



ONTARIO DISTRICT SCHOOL BOARDS A RIGHT TO

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In reasons released on January 31, 2008, a three-judge panel of the Ontario divisional court has recognized the right of school boards and principals to transfer students. It also recognized the right of principals to deny access to students at the conclusion of a suspension. The decision involved two students who had been suspended and then transferred from Emery Collegiate Institute in the Toronto District School Board (the Board). The students had also been denied access to the school pursuant to Ontario Regulation 474/00 when it appeared that they would refuse to accept the transfer. The students brought an application for the judicial review of the principal's decision, citing multiple violations of their rights under the *Education Act* and the *Canadian Charter of Rights and Freedoms*.

The Facts

The case arose after a violent assault of another student at the school by the two students. The victim alleged that he had been punched, kicked and had his head pushed into a wire glass window of an interior door, breaking the glass. He also alleged that one of the students had confronted him at a pizza store two weeks earlier, threatening to have his cousin bring a gun to school to shoot him. The principal and vice-principal of the school conducted an investigation. They concluded that the two students had engaged in the assault and, after two students corroborated the pizza store allegations, that one of those students had previously threatened the victim. The principal was also aware that the cousin of that student had been disciplined for bringing a loaded gun to the school.

The principal suspended the two students for 16 school days. He also advised them that they would not be returning to Emery at the conclusion of their suspensions but they should contact the Board's safe schools department to discuss transfers to other schools in the system. The principal also issued notices to the students, advising them that they were not permitted on school property pursuant to Ontario Regulation 474/00. Subsection 3(1) of that regulation, at the time, permitted a principal to exclude access to anyone whose presence was deemed to be detrimental to the safety or well being of a person on the school premises.¹

The Students' Arguments

The students challenged the principal's decisions primarily on the ground that the exclusion and transfer effectively amounted to a form of double discipline. They argued that once the suspension had been served the principal could not also deny them access to the school premises and transfer them. They argued that the student discipline provisions of the *Education Act* created a complete code for dealing with disciplinary issues and the principal could not rely on other provisions of the Act and its regulations to impose conditions and sanctions on them. The students also argued that the actions of the principal were discriminatory and therefore a violation of section 15 of the

Canadian Charter of Rights and Freedoms and Minutes of Settlement that had been entered between the Board and the Ontario Human Rights Commission.

The Court's Reasons

The court rejected the students' primary argument. It held that the question of whether the principal could exclude and transfer the students after he had suspended was a question of law and one that required the principal to answer correctly. Provided that he answered that question correctly, the question of whether the exclusion and transfer were appropriate or not was not one that the court would review on a standard of correctness. Rather, the court would only review or overturn this question if it found that the principal had acted in a patently unreasonable manner or if he had acted in a way as to deny the students' procedural fairness.

The court had little difficulty in rejecting the students' primary argument. Indeed, the court gave little attention to the argument, simply recognizing that the *Education Act* provides the principal with the various powers he exercised. With respect to the power to deny access, the court wrote:

... the principal in this case had the power to deny access to Emery, even though the applicants were students. He was of the view that their presence would endanger the safety of the victim and other students. While the applicants and intervenor suggest that this was a form of disguised discipline, and an "end-run" on the procedural protections available by statute when discipline is imposed, there is nothing in the record that challenges the bona fides of the principal's decision or suggests that he was intentionally trying to deprive the applicants of their procedural rights.

With respect to the transfer of the two students, the court noted that a transfer is less disruptive than an expulsion. Citing the well-established legal principle that no student has a right to attend a particular school, the court wrote, "In my view, the power to transfer students in the situation of the applicants is implicit in the powers of the school board."

VISIONAL COURT RECOGNIZES TRANSFER STUDENTS

On the first question, the court held that the principal had the power to deny access to the school and transfer the student.

The court did not address the question of whether it felt that decision was patently unreasonable, presumably because the answer was obvious from its reasons. The court did address the issue of whether the students had been afforded procedural fairness and found:

In my view, there was no breach of the duty of procedural fairness. The principal conducted an investigation before deciding to transfer the applicants . . . He invited the applicants to give their side of the story before he made a decision. On the advice of counsel, they chose not to speak, and it is understandable why they did not speak, given the criminal charges. However, that does not undermine the fairness of the procedures that led to the decision.

With respect to the students' *Charter* arguments, the court noted that they had failed to present an evidentiary foundation to support the claim that their equality rights had been violated. The court found that they had failed to establish an appropriate comparator group against which their treatment could be judged. The students also argued that the transfer violated their *Charter* right to "life, liberty and security of the person and the right not to be deprived thereof in accordance with the principles of fundamental justice." Again, the court soundly rejected this argument, reasoning that since the students had no right to attend a particular school, it could not be said that there had been interference with an important and fundamental life choice so as to constitute a denial of liberty.

Conclusion

The decision reaffirms a number of important but established legal principles. It reaffirms that students do not have a right to attend a particular school. It also reaffirms that the duty of procedural fairness requires principals to conduct thorough and fair investigations and to provide students with an opportunity to respond to the allegations being made against them.

The decision also establishes and clarifies two important principles going forward. It confirms that principals and school boards may exclude and transfer students after a suspension. In the Bill 212



era of progressive discipline and alternatives to formal school discipline, this should be reassuring for principals. The decision also clarifies what many educators and school board lawyers have asserted for years: that it is implicit in the powers of a school board to transfer students.

Perhaps most importantly for educators, the decision confirms the deference with which courts will treat their decisions. It should be clear by now that judges have a great deal of respect for what educators do on a daily basis. Our courts, including the Supreme Court of Canada, have recognized the inherent challenges faced by educators. Where principals are seen by the courts to have acted fairly, objectively and in the best interests of all of the students of a school, our courts have consistently refused to interfere with their decisions.

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¹ One of the ironies of the decision is that on February 1, 2008, the day immediately following the release of the Court's reasons, Regulation 474/00, previously released amendments to Ont. Reg. 474/00 came into force. The amendments eliminate students from the scope of the Regulation. Effective February 1, 2008, principals can no longer rely on subsection 3(1) of the regulation to deny access to students from school premises. It should be noted, however, that subsection 265(1) (m) of the *Education Act* continues to apply to students and provides a principal with similar powers to those previously set out in Ont. Reg. 474/00.