The Safe Schools Act : restoring segregation in Ontario

Moral blame, as a response to past wrong-doing, looks back towards a person's past conduct, and judges and condemns it as the conduct of a responsible moral agent: its propriety thus depends on her condition at the time of that conduct; if she was not then a responsible agent it would be unjust to blame her for what she then did.[2]

I. History

Prior to 1980, school boards were not required to provide special education programs to students with disabilities. As a consequence, students with disabilities (cruelly referred to, at the time, as "trainable retarded" and "trainable mentally retarded" children) received either no education or segregated educational programming. In 1980, through the operation of what is widely remembered as "Bill 82,"[3] boards became compelled to provide special education, and students with disabilities were finally invited into the mainstream public education system. Since 1980, integration has been the norm in Ontario schools, with placement in regular classrooms now being the first option considered for all students with disabilities.[4]

II. The Safe Schools Act

Unfortunately, the Safe Schools Act[5] has acted as a step backward for students with disabilities, and it is having the effect of bringing back segregation into Ontario. The segregation of students with disabilities is discriminatory, contrary to the Human Rights Code.[6]

Although the Progressive Conservative Government under Mike Harris stated that the Safe Schools Act was intended to promote "respect,"[7] the effect upon students with disabilities has been clearly disrespectful.

The Harris Government knew, at the time that the Safe Schools Act was introduced, that it would have a discriminatory impact upon students with disabilities. The Harris Government knew that punishing students for all behaviours without exception (therefore including disability-related behaviours) would adversely affect students with disabilities.

Two years prior to the introduction of the Safe Schools Act, the Ministry of Education drafted Special Education Monograph No. 5,[8] which states as follows:

[s]ome students who have violent outbursts are not wholly responsible for their behaviour. Some students with severe disabilities have varying levels of understanding

and controlling acceptable behaviour. These students may need additional support to understand, change, and demonstrate acceptable behaviour consistently over time. . . .

The ministry is concerned that if such pupils are suspended or expelled when behavioural episodes occur, these pupils will never have access to the education they require to succeed. If suspensions and expulsions are used before other educational strategies are tried, per the IEP, the student will be denied the very type of educational program which has the potential to reduce or even eliminate the pupil's unacceptable behaviour.

Just as we would remediate a pupil who fails a mathematical language test, rather than use suspensions or expulsions, we need to review the remedial strategies which can be used when pupils fail to meet behavioural objectives in their IEP. To do otherwise may potentially be viewed as discrimination toward a child due to disability. . . .

Exceptional pupils with behavioural and social goals in their IEP may not be able to make a cause-and-effect connection between their behaviour and the "clear consequences of suspension and expulsion. Furthermore, for some students with severe disabilities, it may not be possible for the individual to control their behaviour. For these students, the behaviour may be a way of communicating, rather than a wilful act of malice. In this situation, the standard route of suspension leading to expulsion may not only be unfair, but may result in denying pupils who have disabilities access to education to which they are entitled under human rights legislation [emphasis added].[9]

Please find, attached at Tab A, a copy of the Ministry's Special Education Monograph No. 5.

Special Education Monograph No. 5 clearly warns against the imposition of suspensions and expulsions on students with disabilities, for disability-related behaviours. Rather than act on the recommendations made in the Monograph, the Harris Government suppressed the document and ordered the Ministry not to release it.

Notwithstanding the known effect that legislation like the Safe Schools Act would have on students with disabilities, the Harris Government introduced it and then rushed it through the legislature, all in a span of three weeks. The Safe Schools Act was introduced on 31 May and received Royal Assent on 23 June 2000. The Safe Schools Act made five amendments to the Education Act[10] that are causing exclusion and segregation for students with disabilities, contrary to modern public policy in Ontario.

The amendments are found in Part XIII of the Education Act. The Part is titled "Behaviour, Discipline and Safety."

The five provisions of the Education Act that were amended by the Safe Schools Act that are having a discriminatory impact upon students with disabilities are the following: ss. 305, 306, 307, 309, and 310. The sections will be examined in greater detail below.

III. Sections 306 and 307 : suspensions

Sections 306 and 307 of the Education Act, amended through the operation of the Safe Schools Act, were proclaimed in force on 1 September 2001.

Section 306 of the Education Act concerns mandatory suspensions. Suspensions are considered mandatory in certain circumstances set out in the statute,[11] but a regulation provides an exception:

The suspension of a pupil is not mandatory if,

a. the pupil does not have the ability to control his or her behaviour;
b. the pupil does not have the ability to understand the foreseeable consequences of his or her behaviour; or
c. the pupil's continuing presence in the school does not create an unacceptable risk to the safety or well-being of any person.[12]

By operation of the regulation, it is a defence to a mandatory suspension (under s. 306) for a parent to show that the student lives with a disability and is not responsible for their behaviour.

