

# Students at the Centre

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## Suspensions and Expulsions: Safer Schools for Whom?

**CAPSLE Conference**  
**April 22-24, 2007**

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# Overview

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- **Safe school as an ideal**
- **Ontario safe school legislation**
- **Disciplinary process**
- **Challenges presented**
  - human rights
  - civil liability
  - administrative law lessons
  - labour relations
- **Fallout**
- **On the horizon**

## **Safer schools for whom?**

# Misconduct in Schools

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- **Safety concerns**
- **Needs of the pupil**
- **Consequences on the victim**
- **Prevention**
- **Response**
- **Dealing with the fallout**

# “Safe Schools”

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## What is a safe school?

# “Safe Schools”

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## How do different stakeholders measure safety?

- School Boards
- Teachers
- Students
- Support Staff
- Parents
- Unions/ Federations
- Government

## “Safe Schools”

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### According to the Ontario Ministry of Education:

- A safe school “*enables learning and teaching within an environment that fosters responsibility, respect and academic excellence*”.
- Safe schools are “*a prerequisite for student success and academic achievement*”.

Ontario Ministry of Education website, [www.edu.gov.on.ca](http://www.edu.gov.on.ca)

# Safe School Legislation

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## Ontario *Safe Schools Act*:

*“ An Act to increase respect and responsibility, to set standards for safe learning and safe teaching in schools and to amend the Teaching Act”*

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

# Safe School Legislation

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## ***Ontario Schools Code of Conduct:***

- *“A school is a place that promotes responsibility, respect, civility and academic excellence in a safe learning and teaching environment”.*
- *“All students, parents, teachers and staff have the right to be safe, and feel safe, in their school community”.*

*Ontario Schools Code of Conduct* available on the Ministry of Education website at [www.edu.gov.on.ca](http://www.edu.gov.on.ca)

# Safe School Legislation

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## ***Safe Schools Act* – What it has:**

- Mandatory suspensions and expulsions for specific offences.
- Mitigating factors for students who cannot control or comprehend the consequences of their behaviour.
- Increased disciplinary power for teachers and principals:
  - Restrictions on access to school premises
  - Establishment of policies and guidelines with respect to the conduct of persons in schools mandated to school boards

# Safe School Legislation

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## ***Safe Schools Act – What it lacks:***

- No framework of reconciliation between the perpetrator and the victim
- No mandatory mediation
- No community service
- Apology not required

# The Disciplinary Process

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## Mandatory Suspensions

- Uttering threat to inflict serious bodily harm on another person;
- Possessing alcohol or illegal drugs;
- Swearing at a teacher or another person in authority.

## Discretionary Suspensions

- For engaging in an activity which qualifies for a discretionary suspension under school board policy.

# The Disciplinary Process

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## Mandatory Limited or Full Expulsions

- Possession of a weapon, including possession of 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.

## Discretionary Expulsions

- For engaging in an activity which qualifies for a discretionary expulsion under school board policy.

# The Disciplinary Process

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## Increased Responsibilities for School Boards:

- Establish policies and procedures to implement Safe School legislation;
- Monitor inappropriate behaviour;
- Adjudicate on disciplinary sanctions;
- Explain and defend actions.

# The Disciplinary Process

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## The Toronto District School Board example:

- Chart of Consequences
  - *“Prior to using the Chart, the principal will conduct an investigation, and consider discretionary factors such as age, degree of harm, history, level of understanding, accommodation of special needs as well as the mitigating circumstances (as set out in the Education Act). In addition, principals will consider whether racial or other harassment predicated the student’s behaviour and whether the principles of progressive discipline have been followed.”*

*Chart of Consequences for Inappropriate Behaviour* available on the Toronto District School Board website at [www.tdsb.on.ca](http://www.tdsb.on.ca).

