye while Olivier was snowshoeing and he developed a cataract. The parents of the victim sued Francis personally, his parents, the parents' insurer and the School Board for Olivier's injuries resulting from the fight. Under s. 1459 of the *Civil Code of Quebec*, parents can be held liable for damages for injuries caused by the act or fault of a minor unless they can prove that they were without fault with respect to the custody, supervision or education of the minor. Section 1460 of the *Code* extends the same liability to schools. Olivier's parents relied on the fact that fault is presumed under s. 1460 in their claim against the Board and alleged that the Board failed to properly discharge its obligations with respect to Francis' custody, supervision and education. In particular, they alleged that the school knew that Francis was prone to violence, that the fight was foreseeable and yet failed to provide proper supervision to prevent the incident. The Court held that the School Board had been successful in reversing the presumption of fault and that it had not failed to properly discharge its obligations under the *Code*.

In *Schmunk (Estate of) v. Medicine Hat Catholic Board of Education*,¹⁹ the parents of Daniel Schmunk sued the School Board, the Board's Superintendent and the school principal for negligence. On the heels of the shooting at W. R. Myers High School in Taber, Alberta, Daniel participated in a prank involving a note with respect to a secret plan to get guns, go to school and shoot everyone. He was dared by his classmates to distribute the note at school by sliding it under a door and he accepted. Shortly after he distributed the note, he was summoned to the principal's office where he was questioned about the presence of a gun in his car. Daniel admitted to having a pellet gun and hunting knife in his car. Due to school policy prohibiting weapons on school property, the police were called, Daniel's car searched

¹⁹ *Schmunk (Estate of) v. Medicine Hat Catholic Board of Education*, 2004 ABQB 273 (CanLII).

and the gun confiscated. School policy also stipulated that parents did not have to be called for students above 18 years of age and the principal did not call Daniel's parents about the incident. The police search occurred during the lunch break and Daniel left the school at 12:30 p.m. on the day in question. He was later found dead from carbon monoxide inhalation in a family car. His family alleged that the principal's actions caused Daniel such humiliation, stress and embarrassment that he intentionally took his own life. The Court examined the specific duties of care alleged by Daniel's family and found no negligence by the principal. In that the principal was not negligent, the School Board and superintendent were held not negligent as well and the action was dismissed.

In *Kendal v. St. Paul's Roman Catholic Separate School Division No. 20*,²⁰ the plaintiff suffered an injury when one of her special needs students struck her on the side of the head with a strong open-handed blow. She sued the School Board in negligence and for breach of contract. The gist of her claim was that the Board failed to provide a safe working environment, which was not only negligent but also in breach of her employment contract. The student in question suffered from Asperger's syndrome and had a tendency to get upset and violent and often required physical restraint. The plaintiff alleged that the incident was foreseeable, that the School Board knew that sooner or later someone was going to get hurt and that it should have removed the student from the school "either by suspension, exemption or expulsion, by relocating him to another facility, or arranging for home schooling".²¹ The Court of Appeal affirmed the trial decision that the School Board had not created an unreasonable risk and as a result, was not negligent.

²⁰ *Kendal v. St. Paul's Roman Catholic Separate School Division No. 20*, 2003 SKQB 214 (CanLII), affirmed by 2004 SKCA 86 (CanLII).

²¹ *Ibid.*

D. Of Labour Relations

While teachers, as defined under the *Education Act*, are not covered by the *Occupational Health and Safety Act*,²² there is no such exemption for educational assistants and increasingly these staff have been refusing to work by invoking safety concerns.²³ In *Peel District School Board v. Elementary Teachers Federation of Ontario - Peel Local*,²⁴ the Ministry of Labour Officer directed the School Board to develop and implement written policies and procedures relating to the protection of workers from violence from special needs students as a result of a work refusal by a teacher. The Board requested a suspension of the order. In deciding such requests, the paramount consideration of the Labour Relations Board is whether the suspension would jeopardize the health and safety of workers. The adjudicator found that the removal of the order would likely exacerbate the risks faced by teachers dealing with special needs students with a propensity for violence inasmuch as the School Board would be freed of the obligation to have safeguards in place. He upheld the order.

E. Of Criminalization Critics

With the enactment of the *Youth Criminal Justice Act*,²⁵ the discrepancy between school discipline and penal sanctions has become more pronounced, with the result that school boards and principals are caught between colliding pieces of legislation and accused of

²² *Occupational Health and Safety Act*, R.S.O. 1990, c.O.1 at s. 3(a).

