

## **MORNING RECESS**

### **Webinar 3 - To Suspend, Expel, Exclude or Not: Responding to Student Incidents by Students with Special Needs**

**November 21, 2013**

#### **Topics & Issues**

➤ **Introduction**

- session will be dealing with incidents and behaviours on the more significant end of the spectrum
- infractions under s.310 or identified in school board policies as attracting potential for expulsion
- in addition these infractions did not have significant planning or cooperation from others

➤ **Education Act, Part XIII Behaviour, Discipline & Safety**

➤ **Suspension Leading to Expulsion**

- “A principal shall suspend a pupil if he or she believes” [s.310(1)]
- Two approaches:
- Approach 1
  - if the incident occurred and the student is responsible according to the principal’s “belief” then the student should be suspended pending a more fulsome investigation
  - following the fulsome investigation the suspension can be quashed or shortened if mitigating and/or other factors apply
- Approach 2
  - section 310 of the Education act must be interpreted through the lense of the *Human Rights Code*
  - the *Human Rights Code* is paramount
  - therefore before any action is taken, the principal needs to consider the behaviour in the context of the mitigating and other factors to evaluate whether or not to suspend

- where it is very clear that the student cannot control or cannot foresee arguably should not suspend
- **Notice Where Victim Harmed [300.3]**
  - despite the Approach applied, must notify the parent/guardian of victim, if notification would not cause the victim further harm
    - Nature of activity harming pupil;
    - Nature of harm;
    - Steps taken for pupil's safety;
    - **Nature of discipline imposed;**
    - NOT the identity of pupil who harmed
- **No Notice Due to Risk to Victim [Reg. 472/07 s.7]**
  - if the principal does not notify the parents because to do so might cause harm to the student the following steps must be taken by the principal:
    - s/he must document the rationale for the decision not to notify a parent or guardian of the pupil;
    - inform the appropriate supervisory officer of the decision not to notify a parent or guardian of the pupil;
    - if a teacher informed the principal of the harm, inform the teacher of the decision not to notify a parent or guardian of the pupil; and
    - if the principal determines it is appropriate to do so, inform other board employees of the decision not to notify a parent or guardian of the pupil.
- **Where the Nature of Offense Not Readily Apparent**
  - many situations not obvious as to application of mitigating or other factors therefore, require further investigation
- **Two Options**
  - **Option 1**
    - exclude from classes s.265(1)(m) but not school during investigation
    - requires supervision, programming and some instruction for a short duration

- **Option 2**
  - suspend and reduce or expunge if later determine mitigating or other factors apply
  - generally be 20d and referral to suspension program - student should be able to profit from suspension program before referred
- **Approach and Option Taken**
  - both should be considered through the lense of the *Human Rights Code*
- **Principal's Investigation [s.311.1(1)]**
  - expulsion within 20 school days [s. 311.3(8)]
  - must make every effort to interview pupil; parent/guardian; any other relevant
- **Principal Determined Student Committed Infraction**
  - presuming determination that the student committed the infraction then investigate to be able to evaluate the mitigating and other factors
- **Regulation 472/07 Behaviour, Discipline and Safety of Pupils**
  - the mitigating and other factors are strictly set out in the regulation
  - mitigation does not mean no discipline or no suspension or no expulsion

#### **Mitigating factors**

For the purposes of subsections 306 (2), 306 (4), 310 (3), 311.1 (4) and clauses 311.3 (7) (b) and 311.4 (2) (b) of the Act, the following mitigating factors shall be taken into account:

1. The pupil does not have the ability to control his or her behaviour.
2. The pupil does not have the ability to understand the foreseeable consequences of his or her behaviour.
3. The pupil's continuing presence in the school does not create an unacceptable risk to the safety of any person. O. Reg. 472/07, s. 2.

#### **Other factors**

For the purposes of subsections 306 (2), 306 (4), 310 (3), 311.1 (4) and clauses 311.3 (7) (b) and 311.4 (2) (b) of the Act, the following other factors shall be taken into account if they would mitigate the seriousness of the activity for which the pupil may be or is being suspended or expelled:

1. The pupil's history.
2. Whether a progressive discipline approach has been used with the pupil.
3. Whether the activity for which the pupil may be or is being suspended or expelled was related to any harassment of the pupil because of his or her race, ethnic origin, religion, disability, gender or sexual orientation or to any other harassment.
4. How the suspension or expulsion would affect the pupil's ongoing education.
5. The age of the pupil.
6. In the case of a *pupil for whom an individual education plan has been developed*,

- i. whether the behaviour was a manifestation of a disability identified in the pupil's individual education plan,
- ii. whether appropriate individualized accommodation has been provided, and
- iii. whether the suspension or expulsion is likely to result in an aggravation or worsening of the pupil's behaviour or conduct.

➤ **Mitigating and Other Factors Not Sufficient**

- consideration of IEP insufficient pursuant to the *Human Rights Code*
- need to consider all disability related needs

➤ **Evaluation of Mitigating and Other Factors**

- evaluate whether student could control behaviour and foresee consequences
  - does the disability impact the ability of the student to control his/her behaviour in the moment
  - does the disability impact the ability of the student to foresee the consequences in the moment
- the "other factors" that might influence behaviour should also be evaluated broadly
- **the purpose of the discipline must be to prevent the behaviour as a result of learning**
  - will suspension and expulsion teach the student positive alternative behaviours that s/he can implement to avoid future similar incidents?
  - if not then imposing is not "discipline" it is punishment
- **Mitigating Factor of Risk**
  - risk to others is perhaps most difficult to evaluate
    - may apply even when student not capable of control / self-regulation or capable of foreseeing consequences consequence
      - therefore, will not profit from suspension and/or expulsion as discipline (learning tool)

➤ **Expulsion Not Recommended [311.1(5)] due to Mitigating and/or Other Factors**

- notice to pupil; parent/guardian
  - duration of suspension; not subject to expulsion; right to appeal suspension (if suspension not withdrawn)

➤ **What if the Student Still Poses a Significant Risk at School?**

- exclusion from school [s.265(1)(m)] sometimes used as alternative to expulsion

- exclusion provision does not mean that school board no longer provides educational services nor does it mean that student cannot attend any school
  - prohibits student from attending the school that they were attending
  - cannot exclude without providing programming
- might use if behaviour emergent / presenting in novel way / escalating / very severe and
  - need to explore temporary alternatives to education (treatment)
  - need to obtain expert assessments and/or
  - need to retool delivery of programming
- **Some Challenges for Evaluating Application of Mitigating and Other Factors**
  - FASE, ODD, ADHD and other disabilities impacting behaviour
    - do not know the extent to which self-regulation and foreseeability is possible
    - difficult to assess extent to which alternative programming has been effective if recent (if not review reports, data tracking related to IEP alternative program)
    - difficult to determine the extent to which expulsion program can assist with behaviour regulation and foreseeability
  - drug addiction
    - expulsion programs might assist with counseling around good choices but are not intensive drug addiction programs
    - external assistance required
    - does it mean expulsion that was rooted in drug addiction should not be disciplined?
- **Child & Family Services Review Board Hearing**
- **Application to Human Rights Tribunal of Ontario**