# Challenges

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## Challenges to Board or Administration actions:

- *Safe Schools Act*: a “zero tolerance” flavour
- Process
- Application of mitigating factors
- Allegations of discrimination against racial minorities and exceptional students
- Criminal or penal concepts applied to a school setting

# Legal Challenges

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- Human rights complaints
- Civil liability suits
- Labour relations matters
- Administrative law process

## Human Rights Issues:

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**On July 2003, the Ontario Human Rights Commission published a report on the disproportionate discriminatory effects of mandatory school discipline policies on racial minority students and students with disabilities.**

See Ken Bhattacharjee, *The Ontario Safe Schools Act: School Discipline and Discrimination*, available on the Ontario Human Rights Commission website at [www.ohrc.on.ca](http://www.ohrc.on.ca)

# Human Rights Issues

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## ***OHRC v. Dufferin-Peel Catholic District School Board***

### **Facts:**

- Complaints arose from concerns that school discipline policies were having a discriminatory impact on students from racialized communities and students with disabilities.

See 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](http://www.ohrc.on.ca)

# Human Rights Issues

## *OHRC v. Dufferin-Peel ...continued*

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- October 6, 2005, the OHRC settled its complaints with the School Board.
- Mitigating factors were not being properly applied before imposition of discipline e.g. student with ADD asserted that his inability to sufficiently control his behaviour due to his disability was not considered nor accommodated before he was suspended.

### **Result:**

- As a result of settlement, the 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.

# Human Rights Issues

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## ***OHRC v. Toronto District School Board***

### **Facts:**

- The complaint was initiated in the public interest and alleged that the application of the Safe Schools Act and the Board policies were having a disproportionate impact on racial minority students and students with disabilities.

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](http://www.ohrc.on.ca)

# Human Rights Issues

## *OHRC v. TDSB ...continued*

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- It was alleged that the Board had failed to accommodate racialized students and students with disabilities, which amounted to a failure to provide equal access to education and to discrimination under the Code.

### **Result:**

- On November 14, 2005, the Commission settled its complaint against the TDSB.
- As part of the settlement, the Board agreed to survey the extent to which the *Safe Schools Act* was having a disproportionate impact on individuals protected under the Code, to rewrite its Grid of Consequences and to develop a procedure for the recruitment, retention and promotion of racialized teachers.

# Human Rights Issues

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## ***OHRC v Her Majesty the Queen (Ministry of Education)***

### **Complaint:**

- The complaint alleged that the application of school discipline legislation and policies were having a discriminatory impact on racialized students and students with disabilities.

### **Result:**

- On April 10, 2007, the Commission reached a landmark settlement with the Ministry of Education in order to “*promote school safety while ensuring that all students, including students with disabilities and racialized students, are given the opportunity to reach their full potential*”.

# Human Rights Issues

## *OHRC v Ministry of Education ... continued*

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- As a result of the settlement, the Ministry committed to a comprehensive review of the safe schools provisions of the *Education Act*, the expansion of the regulations on mitigating factors and their consideration by principals and school boards prior to imposing discipline, and the anti-racism, anti-discrimination and cultural awareness training of principals, vice-principals, teachers and trustees responsible for suspensions and expulsions.

News release, *Safe Schools Settlement Reached with Ministry of Education*, April 13, 2007, available online at the Ontario Human Rights Commission website at [www.ohrc.on.ca](http://www.ohrc.on.ca)

# Mitigating Factors

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Consideration of:

- Whether racial or other harassment a factor in the behaviour;
- Whether progressive discipline was attempted;
- Impact of suspension or expulsion on the student's education;
- Whether suspension or expulsion will result in a worsening of the behaviour;
- Age of the student;
- In the case of a student with a disability, whether the behaviour was a manifestation of the disability and whether accommodation has been provided; and
- Safety of other students.

# Human Rights Issues

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## ***School District No. 44 (North Vancouver) v. Jubran, [2002] BCHRT No. 10, affirmed by BCCA 201 CanLII.***

### **Facts:**

- Azmi Jubran was the victim of homophobic bullying over a period of 5 years.
- The school board actively investigated the incidents of harassment and disciplined the perpetrators.
- The discipline included discussions with these individuals about their behaviour and possible consequences, detentions, meetings with parents and suspensions.
- The harassment against Mr. Jubran did not subside.
- Mr. Jubran did not even identify himself as homosexual.