It makes sense, of course, for the government to ensure that punishment is not visited upon students whose disability-related behaviour is not within their control. Punishment in such circumstances would be gratuitous; such students cannot learn anything through punishment, and they cannot have their behaviour controlled through punishment. Our entire legal system is founded upon the principle that persons should only be punished for acts for which they are responsible.[13] Persons with intellectual disabilities who violate the criminal law cannot be found criminally responsible for their acts and made subject to criminal punishment.[14] Students with disabilities, similarly, should not be punished for school-related acts for which they are not responsible.

The regulation under the Education Act properly sets out mitigating factors for the imposition of mandatory suspensions upon students with disabilities.

The problem with the Education Act, as it concerns suspensions, however, is that at s. 307, there is no similar defence for discretionary suspensions.

At s. 307, the Education Act sets out the circumstances in which teachers and principals have the discretion to suspend students, up to a maximum of 20 days. For discretionary suspensions, there is no defence available to students, like there exists with mandatory suspensions, to avoid punishment for disability-related behaviours that are not within their control.

The effect of not having a defence provision for discretionary suspensions is that students with disabilities may be suspended for disability-related behaviours.

Mr. Justice Marvin Zuker has written that the defence provisions in the Education Act exist to ensure that students with disabilities are not discriminated against through disciplinary actions taken against them:

[T]he purpose of these mitigating factors is to ameliorate the effects of zero tolerance and enable a board to avoid discriminating against pupils who cannot control their behaviour or do not appreciate the consequences of their actions [emphasis added].15

Being suspended from school because of one's disability is discriminatory. Being punished, effectively for having a disability and consequently exhibiting disability-related behaviour, is discriminatory.

IV. Sections 309 and 310 : expulsions

Sections 309 and 310 of the Education Act, amended through the operation of the Safe Schools Act, were proclaimed in force on 1 September 2001.

Section 309 of the Education Act concerns mandatory expulsions. Expulsions are considered mandatory in certain circumstances set out in the statute,16 but a regulation provides an exception:

The expulsion of a pupil is not mandatory if,

a. the pupil does not have the ability to control his or her behaviour;
b. the pupil does not have the ability to understand the foreseeable consequences of his or her behaviour; or
c. the pupil's continuing presence in the school does not create an unacceptable risk to the safety or well-being of any person.17

By operation of the regulation, it is a defence to a mandatory expulsion (under s. 309) for a parent to show that the student lives with a disability and is not responsible for their behaviour.

Once again, it makes sense for the government to ensure that punishment is not visited upon students whose disability-related behaviour is not within their control.

In the United States of America, it is recognized that disability-related behaviour should not be punished. In the landmark decision of Honig v. Doe,18 the U.S. Supreme Court intervened in the circumstance of school boards excluding "one out of every eight disabled children from classes."19 The Court "made it clear that students with disabilities could not be expelled for misbehaviour that was related to their disabilities."20 The Individuals with Disabilities Education Act21 provides that, before a disciplinary decision is made regarding a student with a disability, a review must be conducted and a determination made regarding "the relationship between the child's disability and the behavior subject to the disciplinary action."22

The law in the United States requires that School Boards ensure that they are not disciplining a student with respect to a manifestation of their disability.

Ontario's Education Act is also concerned about disciplining children with respect to manifestations of their disabilities. That is why the Act recognizes mitigating factors with respect to, for example, mandatory expulsions.

The problem with the Education Act, as it concerns expulsions, however, is that at s. 310, there is no similar defence for discretionary expulsions.

At s. 310, the Education Act sets out the circumstances in which principals have the discretion to expel students. For discretionary expulsions, there is no defence available to students, like there exists with mandatory expulsions, to avoid punishment for disability-related behaviours that are not within their control.

The effect of not having a defence provision for discretionary expulsions is that students with disabilities may be expelled for disability-related behaviours. Being expelled from school because of one's disability is discriminatory. Being punished, effectively for having a disability and consequently exhibiting disability-related behaviour, is discriminatory.

V. Section 305 : regulatory exclusions (and coerced withdrawals)

Section 305 was proclaimed in force on 1 September 2000.

