Invented Power: An Analysis of the Exclusion Clause in Ontario's *Education Act*

By Luke Reid BSc. M.S.W. J.D
Staff Lawyer, ARCH Disability Law Centre, Toronto, Ontario

Introduction

Section 265(1)(m) of the *Education Act* outlines the purported power of a principal to exclude "a person whose presence in the school or classroom would in the principal's judgment be detrimental to the physical or mental well-being of the pupils." This provision allegedly allows principals in Ontario to use their discretion to deny access to pupils he or she believes to be unsafe; however, it has become increasingly clear that this power is open to abuse, especially with respect to students with disabilities. One major concern is that a student will be excluded from their school because of a disability-related behaviour when they have not received proper accommodation.

In addition to ARCH's own experiences, preliminary data from People for Education's Annual Report on Ontario's education system suggests that this is a valid concern and that the exclusion of a student with a disability from school, or the threat of such exclusion, often occurs because there are inadequate accommodations in place for disability-related needs. According to their survey, almost half of all elementary principals and 40% of all secondary school principals have 'recommended' that students with disabilities not attend school for at least some period of time. For the most part, principals reported that this widespread practice was related to either safety concerns or the health of the student. However, in a significant proportion of cases, the principals stated that a lack of appropriate support was a factor in this decision.[1]

Given this preliminary data and the exclusion provision's broad scope, ARCH finds it especially concerning that the use of a principal's powers under section 265(1)(m) is not tracked in any appreciable way. Freedom of information requests sent to the ten largest boards of education in the province demonstrated that only two of these boards are currently tracking the use of s. 265(1)(m).

[1] People for Education, *Public Education: Our Best Investment* (Annual Report on Ontario's Publicly Funded Schools 2014) at 13. Although the above survey data is useful, it does not distinguish between instances when a principal 'recommends' a student stay home and instances where a principal does not allow a student to attend class, as per her or his authority under section 265(1)(m).

This paper will discuss why the common understanding of s. 265(1)(m) is not consistent with the history of the provision, judicial interpretation of the provision, and/or the human rights of persons with disabilities. Specifically, the paper will argue that this poorly drafted provision does not in fact give a principal the power to exclude a student with a disability from his school and that even if it did, using it to do so would likely violate a student's human rights.

The paper will begin with a historical interpretation of the provision and then will move on to an analysis of the construction and interpretation of that provision. It will next address some potential objections to this interpretation and will further discuss why jurisprudence thus far supports the idea that s. 265(1)(m) does not outright provide a principal with the power to exclude students with disabilities. Finally, the paper will discuss this provision in the context of a principal's human rights obligations and will highlight how those obligations restrict its use against students with disabilities.

Origin of s. 265(1)(m)

Section 265(1)(m) is a relatively old provision, whose origins can be traced to one of the *Education Act's* predecessors: *The School Administrations Act.* Section 21 (2)(l) of that Act stated that:

> It is the duty of a principal, in addition to his duties as a teacher,
>
> ……
>
> to suspend any pupil guilty of persistent truancy, or persistent opposition to authority, habitual neglect of duty, the use of profane or improper language, or conduct injurious to the moral tone of the school, and to notify the parent or guardian of the pupil and the board and the supervisory officer of the suspension, but the parent or guardian of any pupil suspended may appeal against the action of the principal to the board which has power to remove, confirm or modify the suspension;…[2]

Admittedly, this section is somewhat different from the modern version of s. 265(1)(m). This appears to be because it was altered when *The School Administrations Act* was consolidated with a variety of other statutes related to public education; a consolidation which ultimately created the *Education Act, 1974.* Prior to 1974, education in Ontario had been governed by an inconsistent patchwork of legislation with a number of overlapping and conflicting provisions. In 1966, C. G. Duffin, Assistant Deputy Minister of Education, proposed that these acts be consolidated into one act and subsequently, in 1972, a draft of the proposed consolidation was presented to the public for comment by Thomas Wells, the

[2] *The Schools Administration Act* RSO 1970, c. 424 at s. 21(2)(l).