# Human Rights Issues

## *School District No. 44 v. Jubran ...continued*

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### **Decision:**

- The Tribunal concluded that it was irrelevant whether the complainant identified himself as homosexual and whether his harassers knew or believed him to be homosexual since *“it is the effect of the conduct, or action, not the intent of the harassers that is relevant in determining whether discrimination has occurred”*.
- The School Board was found responsible for the discrimination against Mr. Jubran as it had failed to provide him with an educational environment free from discriminatory harassment.

# Civil Liability Suits

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## *Trépanier (Tuteur) c. Proulx, IIJCan 393 (QCCS).*

### **Facts:**

- Two students were involved in a schoolyard fight.
- F. slugged O. in the left eye and knocked him out.
- O. suffered serious damage and required surgery.
- Damage was later exacerbated by a snowshoeing accident.

### **Claim:**

- O.'s parents sued F.'s parents, their insurer and the school board in negligence.

# Civil Liability Suits

## *Trépanier (Tuteur) c. Proulx ...continued*

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- Under the Quebec *Civil Code*, 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.
- The same liability is extended to school boards.
- The parents relied on the fact that fault is presumed in their claim against the school board and alleged that the board failed to properly discharge its obligations with respect to F.'s custody, supervision and education.
- In particular, they alleged that F. was a special needs child, prone to violence and the school failed to provide proper supervision to prevent the incident.

# Civil Liability Suits

## *Trépanier (Tuteur) c. Proulx ...continued*

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### **Decision:**

- The Court found that the fight took place within seconds, was not foreseeable and could not have been prevented with greater supervision.
- The Court also found that the Board had properly discharged its education obligations towards F. by disciplining him when necessary and closely monitoring his progress.
- Ultimately, the Court held that the Board had successfully reversed the presumption of fault and had not failed to properly discharge its obligations with respect to F.'s custody, supervision and education under the *Civil Code*.

# Civil Liability Suits

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

### **Facts:**

- On the heels of the Columbine and WR Myers shootings, the student participated in a prank involving a note with respect to a 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. The student accepted.
- Shortly after he distributed the note, he was summoned to the principal’s office.

# Civil Liability Suits

## *Schmunk v Medicine Hat ...continued*

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- The principal questioned the student about a gun that was reported to be in his car.
- The student admitted to the presence of a pellet gun that he used for target practice after school.
- School policy prohibited weapons on school property and the principal called the police. The police arrived during lunch hour, searched the student's car and confiscated the weapon.
- The student was above 18 and school policy stipulated that parents did not have to be contacted in such cases. There was no immediate communication between the home and school.
- Suspension was considered as a possible outcome but was not imposed.

# Civil Liability Suits

## *Schmunk v Medicine Hat ...continued*

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- The student left the school that day but never reached home.
- He was later found dead from carbon monoxide inhalation in a family car.

### **Claim:**

- His parents sued the principal, the superintendent and the School Board in negligence, alleging that the principal's actions had caused their son such humiliation, stress and embarrassment causing him to take his own life.

# Civil Liability Suits

## *Schmunk v Medicine Hat* ...continued

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### Decision:

- The Court held that the principal owed only a general duty of care to the student which required him to reasonably follow the policies of the board. There was no specific additional duty of care owed.
- The principal acted reasonably and at all times met the standard of care in following the board policies in ensuring adequate care and supervision to the student and to the student body.
- The claim was dismissed.

# Civil Liability Suits

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***Kendal v. St. Paul's Roman Catholic Separate School Division No. 20, [2004] (SKCA) 86 (CanLII).***

**Facts:**

- The plaintiff was struck on the side of her head by one of her special needs students (Asperger) and suffered an injury.

**Claim:**

- She sued the School Board in negligence and breach of contract for failing to provide her with a safe working environment.
- She alleged that the Board had failed to properly train staff to deal with special circumstances, failed to have the student removed when it became apparent that he could not safely function in the school and failed to provide equipment and facilities necessary to safely work with the student.

# Civil Liability Suits

## *Kendal v St Paul's RCSSD ...continued*

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### Decision:

- The school board owed a duty of care to the plaintiff and having the student in the school presented a risk. The Court examined whether that risk was unreasonable.
- *“Having regard to the statutory obligations imposed upon the defendant, the social value of the programs offered at Bishop Pocock School, the careful planning that went into those programs, and the steps taken to minimize the perils, it is my view that the notional reasonable person of ordinary prudence would accept an elevated level of risk rather than forego the exercise. The game is worth the candle.”*
- The Trial judge dismissed the action which was upheld by the Court of Appeal.

