



# WHAT YOU NEED TO KNOW ABOUT REPORTING CHILD ABUSE

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*In most Canadian jurisdictions there is legislation placing a general duty on people to report the abuse and neglect of children to the appropriate authorities. This general duty correspondingly applies in the school context. However, many child protection statutes also place a greater duty on educators to make reports where they gain information regarding abuse. In Ontario, legislative changes effective March 31, 2000,<sup>1</sup> have expanded the duty to report, which was previously reserved for persons performing professional or official duties with respect to children to all members of the public. Failure to make proper reports as required by the Ontario Child and Family Services Act (CFSA) can lead to penalties, which may include fines.*

In late 2007 a former principal and two vice-principals with the Toronto District School Board were charged under the CFSA for failing to report a serious incident against a student. This related to allegations of a sexual assault on a Muslim female student in a washroom at a Toronto high school. The incident was said to have occurred in October 2006.

Section 72 of the CFSA sets out the duties of all members of the public to report to a children's aid society if they have reasonable grounds to suspect that one of a list of circumstances exist and those circumstances can be attributed to the care (or lack thereof) of the person responsible for the child, or the direct actions of that person. These circumstances include situations where there is risk of or actual emotional, physical or sexual harm or pattern of neglect by the person having charge of the child. A child is defined in the legislation as a person actually or apparently under the age of 16.

The report must be made by the person who has the duty to make the report and that duty cannot be delegated. In addition, a report must be made despite the confidential nature of some of the information, which may be communicated, including information contained in the Ontario Student Record. The statute protects a person coming forward with a report of abuse by preventing a lawsuit against that person unless the person acted maliciously or without reasonable grounds for the suspicion.

For all persons subject to the CFSA, the requirement of reporting must be carried out *forthwith*. The timely reporting of abuse serves to protect the child and, in some cases, may prevent the contamination of a child's evidence.

It is not the duty of the teacher or principal to assess the severity of the abuse. It is mandatory for teachers and principals to report

any and all cases where there are *reasonable* grounds to suspect that abuse has occurred, regardless of whether the injury is minimal. It is not the role of the principal to investigate or to confirm whether, in fact, abuse has occurred. The use of the word *reasonable* in subsection 72(3) suggests that the test regarding the duty to report is an objective one. This means that an educator should report if a reasonable educator in similar circumstances would believe or suspect that a child was the victim of abuse.<sup>2</sup>

Because of the serious consequences of child abuse or neglect, "any doubt as to whether particular circumstances constitute abuse or neglect should be resolved in favour of the child."<sup>3</sup>

## Suspected Abuse Involving Peers

Whether there exists a duty to report abuse of a student by his or her peer has been the subject of some recent debate. While this duty is not as clear as the duty to report abuse at the hands of a person having charge of the child, section 64 of the *Legislation Act, 2006*<sup>4</sup> requires that legislation be given a "fair, large and liberal interpretation as best ensures the attainment of its objects." A liberal reading of the CFSA reveals that the Act does impose such a duty in certain circumstances.

Section 72(1) of the Act imposes a duty to report in specifically enumerated situations. Paragraphs 3 and 4 of section 72(1) state that:

*3. The child has been sexually molested or sexually exploited, by the person having charge of the child or by another person where the person having charge of the child knows or should know of the possibility of sexual molestation or sexual exploitation and fails to protect the child.*

4. *There is a risk that the child is likely to be sexually molested or sexually exploited as described in paragraph 3.*

In this regard, a duty to report exists where a child has been sexually molested or sexually exploited, or is at risk of such an event, by not only “the person having charge of the child,” but also by “another person.” “Another person” could apply to a peer of the child who is the victim of sexual molestation or sexual exploitation. Thus, there exists a duty to report sexual molestation, sexual exploitation or the risk thereof by another person, who could be a peer.