Minister of Education.[3,4] Crucially, the goal of this consolidation was not to effect large scale changes in policy, but merely to create a more coherent framework for education in Ontario.[5]

As the Minister of Education stated in the legislature on November 18, 1974:

> …the principle of this bill is to consolidate the present education Acts, not to bring into this Legislature a new Education Act. It consolidates the *Ministry of Education Act, the Schools Administration Act, the Public Schools Act,* the *Separate Schools Act* and the *Secondary Schools and Boards of Education Act*. It does this for a very good reason, because we are now operating under these five individual Acts and the idea is to bring them together, take out the ambiguities, the duplications and the obscure references, to systemize the legislation, to get rid of some of the complexities and to make it a much more useful document. [*Italics added*][6]

In keeping with this goal of consolidation, many of the draft provisions in the proposed act were largely derived from its predecessor acts. As such, Section 21 of *The Schools Administration Act* became section 230 of the proposed *Education Act.* For the most part the modifications made to this embryonic version of the provision were relatively minor and kept much of the basic language of the original provision:

> s. 230 – (1) A principal shall co-operate with the teachers in the general management of his school and it is the duty of a principal, in addition to his duties as a teacher,
>
> ….
>
> (m) to suspend a pupil for a fixed period because of persistent truancy, persistent opposition to authority, habitual neglect of duty, the willful destruction of school property, the use of profane or improper language, or conduct injurious to the moral tone of the school or to the physical or mental well-being of others in the school and, where a pupil has been suspended, to notify forthwith in writing the pupil, the parent or guardian of the pupil, the board and the appropriate supervisory officer of the suspension, the reasons therefor and the right to appeal to the board,

[3] This consolidation had been a long standing recommendation of the Report of the Royal Commission on Education in Ontario, 1950 (the Hope Commission).
[4] RG 2-215 – National Organization on Legal Problems of Education – 1975 – B188649.
[5] Ontario Ministry of Education, *A Proposed Consolidation of the Schools Act, 1972* (Toronto: Queens Printer, 1972).
[6] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 29th Leg., 4nd Sess Vol. 5 (18 November, 1974) at 5429 (Hon. Mr. Thomas Wells).

> (2) The parent or guardian of a pupil who has been suspended or the pupil, where by reason of age he is not required to attend school, may appeal to the board against the suspension and the board, after hearing the appeal or where no appeal is made, may remove, confirm or modify the suspension.[7]

At some point, after the proposed act was released and before it was presented to the legislature, the provision was again modified to create two separate provisions, the version of s. 265(1)(m) that we know today and s. 22 of the *Education Act, 1974* – a provision explicitly empowering principals to suspend students, subject to a new expanded appeal process.[8]

The new section 230(1)(m) read as follows:

> "230. (1) It is the duty of a principal of a school, in addition to the principal's duties as a teacher,

---

[7] *Supra* note 5 at s. 230

[8] The new s. 22 reads as follows:

22. -(1) A principal may suspend a pupil for a fixed period, not in excess of a period determined by the board, because of persistent truancy, persistent opposition to authority, habitual neglect of duty, the wilful destruction of school property, the use of profane or improper language, or conduct injurious to the moral tone of the school or to the physical or mental wellbeing of others in the school and, where a pupil has been suspended, the principal shall notify forthwith in writing the pupil, his teachers, the parent or guardian of the pupil, the board, the appropriate school attendance counsellor and the appropriate supervisory officer of the suspension, the reasons therefor and the right of appeal under subsection 2.

(2) The parent or guardian of a pupil who has been suspended or the pupil, where he is an adult, may, within seven days of the commencement of the suspension, appeal to the board against the suspension and the board, after hearing the appeal or where no appeal is made, may remove, confirm or modify the suspension and, where the board considers it appropriate, may order that any record of the suspension be expunged. R.S.O. 1970, c. 424, s. 21 (2) (l), *amended*.