# Labour Relations

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## *Peel District School Board v Elementary Teachers' Federation of Ontario – Peel Local, 2005 CanLII 44733 (ONLRB).*

### **Facts:**

- A work refusal was initiated by a teacher.
- The Ministry of Labour ordered the development and implementation of written policies and procedures relating to the protection of workers from violence from special needs students.
- The Board appealed the order and sought to suspend Ministry of Labour order pending disposition of the appeal.

# Labour Relations

## *Peel District School Board v ETFO ...continued*

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- The Board argued that it had developed policies, procedures and practices to address safety issues for staff and students and that *Education Act* and Regulations were “*more than adequate to ensure worker safety...and protect workers from danger associated with special needs students who may be violent.*”

### **Results:**

- The Labour Relations Board held that the removal of the order would likely exacerbate the risks faced by educational staff dealing with special needs students with a propensity for violence and would free the school board of the obligation to maintain safeguards in place.

# Administrative Law Lessons

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## *Jackson v Toronto Catholic District School Board, 2006 CanLII 23951 (ONSCDC).*

### **Facts:**

- An 11-yr old grade six, exceptional pupil brought a knife to school.
- At recess, he threatened schoolmate(s) with the knife which was described as 1 ½ - 2” in length.
- Following a Principal’s Inquiry, the principal imposed a limited expulsion – one year for use of a “weapon”.
- Decision was appealed to Board (no policies dealing with appeals of a limited expulsion imposed by a principal). Following a two day hearing the appeal was denied.

# Administrative Law Lessons

## *Jackson v. TCDSB* ...continued

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### Issues on Judicial Review:

1. Was the Board's procedure fair?
2. Was the Board's appeal hearing fair?
3. Was the knife a "weapon"?
4. Was the decision patently unreasonable?

# Administrative Law Lessons

## *Jackson v. TCDSB* ...continued

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### **Procedural unfairness of Principal's Inquiry -**

#### **Allegations:**

- Failure to provide reasonable notice of the expulsion hearing;
- Failure to provide proper disclosure of the accuser's witness statements;
- Failure to permit full answer and defence since the student was given no opportunity to challenge the evidence of his accusers;
- Failure to provide the student the right to counsel; and
- Failure to provide reasons for the principal's decision.

# Administrative Law Lessons

## *Jackson v. TCDSB ...continued*

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### Decision on Judicial Review:

- The Court held that the above allegations entirely misconstrued the nature of the inquiry conducted by the principal.
- Citing Judge Cory's words in *R. v. M(M.R)*, the court held that:  
*"Current conditions make it necessary to provide teachers and administrators with the flexibility required to deal with discipline problems in schools. They must be able to act quickly and effectively to ensure the safety of students and to prevent serious violations of school rules."*
- The Court found the principal's actions *"scrupulously fair, reasoned and appropriate"*

# Administrative Law Lessons

## *Jackson v. TCDSB ...continued*

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### Conduct of Appeal Hearing –

#### Allegations the Board erred in:

1. Not holding a hearing *de novo*;
2. Reversed order of presentation and onus of proof;
3. Relied on hearsay;
4. Principal failed to call relevant witnesses;
5. Failed to produce OSR of “victims”;
6. Principal has *de facto* accuser; and
7. Failed to provide reasons.

# Administrative Law Lessons

## *Jackson v. TCDSB ...continued*

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- *“These reasons fall dangerously close to being inadequate:*

*The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors.”*

*Gray v. Ontario (Disability Support Program, Director), 212 DLR (4<sup>th</sup>) 353 (Ont. C.A.).*

# Administrative Law Lessons

## *Jackson v. TCDSB ...continued*

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- *“Right to liberty and security of person pursuant to s. 7 of the Canadian Charter of Rights and Freedoms.”*
- *“...expulsion of a student (particularly, as here, a limited expulsion whereby the student enters into a parallel school system) can be sustained under s. 1 of the Charter as a reasonable limit, which is justified in a free and democratic society as per the Supreme court’s test outlined in R. v. Oakes, [1986] CanLII 46 (SCC), 1986, 26 DLR (4<sup>th</sup>) 200.”*