However, it should also be noted that this duty to report is qualified. The duty to report only arises where the person having charge of the child knows or should know of the possibility of sexual molestation or sexual exploitation and fails to protect the child. We are not aware of any cases that have considered this qualifying language in any context, including the context of peer on peer sexual molestation or exploitation.

The question that arises is whether the “possibility of sexual molestation or sexual exploitation” will be broadly or narrowly applied. In other words, will a court impute knowledge of the “possibility of sexual molestation or sexual exploitation” to all secondary school principals simply on the basis that these things occur in that environment? Alternatively, will the court require some more specific knowledge, for example, a planned or imminent sexual assault before it will find that a principal knew or should have known of the possibility and therefore, should have reported? In the absence of case law on this point, it would be an available defence for a teacher or principal to assert that this qualifier should be given a narrow interpretation and assert, in that defence, that he or she was not aware of the possibility in advance of the sexual assault. However, in the absence of a definitive finding on this issue, a teacher or principal who does not report sexual molestation or exploitation in his or her school does so at the peril of being charged with failing to report. No teacher or principal should want to be a test case for this issue.

In this regard, if a teacher or principal has reasonable grounds to suspect that a student is or may be the victim of sexual molestation or sexual exploitation by another student or there is a risk of such sexual molestation or sexual exploitation, it is our view that the teacher or principal should report forthwith to the appropriate children’s aid society.

Paragraph 10 of subsection 72(1) imposes a duty to report when:

*The child suffers from a mental, emotional or developmental condition that, if not remedied, could seriously impair the child’s development and the child’s parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, treatment to remedy or alleviate the condition.*

This paragraph is also worded broadly enough to encompass instances of abuse in which the alleged offender is a student. If a teacher or principal observes that a child has a mental, emotional or developmental condition that could seriously

impair the child’s development, should the source of the condition be another student, that principal or teacher would have a duty to report to the appropriate children’s aid society if the suspicion meets the reasonable grounds test and the child’s parent or person having charge of the child does not consent to appropriate treatment.

Where the allegation or suspicion involves a peer as an alleged offender, but the form of abuse does not fall within paragraphs 3, 4 or 10 of subsection 72(1), the school should review its obligations under the relevant police/school board protocol. In general, incidents involving violence or the imminent threat to the safety and security of the school community will require police response. For example, the Police/School Board Protocol between the Toronto Police Service, the Toronto District School Board, the Toronto Catholic District School Board and the two Toronto francophone school boards sets out occurrences requiring police response. It provides that occurrences that require police response include:

- physical assault causing bodily harm;
- sexual assault;
- criminal harassment;
- hate-and/or bias motivated incidents; and
- threats of serious physical injury.

Under the *Education Act*, the principal of a school has an obligation to maintain order and discipline in the school. Under the *Criminal Code* and other legislation, the police have a duty to investigate criminal and quasi-criminal offences. Where offences are committed on school property or involve students of a school, it will be necessary for the principal and the police to work cooperatively in fulfilling their overlapping obligations and responsibilities. The school boards will endeavour to support their administration and staff with respect to reporting crimes and supporting witnesses for students in schools.

### **Confidentiality and Protection for Persons Making a Report**

Subsection 72(7) of the CFSA provides that the reporting requirements in section 72 apply even though the information reported may be confidential or privileged. That section provides:

*(7) This section applies although the information reported may be confidential or privileged, and no action for making the report shall be instituted against a person who acts in accordance with this section unless the person acts maliciously or without reasonable grounds for the suspicion.*

In this regard, educators are obliged to report child abuse even though they may have obtained knowledge of such abuse in confidence from either the victim, the abuser or a third party, and even if the person has specifically requested that the information not be divulged to authorities. As an incentive to comply with these reporting requirements, the applicable law in all Canadian jurisdictions provides that the person reporting a suspicion of abuse be protected from liability unless the person acts maliciously or without reasonable grounds for suspicion.<sup>5</sup>



Subsection 72(4) sets out the offence provisions regarding the duty to report a child in need of protection. It provides that a person who performs professional or official duties with respect to children, including a teacher or principal, is guilty of an offence if he or she contravenes subsections 72(1) or (2) by not reporting a suspicion and the information on which it was based obtained in the course of his or her professional or official duties.