(3) A board may expel a pupil from its schools on the ground that his conduct is so refractory that his presence is injurious to other pupils where,

(a) the principal and the appropriate supervisory officer so recommend;

(b) the pupil and his parent or guardian have been notified in writing of,

(i) the recommendation of the principal and the supervisory officer, and

(ii) the right of the pupil where he is an adult and otherwise of his parent or guardian to make representations at a hearing to be conducted by the board ;

(c) the teacher or teachers of the pupil have been notified; and

(d) such hearing has been conducted. R.S.O. 1970, c. 424, s. 34, par. 24; 1971, c. 90, s. 5 (3), *amended*.

(4) The parties to a hearing under this section shall be the parent or guardian of the pupil or the pupil, where he is an adult, the principal of the school that the pupil attends and, in the case of an expulsion, the appropriate supervisory officer.

(5) A board may at its discretion readmit to school a pupil who has been expelled. *New*.
Education Act, 1974, c. 109 at s. 22(1).

> Access to school or class
>
> (m) subject to an appeal to the board, to refuse to admit to the school or classroom a person whose presence in the school or classroom would in the principal's judgment be detrimental to the physical or mental well-being of the pupils; and
>
> ……
>
> s. 21 (2): 1972, c. 77, s. 13 (2, 3); 1973, c. 92, s. 8 (3), *amended*."[9]

In the subsequent years, this provision has remained essentially the same, changing only when it has been renumbered by the legislature (first to s. 236(1)(m) and then to s. 265(1)(m)). All of this seems to illustrate that s. 21(1)(l) of *The Schools Administration Act* is the predecessor to both s. 265(1)(m) of the *Education Act* and of the suspension provisions under Part XIII of the Act generally.

What does the Amendment to s. 21(2) Mean?

There are two striking differences between the early versions of s. 265(1)(m) and the final version. The first is that the earlier versions focused on 'students' instead of 'persons' as the final version does. At some point during the amending process, the subject of this provision was broadened to include people outside of the school as well as the students within it.[10]

The second noticeable change is that the language in the provision requiring a principal to 'suspend' a student shifted to language requiring them to 'refuse to admit' someone if they were deemed a risk. This is a seemingly natural consequence of using the word 'person' instead of the word 'student'. After all, a principal cannot 'suspend' a non-student.

Unfortunately, the seemingly natural change to the wording of this subsection has had profound implications for students with disabilities. Whereas the original version of the provision clearly directed a principal to 'suspend' a student, via the typical suspension process, the amended version of this subsection, as it is interpreted today, creates a largely unsupervised parallel process by which a principal can simply exclude a student from school if, in their judgment, the health and well-being of other pupils warrants it.[11]

---

[9] *Ibid* at s. 230.

[10] At present, it is unclear why the first change was made. Research on this provision has thus far been unable to uncover any historical records which speak to the reason the language of the provision shifted from 'students' to 'persons'. It is plausible that this change was made in response to *R. v. Burko*, [1969] 1 OR 598, a criminal trespass case from 1968, which affirmed that the public has the right to use the corridors of a school so long as it is for a reasonable and ordinary purpose. Such a vague legal test may have provoked the legislature to provide more direct guidance to a principal regarding school access for the public at large. Although at this point it should be emphasized that this theory remains speculative.

[11] With a limited appeal to the Board

Historically Problematic Interpretation

This modern interpretation of the provision is seemingly at odds with some of the historical evidence surrounding its enactment. For instance, as referenced above, the Minister of Education made several statements asserting that the purpose of the new *Education* Act was not to introduce wide ranging policy changes but to merely streamline existing education laws. Introducing a new and largely unregulated power to bar students from the school, outside of the suspension process, is a significant policy change and one that seems to be at odds with the stated goals of the Act.

Based on these rather conservative goals, it is doubtful whether this provision, on its own, imparted a new power to exclude a student from school. This argument rings especially true when one considers that s. 22 of the new Act (sister provision of s. 265(1)(m)), for the first time explicitly spelled out a principal's broad discretionary powers of suspension and attached new appeal rights to this process.[12] Given these new explicit powers, why should the legislature suspect that a principal would need any additional powers when they were considering whether to 'refuse to admit' a student?[13] Or equally confounding, why should the legislature suspect that the new appeal rights in s. 22 would be rendered meaningless by giving a principal an alternate way of excluding a student? All of this suggests that the legislature at the time did not intend to create a new exclusionary power meant for students.

