

# How to Conduct an Investigation Under Bill 212

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On June 4, 2007, the Ontario Government passed Bill 212, *An Act to amend the Education Act in respect of behaviour, discipline and safety*. This legislation sets out significant changes to the safe schools provisions of the *Education Act*. These changes were discussed in a previous article in the Fall 2007 issue of *Principal Connections; The Principal's Role Under Bill 212: Seeking Creative Solutions*. All of the provisions of Bill 212 will come into force on February 1, 2008. Among other things, the new legislation replaces the existing regime of mandatory suspensions and expulsions with a more discretionary model.

From the perspective of the principal, Bill 212 will entail enhanced duties and responsibilities. In particular, the new legislation will require a significant administrative role in conducting investigations, preparing reports, liaising with parents and board administrators and participating in suspension appeals or expulsion hearings.

The legislation sets out, in specific terms the timing of a principal's investigation, who the principal should interview and the contents of a principal's report.

Beyond complying with express statutory duties and obligations, principals have a degree of discretion and flexibility in how they conduct their investigations. These guidelines are meant to provide some direction and assist principals in conducting an investigation.

## Mitigating Factors and Other Factors

Prior to suspending or recommending the expulsion of a student, under Bill 212, a principal is required to consider mitigating factors or other factors prescribed by the regulations.

Ontario Regulation 472/07, entitled *Suspension and Expulsion of Pupils*, was released on August 22, 2007. For the purposes of specified sections in the *Education Act*, the following mitigating factors must 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.

With respect to *other factors*, the following must 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; and
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.

These mitigating factors and other factors go well beyond those set out in the current regulations and it is not clear how they will be applied in practice.

## Guidelines in Conducting an Investigation

The investigation, which may lead to a suspension or expulsion, should be conducted by the principal or vice-principal. The principal has the authority to determine whether a student should be suspended, whether the suspension should be withdrawn and the record of the suspension expunged, or whether the matter should be referred to the school board for an expulsion hearing. Where a vice-principal undertakes an investigation, the principal must exercise the authority after reviewing the investigation and conclusions of the vice-principal.

The investigation must begin promptly following the suspension and will be conducted in accordance with the requirements established by school board policy. For the purposes of the investigation, the principal will have the power and duties set out in the policy. Many boards have set out the expectation that the investigation will be completed within five school days, where possible. This will enhance the reliability of the conclusion and give the administrator an opportunity to interview witnesses while events are fresh in their minds.

In undertaking an investigation, a principal should consider the following guidelines:

- Where appropriate, a violent incident report should be completed.
- A staff member should accompany any student or staff requiring medical treatment to the hospital.
- The scene should be protected as much as possible.
- Collect and secure any evidence which must be moved and

retain custody until the evidence is turned over to the police or is no longer required.

- Each suspect, victim or witness should be placed in a separate room under supervision.
- The name, address, telephone number or any other method of contact should be obtained from a witness unable to remain at the scene.
- Have the witness and victim provide written statements independently. Ensure that they sign and date their written statements.
- No part of the interview or related questioning should take place in the presence of other students.
- Every effort should be made to minimize the level of embarrassment to the student being questioned.
- Documentation of the investigation is vital. Details should be recorded as contemporaneously as possible with the events themselves. The notes should be kept on file and should include dates, times, names of witnesses, any relevant observations and a summary of the action taken by school administration.

### **Interviewing Witnesses**

The investigator's primary tool for gathering information is through interviews with the victim, any witnesses and the student who is thought to be at fault. Since the investigation process must be conducted in accordance with the school board's duty to accord the student procedural fairness, it is important that the investigator remain impartial and non-accusatory throughout the investigation. This ensures that the standard of fairness will be met, that all of the evidence will be given appropriate consideration and ultimately the reliability of the administrator's conclusions will be supported.

The interview process is an opportunity for the interviewer to obtain as much information about the incident and the students involved as possible. Interviews are a tool used to gather information in order to make a decision about appropriate discipline. The facts learned through the interviews may also be used as the basis for deciding what witnesses to call in the event of a formal hearing.

With respect to the interview process, where possible, administrators should interview the victim or complainant first. He or she should be interviewed in a private, confidential setting, such as the investigator's office. The administrator should ask the victim or complainant to prepare a written statement of the incident. The administrator should ensure that the victim or complainant signs and dates his or her statement. Where possible, any witnesses should be interviewed next. Witnesses, including students, teachers or other adults, who have direct knowledge of an incident should be asked to provide a written statement. Lastly, the alleged perpetrator should be interviewed. The evidence of the victim and witnesses should be reviewed with the alleged perpetrator. He or she should also be asked to prepare a written statement that should be signed and dated. This statement should be collected immediately after your interview.

Where a student, or other individual, is not able to provide a written statement, the principal or vice-principal, may prepare a statement arising from the interview with the student or other individual.

The principal or vice-principal should ask the student to confirm the accuracy of the statement and where possible, have the student sign and date the statement.

All witnesses should be encouraged to speak freely about all facts they consider relevant; an interviewer should not interrupt the witness unless it is clear that the statements made are irrelevant to the incident.

If the police were involved, it may be necessary to interview the officer that was called to the scene. The police are often a valuable resource in these circumstances, since they are usually on the scene very shortly after the incident, have conducted their own investigation and drawn their own conclusions. A principal or vice-principal must remain aware of the fact, however, that the criminal process is separate from the suspension/expulsion process of the school board. The principal or vice-principal must conduct an independent investigation and should not rely exclusively on the conclusions drawn by the police, or whether the police have charged a student with a criminal offence.