Subsection 72(6.2) of the *CFSA* provides that a professional who does not report suspected child abuse as required by subsection 72(3) of the Act is guilty of an offence and, upon conviction, is liable to a

Clause 18(1) (b) of the *Teaching Profession Act Regulation* requires a teacher who makes an adverse report concerning another teacher to provide that teacher with a written statement of the report. The clause provides:

*A member shall . . .*

*. . . (b) on making an adverse report on another member, furnish him with a written statement of the report at the earliest possible time and not later than three days after making the report.*

However, where the adverse report involves sexual abuse of a student by that other member, the teacher who reports suspected sexual abuse is relieved of the above obligation. Clause 18(1) (c) expressly provides that this obligation need not be fulfilled where the report involves “suspected sexual abuse of a student by that other member.” Clause 18(1) (c) provides:

*(c) notwithstanding section 18(1)(b), a member who makes an adverse report about another member respecting suspected sexual abuse of a student by that other member need not provide him or her with a copy of the report or with any information about the report;*

Where the alleged offender is not another teacher, that person does not have to be told who reported the abuse. However, there is nothing in the *CFSA*, which prevents or prohibits them from being told.<sup>6</sup>

### Consequences of Failure to Report

While all citizens have a duty to report reasonable suspicions of child abuse, only professionals under the *CFSA*, such as principals and teachers, can be charged with an offence for failing to report. These penalties are imposed for the purpose of requiring teachers and school administrators to protect the children under their care, and to report abuse in spite of their possible fears or reluctance to do so.

fine of not more than \$1,000. There is no term of imprisonment if convicted. This type of liability for non-compliance with reporting requirements is perhaps the most obvious and prevalent form of sanction.

Subsection 72(6.1) provides that a director, officer or employee of a corporation who authorizes, permits or concurs in a contravention of an offence under subsection (4) by an employee of the corporation is guilty of an offence. In this regard, a director or officer of a school board may be liable under section 72(6.1) of the *CFSA* for the failure to report abuse where it can be demonstrated that he or she authorized, permitted or concurred in a contravention of the offence.

An educator’s liability under the *CFSA* for failing to report a reasonable suspicion of abuse was recently examined in *R. v. Kaija*.<sup>7</sup> Mr. Kaija, a high school physical education teacher with the Lambton Kent District School Board, was assigned to St. Clair High School. One of the extra-curricular activities at the school was the senior boys’ basketball team, the St. Clair Colts. Mr. Kaija was the coach of that team.

In addition, for a number of years, Mr. Kaija had been involved as the director of a group known as the St. Clair Mini-Colts. This was a basketball program for elementary aged boys. The program was available to any boy, regardless of which elementary school he attended and regardless of which high school he may attend. The program was a feeder program for the various basketball teams at the high school level. There were several coaches involved in the program; among them was a coach named Jim Miller.

On the weekend of February 20, 2005, the St. Clair Mini-Colts travelled to Peterborough for a basketball tournament. When the team returned home on Sunday, one of the boys disclosed to his mother that Mr. Miller had sexually assaulted another of the boys. He was also seen masturbating in his bed. This information was passed on to Mr. Kaija that evening by the mother of the boy who witnessed the sexual assault. Over the next several days, Mr. Kaija and the parents were involved in several meetings to discuss the allegation.

Mr. Kaija was charged with failing to report the information he received regarding the sexual assault to a children's aid society, as required by subsection 72(4) of the *CFSA*. The essence of the allegation against him was that, in the course of his professional duties as a teacher, he received information that gave him reasonable grounds to suspect that a child had been sexually assaulted and that he failed to report that suspicion to a children's aid society.

In this case, the defence moved for a non-suit, arguing, among other things, that there was no evidence to establish that the information came to Mr. Kaija in his capacity as a teacher, in the course of exercising his professional duties.