This historical interpretation of s. 265(1)(m) is obviously at odds with the prevailing understanding of the provision. However, there are a number of other good reasons to doubt the common interpretation of this provision.

The Construction of the Provision

Firstly, the very construction of the provision does not suggest that a 'power' is granted to the principal to exclude a student via some process other than suspension and expulsion. The provision, as it is drafted, outlines the 'duties' of a principal, not her/his powers.

The obvious response to this argument is that the necessary power to exclude a student can be implied under the provision. It is common sense that in order to impose a duty on someone, an Act must also provide them with the necessary powers to fulfill that duty. Indeed, such an interpretation squares with the Supreme Court's ruling in *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, where it was held that a vice-principal had the power to search students for contraband despite the fact that no such power appeared to exist under Nova Scotia's *Education Act*. The court found that this was an implied power granted to the

[12] *Supra* note 8 at s. 22. Note: In earlier education related Acts, the power of suspension appears to have been implicit. It appears that Section 22 was the first time a principal's powers of suspension were explicitly spelled out.
[13] It is also worth noting that Section 34, an exclusionary provision specifically for students with disabilities, was also carried over into the *Education Act,1974* as well. This gives principals another potential "remedy" to deal with students with disabilities – a remedy so extreme that it removes a student's basic right to schooling period. *Supra* note 8 at s. 34.

principals and teachers via s. 54 of the *Education Act*, which imposed a duty on teachers and principals to

> "maintain proper order and discipline in the school or room in his charge and report to the principal or other person in charge of the school the conduct of any pupil who is persistently defiant or disobedient;"[14]

In coming to the conclusion that the principal could search a student, the Court stated that while there was no specific authorization to do this in Nova Scotia's *Education Act*, "…the responsibility placed upon teachers, and principals to maintain proper order and discipline in the school and to attend to the health and comfort of students by necessary implication authorizes searches of students if they are to fulfil the statutory duties imposed upon them."[15]

This case suggests that a power to exclude a student (rather than suspend) under s. 265(1)(m) could be inferred by "necessary implication" if it is required to allow a principal to fulfil the duty imposed by this section. It is worth noting that "necessary implication" in the above case meant both concluding that no explicit power had been granted to search and that such a power was necessary in order to fulfil the duty. This begs the question, is the power to exclude a student with a disability a "necessary implication" of the duty imposed by s. 265(1)(m)?

There are good reasons to think that it is not – the chief reason being that in the case of s. 265(1)(m), a principal already has ample *explicit* powers to carry out the duty imposed upon him, meaning that no additional power is required. The principal has access to Part XIII of the *Education Act,* the suspension and expulsion regime, for students who they believe should be removed from the school premises. This should be all the power that he or she needs to execute their duties under the provision.[16]

Procedural Protections

This argument rings especially true when one considers the effect of applying a power under s. 265(1)(m) to students with disabilities. Namely that it deprives them of a variety of procedural protections and potential remedies afforded to them under Part XIII of the *Education Act.* Under this part, all students are given a number of procedural rights (notice

[14] *Education Act*, R.S.N.S. 1989, c. 136 at s. 54(b). Note: This provision appears to be extremely similar to Ontario's s. 264 and s. 265 and thus provides a good basis for comparison. *R. v. M. (M.R.)* also cited *R. v. J.M.G. (1986), 56 O.R. (2d) 705*, which was a case which found a similar power under s. 265(1)(a) in Ontario's *Education Act*. This was confirmed in *R. v. Cole* 2011 ONCA 218.

[15] *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393 at para 51

[16] It is also worth noting that for non-students, a principal has recourse to the *Trespass to Property Act*, R.S.O. 1990, c. T.21 and trespass regulations (O. Reg. 474/00) made under s. 305 of the *Education Act* to exclude non-students from the school premises. This proves to be another example of how the legislature has already given principals all the power they need to meet their duties under s. 265(1)(m).

requirements, requirements for a hearing, participatory rights etc.) and students with disabilities in particular benefit from 'mitigating factors' which a principal must take into account in making his or her decision about the suspension. These mitigating factors include considering whether or not a student has the ability to control his or her behaviour or foresee the consequences of their behaviour. If they do not then this militates against suspension.[17] Unfortunately, no such rights are enumerated for students excluded by s. 265(1)(m).