²³ Brian P. Nolan *et al.*, When Special Needs Education and Safety Collide : Occupational Health and Safety Implications of the Education of Special Needs Pupils in Ontario, *Education & Law Journal* 2004-05, at pp. 235-248,

²⁴ *Peel District School Board v. Elementary Teachers Federation of Ontario-Peel Local*, 2005 CanLII 44733 (ON L.R.B.).

²⁵ *Youth Criminal Justice Act*, 2002, c.1, Y-1.5.

unjustly criminalizing student behaviour.²⁶ Whereas safe school legislation demands police involvement for certain offences, the police and courts are being told to channel young offenders out of the justice system through diversion. For example, in *R. v. C.M.P.*,²⁷ the offender, a 17 year old student, pled guilty to assault causing bodily harm on her schoolmate. Under school board by-laws, she would have been either suspended or expelled but under the *Youth Criminal Justice Act* she was ordered 12-month probation, 10 hours of community service work and 20 hours of personal service work. The difference in sanctions reflects the intent of the legislators, often with inconsistent results.

VI. Safe School Realities

From the above, a conclusion may be drawn that as school boards and principals take on the heavy burden of the rule-enforcer, they must also equip themselves with the knowledge and tools to defend their actions/decisions. On the one hand, they face potential liability for incidents involving students under their responsibility; on the other, they are at risk of discrimination complaints by expelled or suspended students, all in the face of the wrath of their stakeholders if they fail to fulfill their mandate. Society no longer considers them as just the *in loco parentis* trustees of children under their care; it also expects them to be responsible citizens that set the example for others and to be caring and nurturing employers.

In all this, one cannot help but notice that the mandate is deviating from the necessary focus on education and curriculum. While education invariably remains the core mandate of

²⁶ Sarah Colman and Allyson Otten, *The Safe Schools Act and the Youth Criminal Justice Act: Different Approaches to Justice for Youth*, *Education & Law Journal* 2004-05, at pp. 287-299.

²⁷ *R. v. C.M.P.*, 2003 CanLII 8721 (NL P.C.).

school boards, this core has in recent years been challenged by the increasing demands imposed on school boards, administrators and principals. And again, time and money spent on investigation and hearings is, by necessity, *not* spent on teaching students how to cope with bullies, peer pressure and adolescence nor does it attend to the needs of victims.

The implementation of the safe school legislation has indisputably had repercussions far beyond simple rule-enforcement. It has eaten into the finite pie at the disposal of our school boards, placing increasing demands on the provision of key services such as teacher training, support staff and counseling personnel. When one looks at that pie, one notes: without a complement of trained social workers, who are the silent victims of bullying to turn to? Without adequate lunchroom supervision, how can student fights be prevented? Without appropriate training, how can teachers recognize or respond to the needs of exceptional students? Without counselors and mediators, who is there to awaken the conscience of the bullies?

VII. Conclusion

At the end of the day, educators want to focus on education in an atmosphere conducive to all stakeholders. Restoration of the eroded authority of our schools and reconciliation of the rights of the bullies with those of their victims is essential. Clearly the victims also have education rights equal to those of the bullies and these must be brought back to the fore. In an attempt to shift the focus from regulation of education, initiatives are required in order to complement the existing discipline process.

The Canadian Safe School Network have brought forward some very laudable initiatives, have developed pedagogical resources and have formed key community partnerships to educate students about bullying and the resolution of conflicts. Websites such as *www.b-free.ca* and resources such as the Kids Help Phone are being promoted to the internet generation. In Ontario, the government created the Safe School Action Team to review the *Safe Schools Act* and measure the education community's pulse with respect to the impact of the *Act*.²⁸ More recently, the McGuinty government pledged \$5.7 million over 3 years to enable more than 25,000 teachers and almost 7,500 principals to receive training about bullying-related activity recognition, prevention and intervention strategies.²⁹ In Alberta, the Task Force on Children at Risk was set to develop comprehensive crisis response plans and to explore strategies to provide a healthy start to all kids and not just kids with a propensity for violence.³⁰

In the time that it will take for the benefits from these initiatives to flow, one can only hope that the pressures on educators will be relieved and enable the school communities to focus their attention back on the classroom.

²⁸ *Safe Schools Policy and Practice: An Agenda for Action*, June 2006, available online at the Ministry of Education website at www.edu.gov.on.ca.

²⁹ News Release, *McGuinty Government Helping Teachers and Principals Combat Bullying*, February 23, 2007 available on the Ministry of Education website at <http://www.edu.gov.on.ca>.

³⁰ *Start Young Start Now! Report of the Task Force on Children at Risk*, available on the Alberta Children's Services website at www.gov.ab.ca/cs.