The school's investigation is separate from the police investigation. Once the police have concluded their investigation, the school can commence its investigation.

### **Conducting the Interview**

At the outset of each interview, it should be explained to each individual that the investigation is being undertaken in order to ensure that the school remains a safe place and that his or her cooperation is very important in learning about what has occurred. Each witness should be told that he or she is encouraged to share everything that he or she knows, and that it is very important for the administrator to learn as much as possible about the incident in order to reach a fair conclusion.

The following is a general checklist of questions that may be appropriate when conducting an interview with individuals who may have witnessed the incident.

- Confirm the name, age and, if the interviewee is a student, the school and grade of the person.
- Determine whether and how the students know each other.
- Try to get as many details as possible.
- Ask open-ended, non-judgmental questions and avoid leading questions.
- Determine whether the interviewee has first-hand knowledge of relevant events or whether they are relying on versions of events that they have heard from others.
- Attempt to determine the history or background to the events that preceded or precipitated the conduct by the other student.
- Determine whether this was an isolated incident or an ongoing problem.
- Determine, to the extent possible, what date(s) and at what time(s) the incident(s) occurred.
- Determine where the incident(s) occurred.
- Ask who witnessed the incident(s), if anyone.
- Determine whether any individual intervened, or contacted a teacher or other administrator.

- Ask the individual if he or she told anyone else about the incident(s). If so, obtain details concerning who, when, where, what was said, and the response, if any.
- Ask the student how this made him or her feel at the time it occurred.
- Determine whether there are any mitigating factors, such as the age of the student, whether the principles of progressive discipline have first been attempted, or whether racial or other harassment was a factor in the student's behaviour. Where the perpetrator has a disability, try to determine if the disability had some relation to the behaviour and if so, whether the student was fully accommodated.
- Determine whether the student has any fear of continuing to come to school (or fear of the other student returning to school, if the other student has been suspended pending investigation).
- Ask the student if he or she knows or suspects that there are other victims by the same student.
- Advise the interviewee that the administrator may have follow-up questions after the interview and invite the interviewee to contact the administrator if they wish to add anything or if they remember details later.

When interviewing the student who has allegedly perpetrated the incident it is important to be as fair and open-minded as possible. In addition to the above checklist, the administrator should put the allegations to the student openly and provide the student with an opportunity to respond to those allegations. The administrator should also determine whether this student is aware of the school's code of conduct and whether they have attended any assemblies or other events at which the code of conduct was discussed.

### Taking Notes

In undertaking an investigation, every interview should be thoroughly documented. Notes made by an administrator will be used to support the decision regarding school discipline. All notes should be made contemporaneously with the interview. Notes should be dated and should indicate the source of the information and the name of the recorder. In general, notes of an investigation should not be placed in a student's Ontario Student Record. A separate file should be kept by the administrator containing all notes.

Virtually all notes taken will contain personal information about an identifiable individual. Accordingly, the notes taken by the administrator should not be disclosed to any party except in accordance with the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA). An important exemption that permits a principal or vice-principal to disclose notes under that statute is that notes may be disclosed to a law enforcement agency in Canada for the purposes of a law enforcement investigation. In addition, an administrator's notes may be subpoenaed in a criminal or civil law proceeding.

In recording a description of the incident, the following guidelines should be kept in mind.

- Keep the language clear and use simple terms and sentence structure.
- Work with the data that you have collected.
- Avoid mind reading and fortune telling.
- Avoid opinions or wording which appears to make judgments; just state the facts.
- Use terms that the reader can picture; avoid "edu-babble" or jargon.

- Set out events in a chronological order.
- All records should be objective, direct and forthright and avoid subjective comments or innuendo or any other indirect meaning.
- To the extent possible, information contained in a record should be based on the first-hand knowledge of the record made.
- Investigation notes of a principal or vice-principal should not include irrelevant or third hand information.
- Proofread all statements and complete the description in a neat and professional manner.

All staff involved with an incident should make detailed notes of observations, conversations and decisions simultaneous with the event. Such notes may be used to "refresh memories" in a legal proceeding and will assist with the preparation of the report for a possible suspension appeal or expulsion hearing. Notes which are made well after the event are usually not helpful and can come under criticism in the course of a proceeding if a witness tries to use notes "made after the fact" to refresh his or her memory.

When preparing investigation notes, it is important to be conscious of the fact that the notes may ultimately be admitted in evidence before a court or at an expulsion hearing. A witness who takes care in preparing investigation notes will likely be a more credible and reliable witness. With the introduction of the new regime for suspensions and expulsions, an investigation of an incident by school personnel that is thorough and accurate will assist the school in complying with the principles of procedural fairness.

Under the regulations of MFIPPA, all records containing personal information must be retained for the shorter of one year after use or the period set out in a resolution made by a school board.

### Reaching a Conclusion

At the conclusion of all interviews and a review of the documentation, the administrator must conclude what actually occurred and who was at fault. Essentially, the administrator must make a decision about the truth of what the alleged victim, the witnesses and the alleged offender have said. Simply put, if there is a conflict in the statements made, whom does the administrator believe?

In reaching this conclusion, the administrator should consider which version is more supportable, considering the consistency of the witnesses with each other and which version seems more logical based on common sense. In reviewing all the evidence, the principal must consider, based on a balance of probabilities, whether a school rule, board policy or provision in the Education Act has been breached.

In making this determination, an important consideration for a principal is the weighing of mitigating factors or other factors established by the *Suspension and Expulsion of Students Regulation*.

Bill 212 provides significant instruction to principals on how to carry out investigations and prepare reports. Under the new legislation, the principal plays a critical role in ensuring procedural fairness for all parties.

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