Bypassing these protections via this alternate process arguably sacrifices a student's right to due process – which they almost certainly have in this case, given that the process affects a student's right to education. It is beyond dispute that a decision affecting "the rights, privileges or interests of an individual" is subject to a duty of procedural fairness[18] and that when that decision affects a central right of the individual, a higher degree of fairness is owed.[19]

Procedural fairness in this case almost certainly requires use of a process with a high degree of procedural protection instead of using an unregulated and discretionary one. The Supreme Court has ruled in other cases that a remedial statute, as for these purposes the *Education Act*, "should not be interpreted, in the event of an ambiguity, to deprive one of common law rights unless that is the plain provision of the statute."[20] Interpreting s. 265(1)(m) as giving a principal the power to exclude a student without appropriate due process seems to be a clear violation of this principle.

Potential Objections

This paper will now canvas two potential objections to the idea that s. 265(1)(m) does not provide a principal with the power to exclude students.

The Existence of an Appeal

It could be argued that despite the absence of procedural protection, the very fact that there is an appeal to the Board of Education in this section demonstrates that a power was intended to be granted. The argument suggests that if no such power was granted, then why have an appeal process at all?

The answer to this question is two-fold. First, it is useful to point out that while an appeal provision does suggest that a power was granted to a principal *somewhere* in the act, it does not mean that the power comes from the appeal provision itself, nor does it specify the content of that power. In this case, the powers the principal is exercising come from Part XIII of the *Education Act*, the *Trespass to Property Act,* R.S.O. 1990, c. T.21, and s. 305 of the

[17] O. Reg. 472/07 at ss. 2 & 3.
[18] *Cardinal v. Director of Kent Institution*, [1985] 2 SCR 643 at para 14.
[19] *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 at para 25.
[20] *Laidlaw v. Metro Toronto*, [1978] 2 S.C.R. 736 at 748.

Education Act (see footnote 16). These provisions give the principal everything he or she needs to fulfil his/her duties under s. 265(1)(m).

Admittedly, this response still leaves us with the question of why there is an appeal provision at all, given that students already have access to an appeal through Part XIII. The answer to this question is that the appeal provision is for *non-students*, such as parents, who have been excluded by a principal under a trespass order or s. 305. Nowhere else in the Act is there an appeal provision for non-students, which suggests that its presence in s. 265(1)(m) is for their benefit.

Inadequacy of Suspension and Expulsion

Some may argue that there are too many restrictions placed on the use of the Part XIII disciplinary procedures for them to be fully responsive to the duties imposed upon principals under section 265(1)(m). They may posit that there are some situations in which adhering to suspension and expulsion procedures would create a situation that was "detrimental to the physical or mental well-being of the pupils".

It should be mentioned that this is a very contentious proposition and one that we do not accept. There is very little reason to think that the suspension power, used properly, cannot be responsive to the needs of other pupils in the school. Several school boards around the province in fact claim that it either is not their practice to use the provision or that it is used so infrequently that it does not need to be tracked; all of which suggests that the physical and mental wellbeing of students can be protected in other ways.[21]

It is also worth noting that even if this situation exists, it was not always so. When s. 265(1)(m) was first enacted, it was enacted with a revised suspension power (s. 22) which was in fact extremely responsive to the demands that s. 265(1)(m) placed on a principal, in part because they were both based on the same ancestor provision (s. 21(2) of *The Schools Administration Act)*. The provision explicitly gave principals remarkably broad powers to suspend a student.

Given the initial responsiveness of s. 22 and s. 265(1)(m) to one another, it becomes difficult to argue that s. 265(1)(m) was meant to be used on students when it was first enacted and that it subsequently gained this power after the legislature added procedural protections to the suspension powers. The fact that there is scant mention of s. 265(1)(m) in early jurisprudence also reinforces this idea. It suggests that the provision may not have been used on students (at least frequently) during the initial years of the *Education Act, 1974* because there was no need to do so.