# Administrative Law Lessons

## *Jackson v. TCDSB ...continued*

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- *“The respondents acted in good faith at all times and in accordance with the principals of fundamental justice and procedural fairness. Their actions were taken in fulfillment of their duties and responsibilities under the Act to maintain order and discipline, and to ensure that the school was kept safe and secure for all its students. In doing so, there was no violation of the applicant’s and/or Andre’s rights to liberty and/or security of the person under s. 7 of the Charter.”*
- Application dismissed.
- Leave to Appeal dismissed, February 12, 2007.

# What have we learned?

# Safe Schools Action Team Report, June 2006

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## Recommendations:

1. Prevention
2. Progressive discipline
3. Community and parental involvement
4. Application of the *Safe Schools Act*
5. Programs for suspended/expelled students
6. Education and training
7. The provincial safe school framework

# Prevention

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- Actively promote, support and reinforce positive behaviours;
- Reinforce bullying prevention messages through programs addressing discrimination based on prohibited grounds under the *Human Rights Code*;
- Implement preventative strategies and empowerment programs.

# Progressive Discipline

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- Employ a range of consequences that are developmentally appropriate, include opportunities to learn from mistakes and focus on improving behaviour;
- Shift the focus from punitive to one that is supportive and corrective in nature;
- Consider all relevant factors when investigating an incident and all mitigating factors when determining the appropriate disciplinary approach;

# Progressive Discipline

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- Create in-school disciplinary alternatives;
- Develop policies to support and protect students who have been bullied or affected by violence;
- Implement safe reporting processes and initiatives that result in students being safe from reprisal.

## Application of the *Safe School Act*

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- Revision of the *Act*;
- Expansion of the list to mitigating factors (eg. age, grade, language acquisition)
- One day suspensions served in schools;
- Expulsions by the Board only;
- Alternative programs to be offered by the Board to expelled and suspended students;
- Completion of an alternative program before re-entry to address academic, behavioural and treatment needs.

# Proposed Bill 212, *Education Amendment Act*, 2007 (1<sup>st</sup> Reading – April 17, 2007)

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## A. 306 (1) Possible Suspension

1. Uttering a threat to inflict serious bodily harm on another person.
2. Possessing alcohol or illegal drugs.
3. Being under the influence of alcohol.
4. Swearing at a teacher or at another person in a position of authority.
5. 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.
6. Bullying.
7. Any other activity that is an activity for which a principal may suspend a pupil under a policy of the board.

## Proposed Bill 212 ...continued

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### A. 310 (1) Suspension

1. Possessing a weapon, including possessing a fire arm.
2. Using a weapon to cause or to threaten bodily harm to another person.
3. Committing physical assault on another person that causes bodily harm requiring treatment by a medical practitioner.
4. Committing sexual assault.
5. Trafficking in weapons or in illegal drugs.
6. Committing robbery.
7. Giving alcohol to a minor.

## Proposed Bill 212 ...continued

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- Principal must investigate promptly
- Principal must either confirm the suspension, reduce its length or withdraw
- Principal may also recommend an expulsion
- Appeals are available for suspension and expulsions
- No expulsion is allowed if more than 20 school days have passed since the pupil was suspended.

## Proposed Bill 212 ...continued

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- If board does not expel a pupil the matter is referred back to the principal who can confirm, reduce or withdraw the suspension.
- An appeal is available of this decision.
- If an expulsion is imposed, the board decides if it is to apply to the school only or from all schools of the board.
- If expelled from all schools the pupil is assigned to a program for expelled students provided by the board.

## Proposed Bill 212 ...continued

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### **s. 312**

- requires boards to provide programs for suspended and expelled pupils.

### **s. 314.1**

- an expelled student is entitled to return to school upon either successful completion of a program or satisfaction of the objectives of the program in another way.
- Boards are required to readmit upon completion.
- Boards will have until February 1, 2008, to implement the new requirements.

# Final Thoughts

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- Legislative pendulum
- Legal landscape
- Response to challenges
- Safer schools for whom?

# *Questions*