Section 305, together with a corresponding regulation, provide principals and vice-principals - and any other person authorized by a school board - to exclude a person from school premises if, in their judgement,

[the person's] presence is detrimental to the safety or well-being of a person on the premises.[23]

The purpose of this section is to "help prevent unwanted visitors from coming onto school property."[24]

Section 305 not only provides exclusion power to school officials, but it makes it a provincial offence to contravene a regulatory exclusion, punishable by a fine of up to $5000.[25] There is no appeal mechanism for a regulatory exclusion.[26] Once a student with a disability is subjected to a regulatory exclusion, they may find themselves forever unable to access public education, and without any means to challenge the exclusion.

Even more than discretionary suspensions and expulsions, students with disabilities are being adversely affected by the use of this mechanism of regulatory exclusion. Counsel

for school boards actively encourage principals to use this power against students,[27] despite the fact that the section was never intended to be used to keep students with disabilities out of school.

At ARCH, we receive many telephone calls from parents concerning the operation of s. 305. Typically, principals will contact parents and tell them in advance that they intend to impose a regulatory exclusion on their children due to concerns about anticipated disability-related behaviours. The parents will be given the option of withdrawing their children instead of being excluded, and some parents choose this option, in order to avoid what they fear would be a black mark on their child's record.

Whether a child is withdrawn in the face of a threatened regulatory exclusion or has a regulatory exclusion imposed upon them, the effect is the same. Students with disabilities are prevented from attending school, without any mechanism of redress, without the ability to secure any educational programming. Some students return to school several months later, but some students never return to school.

There is no way to appeal a regulatory exclusion, and there is no defence available to regulatory exclusions.

Recently, the Ontario Human Rights Commission expressed concern that the Safe Schools Act was being applied to students with disabilities, with a discriminatory effect.[28] Unfortunately, the Commission only commented upon the problem related to suspensions and expulsions, and not regulatory exclusions. But it is regulatory exclusions right now that are having the gravest effect upon students with disabilities. The use of the statutory provision, or threatening to use the provision, permits school officials to keep students with disabilities out of school, without any legal avenues of redress.

VI. Conclusion and recommendations

The problem with the Safe Schools Act is that it has established in Ontario a situation in which public education for children with disabilities is no longer guaranteed, and can be - and is presently being - taken away at any time. More and more, the Safe Schools Act is being used against students with disabilities to remove them from the public education system.

The effect of the disciplinary provisions is therefore discriminatory to students with disabilities. Insofar as the provisions are creating exclusion and segregation, the provisions represent a significant backward step in public policy.

Students with disabilities, unlike their peers, are being suspended, expelled, and excluded because of behaviour that they cannot control. Children should not be punished, effectively, for having a disability. Children should not be denied a chance to learn just

because they have a disability. Education is a prerequisite to being able to exercise full citizenship, and students with disabilities must therefore not be needlessly excluded from the public education system.

We urge the McGuinty Government to amend the Education Act to ensure that safeguards are put into place for students with disabilities with respect to the application of the disciplinary amendments made by the Safe Schools Act. The Harris Government knew that safeguards were needed but proceeded in their absence nevertheless. We hope that the McGuinty government will be more concerned about students with disabilities and their integration into the public education system.

We therefore make the following recommendations with respect to changing the law, in order to ensure that there is no discriminatory effect for students with disabilities. These recommendations are simple and will not cost the government any money.

1. Amend the Education Act so that, as in the case of mandatory suspensions, mitigating factors related to disability will be considered with respect to discretionary suspensions. For example, the following amendment could be made (mirroring the language used at s. 306(5) of the Act):

   307(6.1) Despite subsection (1), suspension of a pupil is not permitted in such circumstances as may be prescribed by regulation.

2. Amend Ontario Regulation 106/01 such that s. 1 is available as a defence to either a mandatory or a discretionary suspension.
3. Amend the Education Act so that, as in the case of mandatory expulsions, mitigating factors related to disability will be considered with respect to discretionary expulsions. For example, the following amendment could be made (mirroring the language used at s. 309(3) of the Act):

   310(2.1) Despite subsection (1), expulsion of a pupil is not permitted in such circumstances as may be prescribed by regulation.

4. Amend Ontario Regulation 37/01 such that s. 2 is available as a defence to either a mandatory or a discretionary expulsion.
5. Amend Ontario Regulation 474/00 so that it is clear that it has no application to students (including students with disabilities). The Regulation was not intended to be used against students, whose behaviour is governable through the application of the suspension and expulsion provisions, both of which have corresponding appeal mechanisms. For example, the following amendment could be made to Regulation 474/00:

   3(3) a "person" under this section does not include a person as defined under s. 2(1)1.