[21] This information was obtained from the Freedom of Information requests that ARCH submitted to the 10 largest school boards in the province.

Jurisprudence on S. 265(1)(m)

We can now move on to consider whether jurisprudence up to the present time supports the interpretation that s. 265(1)(m) does not impart any explicit powers to exclude students with disabilities. The earliest mention of s. 265(1)(m) in jurisprudence appears to be from a labour arbitration case in 1984, in which a teacher was disputing the principal's authority over discipline in the school. With reference to s. 265(1)(m), the case states that:

> Under s. 236 [now 265] of the *Education Act*, and in particular s. 236(m), the refusal of admission to the school or to a classroom is again within the authority and responsibility of the principal. We do not agree with the argument raised on behalf of the teachers that s. 236(m) is meant to apply to persons other than students.[22]

This case is of dubious value given its forum. It was decided by arbitrators and not the judiciary. Furthermore, the real issue in the case was who had responsibility for disciplining a student, rather than what gave the principal the power to do so. There is very little evidence that the arbitrators turned their mind to the question of what empowered a principal to exclude in a fulsome manner.[23]

After this initial foray into judicial interpretation, there was a fairly very long period of silence on the judicial front, until the 2002 case of *Bonnah (Litigation Guardian of) v Ottawa-Carleton District School Board.*[24] In that case, Zachary Bonnah, a student labelled with an intellectual disability, had been "administratively transferred" by the Respondent School Board by using its powers of exclusion. The applicants in this case argued before the Court that both s. 265(1)(m) and s. 3(1) of Regulation 474/00 (a trespass provision) did not apply to Zachary because of his status as an exceptional student. The lower Court ultimately ruled against this argument but what is especially interesting for the purposes of this paper is how the Court interpreted s. 265(1)(m). With respect to the provision, Justice Ratushny stated that:

> "Under s. 265(1)(m) of the *Education Act*, a principal has a duty to exercise his or her judgment as to whether a person's presence in the school or classroom would be detrimental to the physical or mental well-being of the pupils and if that decision is made, Regulation 474/00 states that the person is not permitted to remain on school premises."[25]

---

[22] *Re Board of Education for the City of Hamilton v. Ontario Public School Teachers' Federation* 1984 CarswellOnt 2432, 13 LAC 93d) 27 at para 7.
[23] See: W. Alejandro Munoz & Markle Schmid Munoz, *The 2016 Annotated Ontario Education Act* (Canada: Carswell, 2016) at 547.
[24] *Bonnah (Litigation Guardian of) v. Ottawa-Carleton District School Board* 64 O.R. (3d) 454 [2003] O.J. No. 1156.
[25] *Bonnah (Litigation Guardian of) v. Ottawa-Carleton District School Board* [2002] OTC 254, 114 Admin. LR (3d) 25 at para 20.

The Court interpreted the provision in conjunction with Regulation 474/00 which explicitly provided the principal with the power to deny individuals access to the school. That is, s. 265(1)(m) was interpreted as imposing a duty to deny access, and Regulation 474/00 was interpreted as providing him or her with the power to do so.

The Ontario Court of Appeal does not seem to have altered this interpretation. When interpreting s. 265(1)(m), they again did it in conjunction with s. 3(1) of Regulation 474/00:

> "Read together, s. 265(1)(m) and s. 3(1) of the regulation authorize principals to refuse to allow persons into a school, and to require persons to leave a school, where the principal determines that the presence of that person in the school would be detrimental to the safety of others in the school."[26]

The only indication the Court of Appeal gives that s. 265(1)(m) may impart additional powers is in paragraph 36 of the decision, where the court uses the conjunction 'or' instead of 'and' which had been consistently used throughout the decision otherwise.

> "Where a principal must exercise his powers under s. 265(1)(m) **or** s. 3(1), he or she must bear in mind the special significance of the placement decision as it relates to exceptional pupils and strive to minimize any interference with that placement."