The court recognized that the *CFSA* required that the person upon whom the obligation is imposed be a person who is "in the course of his or her professional duties." The court held that given the understanding of the words "in the course of his or her professional duties," there is no evidence that Mr. Kaija was acting in the course of his professional duties when the information came to his attention. The court ruled that Mr. Kaija's involvement with the St. Clair Mini-Colts program was outside the scope of his professional duties as a high school teacher. In this regard, the charge against Mr. Kaija was dismissed.

### Documenting Indicators of Child Abuse

Where a principal receives allegations of abuse, a record of relevant information should be created. All observed indicators should be fully documented. This process helps to put the information in perspective, assists school personnel in reporting to a children's aid society and provides a record in the investigation and court processes. When recording any information, it is important to:

- provide a description that is clear and concise;
- be objective and non-judgmental;

- avoid interpretations of medical, physical or emotional conditions and what you think is happening;
- record any conversations, word for word, between yourself and the child, or any others relevant to the situation;
- record what the child or others said, using their own words;
- provide a full description of any injury, including size, colour, shape and placement on the body;
- sign and date the handwritten form; and
- document any further suspicions that may arise.<sup>8</sup>

Indicators do not prove that a child has been abused. They are clues that should alert teachers that abuse may have occurred. It is not the job of the teacher to assess the physical or psychological state of a child or others involved. It is the teacher or principal's responsibility to report any suspicions to a children's aid society. The assessment and validation of allegations of child abuse is the role of the police and/or the children's aid society. In all cases, a trusted person should remain with the child until the police or a children's aid society worker arrives at the school. Reference should be made to board protocols, which may be in place. Procedures may vary according to the age of the alleged victim and perpetrator.

The reporting requirements under the *CFSA* must be considered in light of the purpose of the Act, which is the protection of children. A teacher or principal is in a special position in which he or she can become quite close to a child and his or her family. As a result, a teacher or principal may become aware of evidence of abuse or its symptoms. Any reluctance or indecision regarding whether or not suspected abuse should be reported should always be resolved in favour of the child and the duty to report. Where a teacher or principal has reasonable grounds to suspect that a child is or may be suffering or may have suffered abuse, he or she is required to report the suspicion and the information on which it is based to the appropriate children's aid society forthwith.

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<sup>1</sup> Contained in the *Child and Family Services Amendment Act (Child Welfare Reform)*, 1999, S.O. 1999, c. 2.

<sup>2</sup> W.F. Foster, "Child Abuse in Schools: Legal Obligations of School Teachers, Administrators and Boards" (paper presented to the Conference of the Canadian Association for the Practical Study of Law in Education, Vancouver, April 29 to May 2, 1990), in W.F. Foster, ed., *Education and Law: A Plea for Partnership* (Welland: Soleil, 1992), p. 145 (hereinafter *Child Abuse in Schools*).

<sup>3</sup> A.W. MacKay, *Education Law in Canada* (Toronto: Emond-Montgomery, 1984), p. 197.

<sup>4</sup> S.O. 2006, c. 21, Sch. F.

<sup>5</sup> See *M.-A. (N.) (Guardian ad Litem of) v. M.-A. (I.A.S.)* (1992), 93 D.L.R. (4th) 659, [1992] 5 W.W.R. 585 (B.C.C.A.). In this case, a psychologist who reported and testified in court that a child's father had sexually abused the child was later sued by the child's father for negligence and/or lack of good faith. The psychologist was granted witness immunity, in part due to the protection afforded people who exercise in good faith powers conferred by the British Columbia child and family service legislation.

<sup>6</sup> Federation of Women Teachers' Associations of Ontario, *Someone Else's Nightmare* (Toronto: 1995), p. 15.

<sup>7</sup> 2006 ONCJ 193 (Ont. Ct. J.).

<sup>8</sup> Toronto District School Board, Operational Procedure PR.560 SCH-"Abuse and Neglect of Students" (September 12, 2007).