When interpreting this paragraph, it is important to remember that the court does not appear to have turned its mind to whether s. 265(1)(m) could exclude individuals on its own. There is no indication in the decision that they have made this determination, so any reading of the decision that suggests it does have the power is almost certainly suspect. Even if one does conclude that this paragraph means there is an implied power to exclude, the ambit of this power has still not been defined.

It is worth noting as well, that since 2002 most significant decisions dealing with s. 265(1)(m) have used a similar approach to *Bonnah*, that is citing both s. 265(1)(m) and the trespass provisions under s. 305 of the *Education Act* (Regulation 474/00).[27] This reinforces the argument that the courts have thus far been unwilling to explicitly interpret s. 265(1)(m) as giving principals the ability to exclude students without some other provision specifically empowering them to do so. Or put another way, Courts have not yet made a finding that the power to exclude is a necessary implication of the duty imposed by s. 265(1)(m).

---

[26] *Supra* note 18 at para 34

[27] See *Walker Youth Homes Inc. v. Ottawa-Carleton District School Board*, [2004] O.J. No. 2307, [2004] O.T.C. 473, 131 A.C.W.S. (3d) 439; *Foschia v. Conseil des Écoles Catholique de Langue Française du Centre-Est*, 2009 ONCA 499.

Amendment to Regulations under s. 305

Since *Bonnah* was decided, the government has amended s. 3(1) of Regulation 474/00 to remove pupils of the school from the purview of the regulation.[28] This appears to be an acknowledgement that exclusionary provisions, such as the one in this regulation, were not meant to be substituted for the suspension and expulsion process. The striking parallels that exist between s. 3(1) and the power claimed under s. 265(1)(m), should reinforce the message that such a power was not meant to be used on students and instead should be directed towards non-students. The process to be used for students remains suspension and expulsion. This is the only process which provides the necessary procedural protections that properly safeguard a student's right to education.

Human Rights Considerations

Finally, even if we assume that there is a power under s. 265(1)(m) which can be used on students with disabilities, it must be remembered that there are some potent human rights considerations which a principal must heed before attempting to exercise it on a student with a disability.

As previously discussed, one of the major concerns for students with disabilities with regards to s. 265(1)(m) is that, at times, it is used to exclude them from the school premises because of disability-related behaviours which are essentially beyond their control. In these situations, a principal must remember that they have an obligation to ensure that students are given *meaningful access* to education regardless of disability. To this end, they must ensure that they have provided the most appropriate accommodation to a student with a disability short of undue hardship.[29] The most appropriate accommodation is one which respects the dignity of the student, meets their individual needs and best promotes inclusion and full participation.[30]

In this context, the accommodations that a principal would have to provide likely include, among other things, access to appropriate support persons and a well-developed behavioural management plan which could include an assessment of environmental triggers which may lead to inappropriate behaviours.

It is a *prima facie* human rights violation for a principal to consider exclusion when they have not provided the most appropriate accommodations. This, in essence, means that Ontario's *Human Rights Code* restricts the use of s. 265(1)(m) on students with disabilities. It mandates that unless a principal has appropriately accommodated a student to the point of

[28] O. Reg. 474/00 s. 3(1).
[29] *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 SCR 360.
[30] See Ontario Human Rights Commission, Guidelines on Accessible Education, (Revised 2009) at 5, online: OHRC http://www.ohrc.on.ca/en/guidelines-accessible-education [OHRC Guidelines].

undue hardship, they cannot exclude a student with a disability for disability-related behaviours.

Conclusion

Section 265(1)(m) has long been misinterpreted as providing a principal with the power to exclude students with disabilities. However, history, jurisprudence, and careful statutory interpretation of the provision do not support this hypothesis. A review of the evidence indicates that a proper interpretation of the provision asserts that a principle cannot use this provision, on its own, to exclude a student with a disability. This interpretation states that a principal already has all the tools necessary to carry out his duties under s. 265(1)(m) with respect to students with disabilities because they have access to Part XIII of the *Education Act.* Given that they have such powers, it is both unnecessary and problematic to infer that they have additional powers of exclusion under this section. Such an inference inevitably leads to a violation of a student's right to due process and potentially to a violation of their human rights.